WAGE AND HOUR AUDITS:
COMMON MISTAKES TO AVOID

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This paper identifies some of the wage and hour law principles about which employers often make mistakes leading to wage hour ligation and liability, and which therefore should look for when conducting wage hour audits. This paper focuses on the federal Fair Labor Standards Act ("FLSA"), because of its broad coverage. State wage hour laws may impose additional or different requirements, so they should be considered in any wage hour audit in addition to the FLSA.

A. RISKS IN ALLOWING OFF-THE-CLOCK WORK

Many Fair Labor Standard Act cases involve off-the-clock work. Such work often results in FLSA liability for the employer

One off-the-clock scenario is where an employee does not report work he claims to have worked. Liability is often found in these cases because the employer has a duty to ensure it is tracking and paying for all time worked by its employees. "It is the employer's duty to make, keep and preserve accurate records of its employees' wages, hours and other conditions and practices of employment." *Dominguez v. Quigley's Ir. Pub, Inc*., 790 F. Supp. 2d 803, 812 (N.D. Ill. 2011); 29 U.S.C. § 778.211. "If an employer fails to maintain accurate records of the hours worked by its employees, an employee may successfully claim unpaid wages by proving that he or she has in fact performed work for which they were improperly compensated...." *Dominguez v. Quigley's Ir. Pub, Inc.*, 790 F. Supp. 2d 803, 812 (N.D. Ill. 2011).

One off-the-clock scenario is where an employer claims the employee worked unauthorized or prohibited hours. Liability is often found in these cases because "It is the obligation of management to exercise control and see that unauthorized work is not performed. Management cannot sit back and accept the benefits of work without compensating for it. The mere promulgation of a rule against unauthorized work is not enough. Management has the power to enforce the rule and must make every effort to do so. Work not requested but suffered or permitted is work time. The employer knows or has reason to believe

that he is continuing to work and the time is working time." *Dominguez v. Quigley's Ir. Pub, Inc*., 790 F. Supp. 2d 803, 816-17 (N.D. Ill. 2011). "[T]he answer to a self-willed employee, who chooses to set his or her own schedule, is to discipline or fire the employee." *Dominguez v. Quigley's Ir. Pub, Inc.*, 790 F. Supp. 2d 803, 812 (N.D. Ill. 2011).

Sometimes off-the-clock claims arise because an employer allegedly requires an employee to work through his meal breaks but not report the work. *E.g., Essame v. SSC Laurel Operating Co. LLC,* 847 F. Supp. 2d 821 (D. Md. 2012). The employer will be liable if the employee proves he was forced to keep that work time off the clock.

Another example of off-the-clock claims occur when an employer allegedly requires an employee to work before or after the conclusion of his shift but not report it. *E.g., Essame v. SSC Laurel Operating Co. LLC*, 847 F. Supp. 2d 821 (D. Md. 2012). The employer will be liable if the employee proves he was forced to work bit not report that time

A particularly difficult scenario arises where an employee claims he was compelled by the employer's production goals to not report work time. *Mitchel v. Crosby Corp*., 2012 U.S. Dist. LEXIS 128362 (D. Md. 2012), is an example of this scenario. In *Mitchel*, loan underwriters working for Freddie Mac in McLean,

Virginia alleged they were forced to not report overtime hours they were compelled to work to meet production quotas:

> Plaintiffs allege that both Crosby and Freddie Mac "have implemented a nationwide policy wherein underwriters are not paid minimum wage or overtime pay." As part of this policy, Defendants required underwriters to meet certain production quotas. Plaintiffs assert that both Freddie Mac and Crosby supervisors told underwriters that they must meet their required weekly loan review quotas, or risk losing their jobs. Defendants were aware that underwriters would need to work more than forty hours per week to meet these quotas. Crosby and Freddie Mac supervisors instructed underwriters not to submit time sheets reflecting more than forty hours worked in a week, because they would not pay employees for overtime hours. This policy resulted in Plaintiffs and other underwriters working uncompensated overtime hours to meet their quotas.

Mitchel v. Crosby Corp., 2012 U.S. Dist. LEXIS 128362, 3-4; *see also Maddy v. GE*, 59 F. Supp. 3d 675 (D.N.J. 2014) (GE service technicians claimed they were compelled to work through lunch but not report time to meet "Revenue Per Day" goals).

An employer that allows off-the-clock work exposes itself to a number of significant risks.

First, if off-the-clock work brings the workweek's total hours to over 40, then the employer is required to pay overtime compensation for the hours over

40. If the employer fails to pay overtime compensation for those hours, then it has violate the overtime compensation requirements of the FLSA.

Second, if off-the-clock work causes the employee's effective hourly rate (the total wages paid for the workweek divided by the total hours worked during the workweek) to fall below the minimum wage, then allowing off-the-clock work causes the employer to violate the minimum wage requirements of the FLSA.

Third, allowing off-the-clock work may violate the recordkeeping requirements of the FLSA, which require the employer to accurately record the number of hours worked.

Fourth, allowing off-the-clock work may prevent an employer from successfully asserting a good faith defense to liquidated damages. If the employer knows the employee is working but not reporting work hours, then it will be difficult for the employer to demonstrate good faith.

Fifth, allowing off-the-clock work may be used as evidence of willful violation of the FLSA, resulting in the statute of limitations of FLSA claims being extended from two years to three years.

Sixth, systematically allowing off-the-clock work may support a FLSA collective action against an employer. *E.g., Maddy v. GE*, 59 F. Supp. 3d 675 (D.N.J.

2014); *Barry v. S.E.B. Serv. of N.Y.*, 2013 U.S. Dist. LEXIS 166746 (E.D.N.Y. 2013); *Mitchel v. Crosby Corp*., 2012 U.S. Dist. LEXIS 128362 (D. Md. 2012).

The lesson is clear: employers must do everything reasonably necessary to prevent employees from working off-the-clock.

B. CALCULATING THE OVERTIME RATE

Under FLSA, an employee's overtime rate is a multiple of his "regular rate" during the workweek. Therefore, determining the regular rate is the first step in determining the overtime rate. The proper multiplier then is applied to the overtime rate to determine overtime compensation.

1. Hourly Employees Paid at One Hourly Rate.

The simplest method of overtime rate calculation applies to hourly employees working one hourly rate. For such an employee, the employee's regular rate is the employee's hourly wage rate, and his overtime rate is 150% of that amount. 29 C.F.R. § 778.110.

2. Hourly Employees Paid at Two or More Hourly Rates.

For an employee who works at two or more different hourly rates during the same workweek (for example, for different types of work), the regular rate is the "weighted average" of the hourly rates. "His total earnings (except statutory exclusions) are computed to include his compensation during the workweek from

all such rates, and are then divided by the total number of hours worked at all jobs." 29 C.F.R. § 778.115; *see Allen v. Bd. of Pub. Educ*., 495 F.3d 1306 (7th Cir. 2007); *Ford v. Houston Indep. Sch. Dist*., 97 F. Supp. 3d 866 (S.D. Tex. 2015).

3. Piece Rate Employees.

Some employees are paid based on how many units they produce, i.e., on a "piece-rate" basis. For a piece-rate employee, the regular rate is calculated by dividing the total earnings in the workweek by the hours worked in the workweek. The overtime rate, which applies to all hours over 40 during the workweek, is 150% of the regular rate, unless the employee already has been paid at the piece rate for the workweek. If the employee already has been paid at the piece rate for the workweek, then he is paid additional overtime compensation for hours over 40 applying an overtime rate of 50% of the regular rate. 29 C.F.R § 778.111(a). Example:

> If the employee has worked 50 hours and has earned $491 at piece rates for 46 hours of productive work and in addition has been compensated at $8.00 an hour for 4 hours of waiting time, the total compensation, $523.00, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay - $10.46. For the 10 hours of overtime the employee is entitled to additional compensation of $52.30 (10 hours at $5.23). For the week's work the employee is thus entitled to a total of $575.30 (which is equivalent to 40 hours at $10.46 plus 10 overtime hours at $15.69).

29 C.F.R § 778.111(a).

If an employee is hired on a piece-rate basis with a minimum hourly guaranty, and the piece-rate earnings in a workweek are less than the guaranteed hourly earnings, then the employee is paid as if he is an hourly employee working at the guaranteed hourly rate. The regular rate is his guaranteed minimum rate, and his overtime rate is 150% of his regular rate. 29 C.F.R § 778.111(b).

4. Day Rate Employees.

If an employee is paid a day rate, i.e., a fixed amount for each day worked, then the regular rate is calculated by dividing the total daily rate wages paid during the workweek by the number of hours worked during the workweek, and the overtime rate is 50% of the regular rate.

The employee is paid overtime pay, in addition to his day rate wages, calculated by multiplying his overtime hours (hours over 40 in a workweek) times the 50% overtime rate. 29 C.F.R § 778.112. Some courts have held that this method of calculating overtime does not require that employee and employer have a mutual understanding concerning the regular rate of pay, and that all that is required is that employee in fact is paid on a day rate basis. *E.g., Hartsell v. Dr. Pepper Bottling Co.*, 207 F.3d 269 (5th Cir. 2000).

5. Job Rate Employees.

Similar to day rate workers, some employees are paid for each entire job completed. If an employee is paid on a job rate basis, i.e., then the regular rate is calculated by dividing the total wages paid during the workweek by the number of hours worked during the workweek, and the overtime rate is 50% of the regular rate. The employee is paid overtime pay, in addition to his weekly wages, calculated by multiplying his overtime hours (hours over 40 in a workweek) times the 50% overtime rate. 29 C.F.R § 778.112.

6. Task Rate Employees.

Under some compensation arrangement employees are paid according to a job or task rate without regard to the number of hours spent completing the task. The FLSA regulations recognize two variations of this kind of arrangement.

The first type is where "It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 hours of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the hours so credited and at one and one-half times such rate

for the hours so credited in excess of 40. The number of hours credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. Overtime may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours." 29 C.F.R § 778.312(a).

The second type is where "A similar task is set up and 8 hours pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or task hours (or combination thereof) for which he received pay at the established rate. Overtime pay under this plan may be due after 20 hours of work, 25 or any other number up to 40." 29 C.F.R § 778.312(b).

For such arrangements, the FLSA regulations state:

> These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives.

> Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.
>
> Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8 per day or 40 per week, they cannot qualify as overtime premiums under section 7(e) (5), (6), or (7) of the Act. They must therefore be included in the regular rate and no part of them may be credited against statutory overtime compensation due. Under plans of the second type, however, where the pay of an employee on a given day is actually controlled by the established hourly rate (because he fails to complete the task in the 8-hour period) and he is paid at one and one-half times the established rate for hours in excess of 8 hours actually worked, the premium rate paid on that day will qualify as an overtime premium under section 7(e)(5).

29 C.F.R § 778.312(c), (d). For a detailed example of the calculation of overtime in a task basis, see 29 C.F.R § 778.313.

7. Nonexempt Salaried Employees - Generally.

A nonexempt salaried employee's regular rate of pay is calculated by reference to the number of hours it is intended to compensate.

If an employee is employed on a weekly salary basis, then the regular rate of pay is calculated by dividing the weekly salary by the number of hours which the salary is intended to compensate. 29 C.F.R. § 778.113(a). Example:

> If an employee is hired at a salary of $350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $350 divided by 35 hours, or $10 an hour, and when the employee works overtime the employee is entitled to receive $10 for each of the first 40 hours and $15 (one and one-half times $10) for each hour thereafter. If an employee is hired at a salary of $375 for a 40-hour week the regular rate is $9.38 an hour.

29 C.F.R. § 778.113(a).

If nonexempt salaried employee's salary covers a period longer than a workweek (e.g. a month) then it must be reduced to its workweek equivalent. 29 C.F.R. § 778.113(b). "A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52." 29 C.F.R. § 778.113(b). Once the weekly wage is determined, the regular hourly rate of pay is calculated like an employee paid a weekly salary. 29 C.F.R. § 778.113(b). For example, the regular rate of an employee who is paid a regular monthly salary of $1,560, or a

regular semimonthly salary of $780 for 40 hours a week, is $9 per hour. 29 C.F.R. § 778.113(b).

8. Nonexempt Salaried Employees - Fluctuating Workweek.

An alternative method of computing overtime compensation of a nonexempt salaried employee is the "fluctuating workweek" method, which also is called the "variable workweek" or "halftime" method. Under the FLSA regulations, the fluctuating workweek method can be applied only if the following requirements are met:

(1) The employee works hours that fluctuate from week to week;

(2) The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many;

(3) The amount of the employee's fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest;

(4) The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, hazard pay, or other additional pay of any kind not excludable from the regular rate under section 7(e)(l) through (8) of the Act) for the total hours worked each

workweek regardless of the number of hours, although the clear and mutual understanding does not need to extend to the specific method used to calculate overtime pay; and

(5) The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek. Since the salary is fixed, the regular rate of the employee will vary from week to week and is determined by dividing the amount of the salary and any non-excludable additional pay received each workweek by the number of hours worked in the workweek. Payment for overtime hours at not less than one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate by payment of the fixed salary and non-excludable additional pay. Payment of any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind is compatible with the fluctuating workweek method of overtime payment, and such payments must be included in the calculation of the regular rate unless excludable under section 7(e)(1) through (8) of the Act.

29 C.F.R. § 778.114(a).

Not all courts agree on the precise requirements for application of the fluctuating workweek method. For example, in regard to the "clear and mutual

understanding" requirement, the Fourth Circuit stated in *Bailey v County of Georgetown*, 94 F.3d 152 (4th Cir 1996):

> To the extent that those or other cases do suggest that employees whose employer has adopted a fluctuating pay plan must understand the manner in which their overtime pay is calculated, see, e.g., Duck v. Wallace Assoc., 313 S.C. 448, 438 S.E.2d 269 (S.C. App. 1993); *Marshall v. Hamburg Shirt Corp*., 444 F. Supp. 18 (W.D. Ark. 1977), rev'd, 577 F.2d 444 (8th Cir. 1978), or that the employer must secure written acknowledgements that the pay plan had been explained to the employees, we reject their reasoning as contrary to the plain language of the FLSA and section 778.114.

Bailey v County of Georgetown, 94 F.3d at 156-57; *see Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998) ("this circuit confirmed in *Bailey v. County of Georgetown* that this prong of section 778.114 only requires employees to understand the essential feature of the fluctuating workweek plan - "that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period.")

9. Commissions.

Commissions paid to an employee must be included in the employee's total weekly compensation for calculating the employee's regular rate. 29 C.F.R. § 778.117.

If commissions are paid on a weekly schedule, then the commissions are added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), the total earnings are divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for that workweek, and the employee must be paid overtime compensation at 50% of the regular rate for each hour worked in excess of 40. 29 C.F.R. § 778.118.

For commissions earned during a workweek but not paid until a subsequent workweek (e.g., a sales employee makes a sale in a workweek, but is not paid for it until a later workweek when the customer makes the payment), the employer may disregard the commission for calculating the regular rate for the earlier workweek, and recalculate it and pay additional overtime for it in the subsequent week. To calculate this additional overtime compensation, it normally is necessary to apportion the commission back over the workweeks of the period during which it was earned, and then pay the employee additional overtime compensation for each week during the period in which he worked overtime. The additional overtime compensation for each workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for

that workweek multiplied by the number of hours worked in excess of 40 that workweek. 29 C.F.R. § 778.119.

For commissions which are not identifiable as earned in particular workweeks, the FLSA regulations, 29 C.F.R. § 778.120, state overtime should be calculated as follows:

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

> (a) Allocation of equal amounts to each week.
>
> Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows:
>
> (1) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(2) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction

$$\frac{\text{Overtime hours}}{\text{Total hours} \times 2}$$

A coefficient table (WH–134) has been prepared which contains the appropriate decimals for computing the extra half-time due.

Examples:

(i) If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416 × 12 = $4,992 ÷ 52 = $96). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $96 by 48 gives the increase to the regular rate of $2. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay due of $8.

(ii) An employee received $384 in commissions for a 4-week period. Dividing this by 4 gives him a weekly

increase of $96. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $4.36 for the first and third week ($96 ÷ 44 = $2.18 ÷ 2 = $1.09 × 4 overtime hours = $4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) Allocation of equal amounts to each hour worked.

Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

Example:

> An employee received commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (i.e., two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.

10. Bonuses.

Section 7(e) of the FLSA requires the inclusion in the regular rate of all remuneration for employment except specified types of payments, including discretionary bonuses and payments in the nature of gifts on special occasions. Bonuses which do not qualify for exclusion under Section 7(e) must be added to other earnings to determine the regular rate on which overtime pay is based. 29 C.F.R. § 778.208.

Where a bonus covers only one weekly pay period, the amount of the bonus is added to the other earnings of the employee (except statutory exclusions) and the total is divided by total hours worked to determine the regular rate. 29 C.F.R. § 778.209(a).

Where a bonus is deferred over a period longer than a workweek, the bonus may be disregarded in computing the regular rate until the amount of the bonus can be determined. Until that is done, the employer should pay overtime

compensation at 150% the regular rate excluding the bonus. When the amount of the bonus is determined, it must be apportioned back over the workweeks of the period during which it was earned, and the employee must be paid additional overtime compensation for each workweek that he worked overtime during the period equal to 50% of the hourly rate of pay allocable to the bonus for that workweek multiplied by the number of overtime hours worked during the workweek. 29 C.F.R. § 778.209(a).

If bonus cannot be identified to specific workweeks, the FLSA regulation state:

> If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total

> bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

29 C.F.R. § 778.209(b).

C. IMPROPER DEDUCTIONS

1. Deductions Impacting the Regular Rate.

Certain deductions from an employee's wages can be counted in calculating the regular rate, while others cannot. Improper deductions from an employee's wages can result in miscalculation of the regular rate and violation of the minimum wage and overtime requirements.

a. Deductions for Meals, Lodging or Other Facilities.

Deductions from wages to cover the cost to the employer of furnishing "board, lodging or other facilities," within FLSA section 3(m) can be disregarded in calculating an the employee's regular rate. 29 C.F.R. § 778.304; 29 C.F.R. § 778.305.

FLSA Section 3(m) provides in pertinent part:

> "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or

> other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value.

29 U.S.C. § 203(m).

i. Meals.

"Section 203(m) of the FLSA permits employers to pay a portion of the minimum wage in meals." *Rahman v. Limani* 51, LLC, 2022 U.S. Dist. LEXIS 157705 (S.D.N.Y. 2022); 29 U.S.C. § 203(m). "Specifically, the statute defines 'wage' to include 'the reasonable cost ... to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." *Rahman, supra*. Likewise. "the FLSA permits employers to deduct meal credits from their employees' pay when meals are "customarily furnished" to employees. *Rahman, supra*; 29 U.S.C. § 203(m)(1).

"The FLSA does not define 'customarily furnished,' and ... is silent as to whether an employee must voluntarily accept a meal for an employer to be permitted to deduct meal credits from that employee's pay." *Rahman, supra*. "The Department of Labor has interpreted 'furnished' to mean not only that an employer has offered meals to an employee, but also that the employee has accepted the offer, and has eaten those meals." *Rahman, supra*, citing 29 C.F.R. § 531.30. A number of courts have rejected the Department of Labor's interpretation of "customarily furnished" as requiring employees to have accepted the offer and eaten the meals. *E.g., Herman v. Collis Foods, Inc.*, 176 F.3d 912 (6th Cir. 1999); *Donovan v. Miller Properties, Inc*., 711 F.2d 49 (5th Cir. 1983); *Davis Brothers, Inc. v. Donovan*, 700 F.2d 1368 (11th Cir. 1983); *Rahman v. Limani* 51, LLC, 2022 U.S. Dist. LEXIS 157705 (S.D.N.Y. 2022); *see Shum v. Jili Inc*., 2023 U.S. Dist. LEXIS 46932 (S.D.N.Y. 2023). In U.S. Dep't Labor, Wage Hour Division, Field Assistance Bulletin 2015-1, Credit Toward Wages Under Section 3(m) of the FLSA for Lodging Provided to Employees (Dec. 17, 2015) ("Field Bulletin 2015-1"), DOL stated:

> Several courts have rejected the WHD's position, expressed in 29 C.F.R. § 531.30, that employees must voluntarily accept meals instead of cash wages for the employer to properly count toward its minimum wage obligation the reasonable cost or fair value of those meals. *See, e.g., Herman v. Collis Foods, Inc*., 176 F.3d

> 912, 916-18 (6th Cir. 1999); *Donovan v. Miller Properties, Inc*., 711 F.2d 49, 50 (5th Cir. 1983); *Davis Bros., Inc. v. Donovan*, 700 F.2d 1368, 1369-72 (11th Cir. 1983). Accordingly, the WHD "no longer enforces the 'voluntary' provision" of 29 C.F.R. § 531.30 "with respect to meals." FOH § 30c09(b) ("Therefore, where an employee is required to accept a meal provided by the employer as a condition of employment, [the WHD] will take no enforcement action, provided that the employer takes credit for no more than the actual cost incurred.

Employers who deduct the cost of meals from wages or exclude the cost of meals from the regular rate pursuant to FLSA section 3(m) should watch for changes in the position of the Department of Labor and the court on this issue.

ii. Lodging.

According to the Department of Labor, "An employer who wishes to claim the section 3(m) credit for lodging must ensure that the following five requirements are met: (1) The lodging is regularly provided by the employer or similar employers; (2) The employee voluntarily accepts the lodging; (3) The lodging is furnished in compliance with applicable federal, state, or local law; (4) The lodging is provided primarily for the benefit of the employee rather than the employer; and (5) The employer maintains accurate records of the costs incurred in furnishing the lodging." U.S. Dep't Labor, Wage Hour Division, Field Assistance

Bulletin 2015-1, Credit Toward Wages Under Section 3(m) of the FLSA for Lodging Provided to Employees (Dec. 17, 2015) ("Field Bulletin 2015-1").

b. Deductions for Other Items That Are Not Facilities.

Deductions from wages for items such as tools and uniforms which are not regarded as "facilities," within the meaning of "board, lodging or other facilities" within FLSA section 3(m), are disregarded in calculating an the employee's regular rate. 29 C.F.R. § 778.304; 29 C.F.R. § 778.305.

c. Deductions Authorized by Employee.

Deductions from wages authorized by the employee, such as union dues, are disregarded in calculating an the employee's regular rate. 29 C.F.R. § 778.304; 29 C.F.R. § 778.305.

d. Deductions Required By Law.

Deductions from wages required by law, such as taxes and garnishments, are disregarded in calculating an the employee's regular rate. 29 C.F.R. § 778.304; 29 C.F.R. § 778.305.

e. Reductions in Workweek Salary.

The FLSA regulations state that reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule are not considered wage deductions. 29 C.F.R. § 778.304; 29 C.F.R. § 778.306. "If an

employee is compensated at a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $200 for a 40-hour week, his hourly rate is $5. When he works only 36 hours he is therefore entitled to $180. The employer makes a 'deduction' of $20 from his salary to achieve this result. The regular hourly rate is not altered." 29 C.F.R. § 778.306.

If an employee is paid a fixed salary for a workweek of variable hours, then there should be no wages deductions based on work hours, since the work hours are expected to be variable. "In cases where the understanding of the parties is not clearly shown as to whether a fixed salary is intended to cover a fixed or a variable workweek the practice of making deductions from the salary for hours not worked in short weeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek." 29 C.F.R. § 778.306.

f. Disciplinary Deductions.

Am employer may reduce a nonexempt employee's pay for disciplinary reasons such as willful and unexcused absences, tardiness, or being sent home

due to intoxication. The regular rate of the employee, however, must be calculated before the deduction is made. 29 C.F.R. § 778.307. A disciplinary deduction is not permitted to reduce the employees' earnings to an average below the applicable minimum wage, or cut into any part of the overtime compensation due the employee. 29 C.F.R. § 778.307.

2. Deductions Impacting the Exempt Employees' Salary Basis.

The FLSA section 13(a)(1) "white collar" exemptions from the minimum wage and overtime requirements require the employee be paid on a "salary basis" (some also can be paid on a fee basis). An exempt "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act must be paid *on a salary basis*. 29 C.F.R. § 541.100. An exempt employee "employed in a bona fide administrative capacity," an exempt employee "employed in a bona fide professional capacity," an exempt "computer employee," and an exempt "highly compensated employee" must be paid *on a salary or fee basis.* 29 C.F.R. § 541.200, 29 C.F.R. § 541.300, 29 C.F.R. § 541.400, 29 C.F.R. § 541.601.

In general, an employee will be considered to be paid on a salary basis if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's

compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a).

Subject to certain exceptions stated below, "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a)(1).

"Exempt employees need not be paid for any workweek in which they perform no work." 29 C.F.R. § 541.602(a)(1).

"An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." 29 C.F.R. § 541.602(a)(2).

"Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence." 29 C.F.R. § 541.602(b)(1).

"Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law." 29 C.F.R. § 541.602(b)(2).

"An employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave." 29 C.F.R. § 541.602(b)(3). However, "the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption." 29 C.F.R. § 541.602(b)(3).

"Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines." 29 C.F.R. § 541.602(b)(4).

"Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve

days for violating a generally applicable written policy prohibiting workplace violence." 29 C.F.R. § 541.602(b)(5).

"An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed." 29 C.F.R. § 541.602(b)(6).

"An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week." 29 C.F.R. § 541.602(b)(7).

"When calculating the amount of a deduction from pay allowed [above], the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee." 29 C.F.R. § 541.602(b). However, "a deduction from pay as a penalty for violations of major safety rules ... may be made in any amount." 29 C.F.R. § 541.602(b).

Under the FLSA regulations, "An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions." 29 C.F.R. § 541.603(a). "If

the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt." 29 C.F.R. § 541.603(b). "Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions." 29 C.F.R. § 541.603(c).

"If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing

to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employers Intranet." 29 C.F.R. § 541.603(d).

D. FAILING TO COMPENSATE EMPLOYEES FOR BREAKS

1. Waiting and On-Call Time.

In some jobs, an employee's job duties include periods of time during which they must wait to be called to do productive work. The general test to determine the compensability of such waiting time is whether the employee "engaged to wait," in which case the time is compensable, or "waiting to be engaged," in which case it is not. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). If the waiting time is primarily for the benefit of the employer, then it is

compensable; if it is primarily for the benefit of the employee, then it is not compensable. *Armour & Co. v. Wantock,* 323 U.S. 126 (1944). Waiting time is more likely to be compensable the more the employer exercised control over the employee during that time, and is less likely to be compensable the more the employee can effectively use that time for his own purposes. See 29 C.F.R. § 785.15; 29 C.F.R. § 785.16; 29 C.F.R. § 785.17.

2. Rest and Meal Periods.

Rest periods of up to 20 minutes are included in compensable hours worked. 29 C.F.R. § 785.18. Longer rest periods may also be compensable if the employee is not free to use the rest period for his own purposes.

3. Meal Periods.

Bona fide meal periods are not compensable work time. The FLSA regulations suggest such a meal period normally must be at least 30 minutes long, and that the employee must be completely relieved of all job duties during the meal period. 29 C.F.R. § 785.19. The FLSA regulations state that a meal period must be included in compensable work hours if the employee is required or permitted to perform work during the mean period. A meal period may be compensable if the employee is required to remain at his desk or machine during the period.

E. THE DOS AND DON'TS OF DOCUMENTATION AND RECORDKEEPING

Section 11(c) of the Fair Labor Standards Act, 29 U.S.C. § 211, requires all employers employing covered employees to "make, keep, and preserve" records of their

employees and their "wages, hours, and other conditions and practices of employment" in accordance with the regulations promulgated by the Wage Hour Division of the United States Department of Labor. 29 C.F.R. § 516.1.

1. Records to Be Kept for 3 Years.

29 C.F.R. § 516.5 requires the employer to keep the following records for at least 3 years:

(a) Payroll records. From the last date of entry, all payroll or other records containing the employee information and data required under any of the applicable sections of 29 C.F.R Part 516 ("Records to be Kept by Employers").

(b) From their last effective date, certain written certificates, agreements, plans, and notices:

(1) Collective bargaining agreements relied upon for the exclusion of certain costs under section 3(m) of the Act,

(2) Collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act, and any amendments or additions thereto,

(3) Plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act,

(4) Individual contracts or collective bargaining agreements under section 7(f) of the Act. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement,

(5) Written agreements or memoranda summarizing the terms of oral agreements or understandings under section 7(g) or 7(j) of the Act, and

(6) Certificates and notices listed or named in any applicable section of 29 C.F.R Part 516 ("Records to be Kept by Employers").

(c) Sales and purchase records of:

(1) total dollar volume of sales or business, and

(2) total volume of goods purchased or received during such periods (weekly, monthly, quarterly, etc.), in such form as the employer maintains records in the ordinary course of business.

2. Records to Be Kept for 2 Years.

29 C.F.R. § 516.6 requires the employer to keep the following records for at least 2 years:

(a) Supplementary basic records:

(1) Basic employment and earnings records. From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) Wage rate tables. From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation.

(b) Order, shipping, and billing records: From the last date of entry, the originals or true copies of all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (not including individual sales slips, cash register tapes or the like) which the employer retains or makes in the usual course of business operations.

(c) Records of additions to or deductions from wages paid:

(1) Those records relating to individual employees referred to in § 516.2(a)(10) (employees subject to deductions from wages, including deductions for employee purchase orders or wage assignments).

(2) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

3. Nonexempt Employees Generally.

The FLSA regulations do not require that records be kept in any particular form, provided they are "clear and identifiable by date or pay period." 29 C.F.R. §516.1.

29 C.F.R. § 516.2 establishes the following twelve types of information that must be maintained for employees subject to the FLSA minimum wage and overtime provisions:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records.

(2) Home address, including zip code.

(3) Date of birth, if under 19.

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 C.F.R. part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice.

(6)

(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act,

(ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and

(iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data).

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays).

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation.

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section.

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions.

(11) Total wages paid each pay period.

(12) Date of payment and the pay period covered by payment.

For employees working on fixed schedules, an employer may maintain records showing the schedule of daily and weekly hours the employee normally works instead of the hours worked each day and each workweek 29 C.F.R. § 516.2(c). However, if the employer does so then, in weeks in which an employee adheres to the schedule, the records must indicates by check mark, statement or other method that such hours were in fact actually worked by him, and, in weeks in which the employee works more or less than the scheduled hours, the records

must show the exact number of hours worked each day and each week. 29 C.F.R. § 516.2(c).

4. Exempt White Collar Employees.

29 C.F.R. § 516.3 provides:

> With respect to each employee in a bona fide executive, administrative, or professional capacity (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools), or in outside sales, as defined in part 541 of this chapter (pertaining to so-called "white collar" employee exemptions), employers shall maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a) (6) through (10) and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites. (This may be shown as the dollar amount of earnings per month, per week, per month plus commissions, etc. with appropriate addenda such as "plus hospitalization and insurance plan A," "benefit package B," "2 weeks paid vacation," etc.)

Therefore, the records that must be kept for exempt white collar employees are:

1. Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records. (29 C.F.R. § 516.2(a)(1).)

2. Home address, including zip code. (29 C.F.R. § 516.2(a)(2).)

3. Date of birth, if under 19. (29 C.F.R. § 516.2(a)(3).)

4. Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 C.F.R. part 1620.) (29 C.F.R. § 516.2(a)(4).)

5. Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. (29 C.F.R. § 516.2(a)(5).)

6. Total wages paid each pay period. (29 C.F.R. § 516.2(a)(11).)

7. Date of payment and the pay period covered by payment. (29 C.F.R. § 516.2(a)(12).)

8. The basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites. (29 C.F.R. § 516.3.)

5. Recordkeeping Requirements for Specific Employees.

Pursuant to 29 C.F.R. § 516.11, employers must maintain and preserve records containing the information and data required by 29 C.F.R. § 516.2(a) (1) through (4) for employees exempt from the FLSA minimum wage and overtime pay requirements pursuant to:

- FLSA section 13(a)(3) - Any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture.

- FLSA section 13(a)(5) - Any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee.

- FLSA section 13(a)(8) - Any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the

preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock.

- FLSA section 13(a)(10) - Any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations.

Pursuant to 29 C.F.R. § 516.12, employers must maintain and preserve records containing the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(6) and (a)(9) and, in addition, information and data regarding the basis on which wages are paid (such as the monetary amount paid, expressed as earnings per hour, per day, per week, etc.) for employees exempt from the FLSA overtime pay requirements pursuant to:

- FLSA section 13(b)(1) - Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49 [motor carried safety requirements for qualifications, hours of service, safety, and equipment standards].

- FLSA section 13(b)(2) - Any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49.

- FLSA section 13(b)(3) - Any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.].

- FLSA section 13(b)(5) - Any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state.

- FLSA section 13(b)(9) - Any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.

- FLSA section 13(b)(10) - (A) Any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or (B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.

- FLSA section 13(b)(15) - Any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup.

- FLSA section 13(b)(16) - Any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of

persons employed or to be employed in the harvesting of fruits or vegetables.

- FLSA section 13(b)(17) - Any driver employed by an employer engaged in the business of operating taxicabs.

- FLSA section 13(b)(20) - Any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be.

- FLSA section 13(b)(21) - Any employee who is employed in domestic service in a household and who resides in such household.

- FLSA section 13(b)(24) - Any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children (A) who are orphans or one of whose natural parents is deceased, or (B) who are enrolled in such institution and reside in residential facilities of the institution, while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000.

- FLSA section 13(b)(27) - Any employee employed by an establishment which is a motion picture theater.

- FLSA section 13(b)(28) - Any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

Pursuant to 29 C.F.R. § 516.13, with respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(13) - any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by 29 section 206(a)(1) - an employer must maintain and preserve records containing the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(6) and (9) and, in addition, for each workweek in which the employee is employed both in agriculture and in connection with livestock auction operations, (a) the total number of hours worked by each such employee, (b) the total number of hours in which the employee was employed in agriculture and the total number of hours employed in connection with livestock auction operations, and (c) the total straight-time earnings for employment in livestock auction operations.

Pursuant to 29 C.F.R. § 516.14, with respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(14) - any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations - an employer must maintain and preserve records containing (a) the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(6) and (9) and, in addition, for each workweek, the names and occupations of all persons employed in the country elevator, whether or not covered by the Act, and (b) information demonstrating that the "area of production" requirements of 29 C.F.R. part 536 ("Area of Production") are met.

Pursuant to 29 C.F.R. § 516.15, with respect to each employee exempt from the overtime pay requirements of the Act pursuant to section 13(b)(11) - any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under 29 U.S.C.§ 207(a) - an employer

must maintain and preserve payroll or other records, containing all the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(6) and (9) and, in addition, information and data regarding the basis on which wages are paid (such as the dollar amount paid per trip; the dollar amount of earnings per week plus 3 percent commission on all cases delivered), and records containing (a) a copy of the Administrator's finding under part 551 of this chapter with respect to the plan under which such employees are compensated, (b) a statement or description of any changes made in the trip rate or other delivery payment plan of compensation for such employees since its submission for such finding; (c) identification of each employee employed pursuant to such plan and the work assignments and duties; and (d) a computation for each quarter-year of the average weekly hours of full-time employees employed under the plan during the most recent representative annual period as described in 29 C.F.R.§ 551.8(g)(1) and (2).

Pursuant to 29 C.F.R. § 516.16, with respect to each employee of a retail or service establishment exempt from the overtime pay requirements of the Act pursuant to the provisions of FLSA section 7(i), an employer must maintain and preserve payroll and other records containing all the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(6), (8), (9), and (11), and in

addition (a) a symbol, letter or other notation placed on the payroll records identifying each employee who is paid pursuant to section 7(i), (b) a copy of the agreement or understanding under which section 7(i) is utilized or, if such agreement or understanding is not in writing, a memorandum summarizing its terms including the basis of compensation, the applicable representative period and the date the agreement was entered into and how long it remains in effect (such agreements or understandings, or summaries may be individually or collectively drawn up), and (c) total compensation paid to each employee each pay period (showing separately the amount of commissions and the amount of noncommission straight-time earnings).

Pursuant to 29 C.F.R. § 516.17, with respect to each employee employed as a seaman and exempt from the overtime pay requirements of the Act pursuant to FLSA section 13(b)(6), an employer must maintain and preserve payroll or other records, containing all the information required by 29 C.F.R. § 516.2(a) except paragraphs (a)(5) through (9) and, in addition, (a) the basis on which wages are paid (such as the dollar amount paid per hour, per day, per month, etc.), (b) the hours worked each workday and total hours worked each pay period (for purposes of this section, a "workday" shall be any fixed period of 24 consecutive hours; the "pay period" shall be the period covered by the wage payment, as

provided in section 6(a)(4) of the Act), (c) the total straight-time earnings or wages for each such pay period, and (d) the name, type, and documentation, registry number, or other identification of the vessel or vessels upon which employed.

Pursuant to 29 C.F.R. § 516.18, with respect to each employee providing services in connection with certain types of green leaf or cigar leaf tobacco, cotton, cottonseed, cotton ginning, sugar cane, sugar processing or sugar beets who are partially exempt from the overtime pay requirements of the Act pursuant to 7(m), 13(h), 13(i) or 13(j), an employer must, in addition to the records required in 29 C.F.R. § 516.2, maintain and preserve a record of the daily and weekly overtime compensation paid, and the employer must note in the payroll records the beginning date of each workweek during which the establishment operates under the particular exemption.

Pursuant to 29 C.F.R. § 516.20, for employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided in FLSA section 7(b)(1) - employees employed in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty

hours during any period of twenty-six consecutive weeks - or FLSA §7(b)(2) - employees employer in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed - the following applies:

(a) The employer shall maintain and preserve all the information and data required by § 516.2 and shall record daily as well as weekly overtime compensation for each employee employed:

(1) Pursuant to an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employees shall be employed more than 1,040 hours

during any period of 26 consecutive weeks as provided in section 7(b)(1) of the Act, or

(2) Pursuant to an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall be employed not more than 2,240 hours during a specified period of 52 consecutive weeks and shall be guaranteed employment as provided in section 7(b)(2) of the Act.

(b) The employer shall also keep copies of such collective bargaining agreement and such National Labor Relations Board certification as part of the records and shall keep a copy of each amendment or addition thereto.

(c) The employer shall also make and preserve a record, either separately or as a part of the payroll:

(1) Listing each employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto,

(2) Indicating the period or periods during which the employee has been or is employed pursuant to an agreement under section 7(b)(1) or 7(b)(2) of the Act, and

(3) Showing the total hours worked during any period of 26 consecutive weeks, if the employee is employed in accordance with section 7(b)(1) of the Act, or during the specified period of 52 consecutive weeks, if employed in accordance with section 7(b)(2) of the Act.

Pursuant to 29 C.F.R. § 516.221, with respect to each employee partially exempt from the overtime provisions of the Act pursuant to FLSA section 7(b)(3),[1] the employer shall maintain and preserve records containing all the information and data required by § 516.2(a), and, in addition, shall record the daily as well as the weekly overtime compensation paid to the employees, the rate per hour and the total pay for time worked between the 40th and 56th hour of the workweek.

Pursuant to 29 C.F.R. § 516.22, with respect to an employee employed in charter activities for a street, suburban or interurban electric railway or local trolley or motorbus carrier pursuant to section 7(n) of the Act, the employer shall

[1] No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed - by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if - (A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes, (B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and (C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale - and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title - and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. § 207(b)(3).

maintain and preserve records containing all the information and data required by 29 C.F.R. § 516.2(a) and, in addition, (a) the hours worked each workweek in charter activities, and (b) a copy of the employment agreement or understanding stating that in determining the hours of employment for overtime pay purposes, the hours spent by the employee in charter activities will be excluded and, also, the date this agreement or understanding was entered into.

Pursuant to 29 C.F.R. § 516.23, with respect to each employee of hospitals and institutions primarily engaged in the care of the sick, the aged, or mentally ill or defective who reside on the premises compensated for overtime work on the basis of a work period of 14 consecutive days pursuant to an agreement or understanding under section 7(j) of the Act, an employer must maintain and preserve (a) the records required by 29 C.F.R. § 516.2 except paragraphs (a)(5) and (7) through (9), and in addition (1) the time of day and day of week on which the employee's 14-day work period begins, (2) the hours worked each workday and total hours worked each 14-day work period, (3) the total straight-time wages paid for hours worked during the 14-day period, and (4) the total overtime excess compensation paid for hours worked in excess of 8 in a workday and 80 in the work period; and (b) a copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or

understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect.

Pursuant to 29 C.F.R. § 516.24, with respect to each employee employed under a section 7(f) "Belo" contract, an employer must maintain and preserve payroll or other records containing all the information and data required by 29 C.F.R. § 516.2(a) except paragraphs (a)(8) and (9), and, in addition, (a) the total weekly guaranteed earnings, (b) the total weekly compensation in excess of weekly guaranty, and (c) a copy of the bona fide individual contract or the agreement made as a result of collective bargaining by representatives of employees, or where such contract or agreement is not in writing, a written memorandum summarizing its terms.

Pursuant to 29 C.F.R. § 516.25, with respect to each employee paid for overtime on the basis of "applicable" rates provided in FLSA sections 7(g)(1) and 7(g)(2), an employer must maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a)(6) and (9) and, in addition, the following:

(a) (1) each hourly or piece rate at which the employee is employed,

(2) the basis on which wages are paid,

(3) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate,"

(b) the number of overtime hours worked in the workweek at each applicable hourly rate or the number of units of work performed in the work-week at each applicable piece rate during the overtime hours,

(c) the total weekly overtime compensation at each applicable rate which is over and above all straight-time earnings or wages earned during overtime worked, and

(d) the date of the agreement or understanding to use this method of compensation and the period covered; if the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to use this method of compensation a single notation of the date of the agreement or understanding and the period covered will suffice.

Pursuant to 29 C.F.R. § 516.26, with respect to employees paid for overtime at premium rates computed on a "basic" rate authorized in accordance with FLSA section 7(g)(3) and 29 C.F.R. part 548, an employer must maintain and preserve records containing all the information and data required by 29 C.F.R. § 516.2 except paragraph (a)(6) thereof and, in addition, the following:

(a)

(1) The hourly rates, piece rates, or commission rates applicable to each type of work performed by the employee.

(2) The computation establishing the basic rate at which the employee is compensated for overtime hours (if the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to accept this method of compensation, a single entry of this computation will suffice).

(3) The amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate."

(b)

(1) Identity of representative period for computing the basic rate,

(2) the period during which the established basic rate is to be used for computing overtime compensation,

(3) information which establishes that there is no significant difference between the pertinent terms, conditions and circumstances of employment in the period selected for the computation of the basic rate and those in the period for which the basic rate is used for computing overtime compensation, which could affect the representative character of the period from which the basic rate is derived.

(c) A copy of the written agreement or, if there is no such agreement, a memorandum summarizing the terms of and showing the date and period covered by the oral agreement or understanding to use this method of computation. If the employee is one of a group, all of whom have agreed to use this method of computation, a single memorandum will suffice.

Pursuant to 29 C.F.R. § 516 for "board, lodging, or other facilities under FLSA section 3(m):

(a) In addition to keeping other records required by this part, an employer who makes deductions from the wages of employees for "board, lodging, or other facilities" (as these terms are used in sec. 3(m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such "board, lodging, or other facilities" to employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility except as noted in paragraph (c) of this section. Separate records of the cost of each item furnished to an employee need not

be kept. The requirements may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance, utilities, and repairs for all the houses may be shown together. Original cost and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishing similar or closely related facilities, moreover, may be shown in combined records. Where cost records are kept for a "class" of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; e.g., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc.

(1) Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost, as defined in part 531 of this chapter, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets. If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined.

(2) No particular degree of itemization is prescribed. However, the amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or authorized representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to § 516.6(c)(2).

(b) If additions to or deductions from wages paid

(1) so affect the total cash wages due in any workweek (even though the employee actually is paid on other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or

(2) if the employee works in excess of the applicable maximum hours standard and

(i) any additions to the wages paid are a part of wages, or

(ii) any deductions made are claimed as allowable deductions under sec. 3(m) of the Act, the employer shall maintain records showing on a workweek basis those additions to or deductions from wages. (For legal deductions not claimed under sec. 3(m) and which need not be maintained on a workweek basis, see part 531 of this chapter.)

(c) The records specified in this section are not required with respect to an employee in any workweek in which the employee is not subject to the overtime provisions of the Act and receives not less than the applicable statutory minimum wage in cash for all hours worked in that workweek.

Pursuant to 29 C.F.R. § 516.28 (52 FR 24896, July 1, 1987, as amended at 76 FR 18854, Apr. 5, 2011; 85 FR 86788, *Dec. 30, 2020*] for tipped employees and employer-administered tip pools:

(a) With respect to each tipped employee whose wages are determined pursuant to section 3(m) of the Act, the employer shall maintain and preserve payroll or other records containing all the information and data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter or other notation placed on the pay records identifying each employee whose wage is determined in part by tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

(3) Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable minimum wage specified in section 6(a)(1) of the Act). The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

(4) Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.

(5) Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

(b) With respect to employees who receive tips but for whom a tip credit is not taken under section 3(m)(2)(A), any employer that collects tips received by employees to operate a mandatory tip-pooling or tip-sharing arrangement shall maintain and preserve payroll or other records containing the information and data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter, or other notation placed on the pay records identifying each employee who receive tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

Pursuant to 29 C.F.R. § 516.29, with respect to each employee who is partially exempt from the overtime pay requirements of the Act pursuant to section 13(b)(29) (employees employed by a private entity operating an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System who are partially exempt from overtime pay requirements pursuant to FLSA § 13(b)(29)), an employer must maintain and preserve the records required in 29 C.F.R. § 516.2, except that the record of the regular hourly rate of pay in 20 C.F.R. § 516.2(a)(6) is required only in a workweek when overtime compensation is due under FLSA § 13(b)(29).

Pursuant to 29 C.F.R. § 516.30 (learners, apprentices, messengers, students, or handicapped workers employed under special certificates as provided in section 14 of the Act) with respect to persons employed as learners, apprentices, messengers or full-time students employed outside of their school hours in any retail or service establishment in agriculture, or in institutions of higher education, or handicapped workers employed at special minimum hourly rates under Special Certificates pursuant to FLSA § 14, an employer must maintain and preserve records containing the same information and data required with respect

to other employees employed in the same occupations, an, in addition, each employer must segregate on the payroll or pay records the names and required information and data with respect to those learners, apprentices, messengers, handicapped workers and students, employed under Special Certificates. A symbol or letter may be placed before each such name on the payroll or pay records indicating that that person is a "learner," "apprentice," "messenger," "student," or "handicapped worker," employed under a Special Certificate.

Pursuant to 29 C.F.R. § 516.31 for industrial homeworkers:

(a) Definitions -

(1) Industrial homeworker and homeworker, as used in this section, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(2) Industrial homework, as used in this section, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(3) The meaning of the terms person, employ, employer, employee, goods, and production as used in this section is the same as in the Act.

(b) Items required. In addition to all of the records required by 29 C.F.R. § 516.2, every employer of homeworkers shall maintain and preserve payroll or other records containing the following information and data with respect to each and every industrial

homeworker employed (excepting those homeworkers to whom section 13(d) of the Act applies and those homeworkers in Puerto Rico to whom part 545 of this chapter applies, or in the Virgin Islands to whom part 695 of this chapter applies):

(1) With respect to each lot of work:

(i) Date on which work is given out to worker, or begun by worker, and amount of such work given out or begun;

(ii) Date on which work is turned in by worker, and amount of such work;

(iii) Kind of articles worked on and operations performed;

(iv) Piece rates paid;

(v) Hours worked on each lot of work turned in;

(vi) Wages paid for each lot of work turned in.

(2) With respect to any agent, distributor, or contractor: The name and address of each such agent, distributor, or contractor through whom homework is distributed or collected and the name and address of each homeworker to whom homework is distributed or from whom it is collected by each such agent, distributor, or contractor.

(c) Homeworker handbook. In addition to the information and data required in paragraph (b) of this section, a separate handbook (to be obtained by the employer from the Wage and Hour Division and supplied by such employer to each worker) shall be kept for each homeworker. The employer is required to insure that the hours worked and other information required therein is entered by the homeworker when work is performed and/or business-related expenses are incurred. This handbook must remain in the possession of the homeworker except at the end of each pay period

when it is to be submitted to the employer for transcription of the hours worked and other required information and for computation of wages to be paid. The handbooks shall include a provision for written verification by the employer attesting that the homeworker was instructed to accurately record all of the required information regarding such homeworker's employment, and that, to the best of his or her knowledge and belief, the information was recorded accurately. Once no space remains in the handbook for additional entries, or upon termination of the homeworker's employment, the handbook shall be returned to the employer. The employer shall then preserve this handbook for at least two years and make it available for inspection by the Wage and Hour Division on request.

Pursuant to 29 C.F.R. § 516.32 for employees employed in agriculture pursuant to FLSA § 13(a)(6) or 13(b)(12):

(a) No records, except as required under paragraph (f) of this section, need be maintained by an employer who did not use more than 500 man-days[1] of agricultural labor in any quarter of the preceding calendar year, unless it can reasonably be anticipated that more than 500 man-days of agricultural labor will be used in at least one calendar quarter of the current calendar year. The 500 man-day test includes the work of agricultural workers supplied by crew leaders, or farm labor contractors, if the farmer is an employer of such workers, or a joint employer of such workers with the crew leader or farm labor contractor. However, members of the employer's immediate family are not included. (A "man-day" is any day during which an employee does agricultural work for 1 hour or more.)

(b) If it can reasonably be anticipated that the employer will use more than 500 man-days of agricultural labor in at least one calendar quarter of the current calendar year, the employer shall maintain and preserve for each employee records containing all the information and data required by § 516.2(a) (1), (2) and (4) and, in addition, the following:

(1) Symbols or other identifications separately designating those employees who are

(i) Members of the employer's immediate family as defined in section 13(a)(6)(B) of the Act,

(ii) Hand harvest laborers as defined in section 13(a)(6)(C) or (D), and

(iii) Employees principally engaged in the range production of livestock as defined in section 13(a)(6)(E).

(2) For each employee, other than members of the employer's immediate family, the number of man-days worked each week or each month.

(c) For the entire year following a year in which the employer used more than 500 man-days of agricultural labor in any calendar quarter, the employer shall maintain, and preserve in accordance with §§ 516.5 and 516.6, for each covered employee (other than members of the employer's immediate family, hand harvest laborers and livestock range employees as defined in sections 13(a)(6) (B), (C), (D), and (E) of the Act) records containing all the information and data required by § 516.2(a) except paragraphs (a) (3) and (8).

(d) In addition to other required items, the employer shall keep on file with respect to each hand harvest laborer as defined in section 13(a)(6)(C) of the Act for whom exemption is taken, a statement from each such employee showing the number of weeks employed in agriculture during the preceding calendar year.

(e) With respect to hand harvest laborers as defined in section 13(a)(6)(D), for whom exemption is taken, the employer shall maintain in addition to paragraph (b) of this section, the minor's date of birth and name of the minor's parent or person standing in place of the parent.

(f) Every employer (other than parents or guardians standing in the place of parents employing their own child or a child in their custody) who employs in agriculture any minor under 18 years of age on days when school is in session or on any day if the minor is employed in an occupation found to be hazardous by the Secretary shall maintain and preserve records containing the following data with respect to each and every such minor so employed:

(1) Name in full,

(2) Place where minor lives while employed. If the minor's permanent address is elsewhere, give both addresses,

(3) Date of birth.

(g) Where a farmer and a bona fide independent contractor or crew leader are joint employers of agricultural laborers, each employer is responsible for maintaining and preserving the records required by this section. Duplicate records of hours and earnings are not required. The requirements will be considered met if the employer who actually pays the employees maintains and preserves the records specified in paragraphs (c) and (f) of this section.

Pursuant to 29 C.F.R. § 516.33, with respect to each employee exempt from the overtime pay requirements of the Act for time spent receiving remedial education pursuant to FLSA § 7(q)[2] and 29 C.F.R. § 778.603, an employer must

[2] FLSA § 7(q) (maximum hour exemption for employees receiving remedial education) provides: "Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is - (1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level; (2) designed to provide reading and other

maintain and preserve records containing all the information and data required by 29 C.F.R. § 516.2 and, in addition, must also make and preserve a record, either separately or as a notation on the payroll, showing the hours spent each workday and total hours each workweek that the employee is engaged in receiving such remedial education that does not include any job-specific training but that is designed to provide reading and other basic skills at or below the eighth-grade level or to fulfill the requirements for a high school diploma (or General Educational Development certificate), and the compensation (at not less than the employee's regular rate of pay) paid each pay period for the time so engaged.

F. PITFALLS AND PERILS OF CLASSIFICATION ERRORS

1. Misclassifying Employees as Independent Contractors.

Much litigation has arisen regarding employers misclassifying workers as independent contractors instead of employees. Some employers classify workers as independent contractors to reduce expenses including minimum wages, and overtime compensation, payroll taxes, and employee benefits. In recent years the Department of Labor has cracked down on misclassification of employees as independent contractors.

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basic skills at an eighth grade level or below; and (3) does not include job specific training.

The Department of Labor and the federal circuits have developed a number of articulations of the test for distinguishing an employee from an independent contractor under the FLSA. In *Schultz v. Capital Int'l Sec., Inc*., 466 F.3d 298 (4th Cir. 2006), the United States Court of Appeals for the Fourth Circuit adopted the "economic realities" test:

> An employee is defined as "any individual employed by an employer, [29 U.S.C. § 203(e)(1)], and an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," [29 U.S.C. § 203(d)]. In addition, the Act defines the verb "employ" expansively to mean "suffer or permit to work." These definitions broaden the meaning of 'employee' to cover some workers who might not qualify as such under a strict application of traditional agency or contract law principles. In determining whether a worker is an employee covered by the FLSA, a court considers the "*economic realities*" of the relationship between the worker and the putative employer. The focal point is whether the worker "is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself.
>
> The emphasis on economic reality has led courts to develop and apply a six-factor test to determine whether a worker is an employee or an independent contractor. The factors are (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work;

(5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. These factors are often called the "Silk factors" in reference to *United States v. Silk*, 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757, 1947-2 C.B. 167 (1947), the Supreme Court case from which they derive. No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer.

Applying the *Silk* test, the district court concluded that the agents were independent contractors, not FLSA-covered employees. The district court's analysis focused primarily on the first *Silk* factor, and the analysis compared the minimal control CIS had over the agents with the high degree of control exercised by the Prince. Although control is an important part of the *Silk* test, the issue is not the degree of control that an alleged employer has over the manner in which the work is performed in comparison to that of another employer. Rather, it is the degree of control that the alleged employer has in comparison to the control exerted by the worker. The district court therefore erred by weighing the degree of control exercised by CIS against that exercised by the Prince. The court should have instead weighed the agents' control against the total control exercised by CIS and the Prince. In taking this wrong turn, the district court strayed from the ultimate question posed by the *Silk* test: whether the agents were, as a matter of economic reality, dependent on the business they served, or, conversely, whether they were in business for themselves. Before the *Silk* test can be correctly applied in this case, the established facts must be reviewed to identify the putative employer or employers. As the discussion below reveals, CIS and the Prince were joint employers who must be viewed

as providing "one employment" for purposes of the FLSA. When the Silk test is applied to this joint employment arrangement, the inescapable legal conclusion is that the agents were employees, not independent contractors.

The first *Silk* factor is the degree of control that the putative employer has over the manner in which the work is performed. When the employment arrangement here is considered as one employment by the Prince (acting through Abushalback) and CIS, the joint employers exercised nearly complete control over how the agents did their jobs. The eight-page SOP -- written and issued by Abushalback and the detail leader -- strictly dictated the manner in which the agents were to carry out their duties of providing security for the Prince and his family. For instance, the SOP directed agents to "[m]ake hourly walks" of the property, to "make regular checks at all locations where contractors are working," and to escort contractors in and out of the residence through a specific set of doors. The SOP even dictated the exact manner in which the agents were to open the front door of the residence when the Prince arrives: "The agent will open the door for Prince Faisal (if he is alone) or for Princess Reema if they are together and have no security with them. If security is with them then the outside agent will open the door for Prince Faisal and leave the door for Princess Reema to be opened by the security agent that is with them." While there were no doubt occasions when the agents were required to exercise independent judgment (such as determining whether a particular visitor appeared suspicious), as a general rule they did not control the manner in which they provided security.

The second *Silk* factor is whether the worker has opportunities for profit or loss dependent on his

managerial skill. In determining that this factor weighed against finding employee status, the district court offered reasoning that does not support its ultimate conclusion: The number of hours that these individuals worked on the detail depended upon the shift. The shift schedule was developed by Mr. Parham [the detail leader] after consulting with the agents. Mr. Parham and Mr. Abushalback made judgments about who would travel overseas. But again whether or not a person participated in the schedule, whether it was one day or every day depended in part upon their desire, availability and the need. Agents who were assigned to travel duty were often given cash bonuses, gifts, or days off with pay. The receipt of these perquisites did not depend on managerial skill, however. There is no evidence the agents could exercise or hone their managerial skill to increase their pay. CIS paid the agents a set rate for each shift worked. The Prince's schedule and security needs dictated the number of shifts available and the hours worked. There was no way an agent could finish a shift more efficiently or quickly in order to perform additional paid work. The agents' security work was, by its very nature, time oriented, not project oriented. The second Silk factor weighs in favor of employee status for the agents.

The third factor is the worker's investment in equipment or materials required for the task, or his employment of other workers. This factor weighs heavily against a conclusion that the agents were independent contractors. CIS and the Prince supplied almost every piece of equipment the agents used: radios, holsters, cell phones, cars, cameras, first aid kits, business cards, and lapel pins. Although some agents chose to use their own firearms, CIS supplied firearms to those who wanted them. The agents were thus not required to invest in any equipment or

materials. In addition, the agents could not hire other workers to help them do their work. Although the agents arguably had an investment in their individual PPS licenses, this investment is immaterial for our purposes. Licensing is required of all persons working as personal protection specialists in Virginia regardless of whether they are employees or independent contractors. More telling is the licensing and insurance that the five plaintiff-agents did not obtain, despite CIS's flaccid requests: the individual business licenses and individual liability insurance. Because the agents were never compelled to obtain these credentials while they worked on the Prince's security detail, they continued to operate under the authority of CIS's license and the protection of the company's liability insurance.

The fourth *Silk* factor is the degree of skill required for the work. In concluding that this factor weighed against employee status, the district court said, "I think that personal security requires special skills." This observation cannot end the inquiry, however, because it applies to many workers, regardless of whether they are independent contractors or employees. Of course, a licensed PPS agent can be expected to offer more specialized services than the average private security guard, and providing security for a diplomat and members of a royal family surely presents special challenges. Although these points could weigh in favor of concluding that the agents were independent contractors, there are important countervailing factors. The agents' tasks were, for the most part, carefully scripted by the SOP. Moreover, many of their tasks required little skill, for example, sorting the mail, making wake up calls, moving furniture, providing newspapers for the Prince, and checking the Dallas Morning News website for updates about the Dallas Cowboys. Although we are

mindful of the district court's observation about the need for special skills, we do not see the skill factor as tipping significantly one way or the other.

The fifth factor is the degree of permanency of the working relationship. The more permanent the relationship, the more likely the worker is to be an employee. As to this factor the district court noted only that the real working relationship here was with the Prince, not CIS. Indeed, when the Prince is viewed as one of the joint employers, this factor weighs heavily in favor of a conclusion that the agents were employees. Two of the five plaintiffs began working on the Prince's detail in 1998, when Vance had the contract. These agents chose to stay after the Prince terminated his contract with Vance, even though their decision exposed them to liability under the non-compete agreements they had signed with Vance. The Prince contributed money to settle Vance's lawsuit against the agents, and he compensated the agents for their lost earnings. More important, the Prince terminated Vance in part because it changed agents too often. When CIS took over the detail, it hired the agents who were already working on the Prince's detail. The Prince clearly wanted security agents who would be with him over the long term, and CIS worked to oblige the Prince in this regard.

The sixth (and last) *Silk* factor is the extent to which the service rendered by the worker is an integral part of the putative employer's business. CIS was formed specifically for the purpose of supplying the Prince's security detail, which appears to have been CIS's only business function during the period relevant to this case. The agents were thus an integral part of CIS's business. Insofar as the "business" of the Prince's residence can be characterized as general housekeeping, the agents' service was likewise

> integral. The agents ensured the safety of the Prince and his family and guests and performed administrative and personal tasks that no doubt helped the household run smoothly.
>
> In sum, the district court committed legal error by applying the *Silk* test without first determining whether a joint employment relationship existed. The undisputed facts establish that CIS and the Prince were joint employers: the agents performed work that simultaneously benefitted CIS and the Prince, who shared control over the agents' work. When the *Silk* factors are applied to the joint employment circumstance, it becomes apparent that the agents were not in business for themselves. The agents were thus employees, not independent contractors.

Schultz v. Capital Int'l Sec., Inc., 466 F.3d at 304 (internal citations and quotations omitted). In *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016), the Fourth Circuit stated:

> The economic reality test focuses on whether the worker 'is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself. Relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. [No] one factor is dispositive....

Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d at 83 (internal citations and quotations omitted). In *Wilson v. Marlboro Pizza, LLC*, 2023 U.S. Dist. LEXIS 74288 (D. Md. 2023), the court stated:

> Courts employ a multi-factor economic reality test to determine whether the employee is economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself. Although no one factor is dispositive, relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Wilson v. Marlboro Pizza, LLC, supra (internal citations and quotations omitted). In *Hill v. Pepperidge Farm, Inc.,* 2022 U.S. Dist. LEXIS 146817 (E.D. Va. 2022), the court stated:

> To determine whether a worker is an employee as defined in the FLSA, and Va. Code § 40.1-29, the United States Court of Appeals for the Fourth Circuit has adopted the "economic realities test." *Schultz v. Cap. Int'l. Sec., Inc*., 466 F.3d 298, 304 (4th Cir. 2006); *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 241 (4th Cir. 2016). This tests the relationship between the worker and their employer to determine if "the worker is economically dependent on the business to which he renders services or is, as a matter of economic [reality], in business for himself. The economic realities test consists of six factors:

> (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.
>
> With this test, no single factor is dispositive....

Pepperidge Farm, Inc., supra (E.D. Va. 2022).

Misclassification of employees as independent contractors can lead to significant FLSA liability, most often for overtime compensation, and can trigger an FLSA collective action. because the liability often is for an entire class of employees rather than for one or two individuals. Therefore, employers conducting wage hour audits should determine the precise test applicable in their jurisdiction or jurisdictions, and ensure that workers are properly classified as either employees or independent contractors.

2. Classifying Employees Based Only On Job Titles.

In order to be an exempt white collar employee under the FLSA, the "primary duties" of the employee's job must meet the criteria specified in the FLSA regulations. Employers often believe this requirement is satisfied by giving the employee a job title that suggests the employee performs the required job

duties, but that is a mistake. "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2; *Morrison v. Cnty. of Fairfax, Va.*, 826 F.3d 758, 768 (4th Cir. 2016); *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 128 n.15 (4th Cir. 2015). The employee's actual job primary job duties must satisfy the exemption's requirements, and "the applicability of the exemptions must be determined based on the individualized facts and record in each case." *Morrison v. Cnty. of Fairfax, Va*., 826 F.3d 758, 768 (4th Cir. 2016); *Emmons v. City of Chesapeake*, 2019 U.S. Dist. LEXIS 231372, n.14 (E.D. Va. 2019); *Fusco v. NorthPoint ERM, LLC*, 2016 U.S. Dist. LEXIS 4254, 6 (W.D.N.C. 2016); *McVay v. Mayflower Vehicle Sys*., 2008 U.S. Dist. LEXIS 142432 (S.D.W. Va. 2008) ("in determining whether an employee is exempt, the name of the position the employee holds is not conclusive"). Therefore, employers conducting wage hour audits should look beyond the job titles of exempt employees and ensure their actual job duties satisfy the requirements of the exemption.

3. Classifying Employees As White Collar Exempt Based On Secondary Duties Instead of Primary Duties.

Employers sometimes misclassify employees as exempt because the employee performs some small amount of exempt work. To qualify for an exemption, the employee's "primary duty" must be the performance of exempt work. 29 C.F.R. § 541.700.

"An employee's primary duty is the principal, main, major or most important duty that the employee performs, based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." *Morrison v. Cnty. of Fairfax, Va*., 826 F.3d 758, 769 (4th Cir. 2016) (internal quotations omitted); 29 C.F.R. § 541.700(a). "Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a); *Morrison v. Cnty. of Fairfax, Va*., 826 F.3d 758, 769 (4th Cir. 2016).

"The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." 29 C.F.R. § 541.700(b).

As with job titles, employers conducting wage hour audits should examine each exempt employee's actual job duties to ensure exempt work is the employee's primary duty.

4. Classifying All Salaried Employees as Exempt.

Some FLSA-exempt employees must be paid on a salary basis, and some must be paid on a salary or fee basis. Some employers mistakenly believe paying an employee on a salary basis makes the employee exempt. Employers conducting wage hour audits should ensure FLSA exemptions are applied only to employees who meet all the applicable requirements.

5. Classifying Supervisors as Exempt Executive Employees.

Exempt executive employees (other than business owners) are limited to employees

(1) who are paid on a salary basis and meet the applicable compensation requirements ($684 per week); (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) who customarily and regularly directs the work of two or more other employees; and (4) who have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100.

Employers sometime believe this makes all supervisors exempt executive employees. Not all supervisors, however, will meet the exemption requirements. For example, a supervisor who supervises only one subordinate does not "customarily and regularly directs the work of two or more other employees." A supervisor's authority may not extend to hiring or firing other employees, and a supervisor's suggestions and recommendations as to the hiring, firing, advancement, promotion of other employees may not be given particular weight. A supervisor's primary duty may not be management of the business or a

customarily recognized department or subdivision of it. "Generally, 'management' includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures." 29. C.F.R. § 541.102.

Employers conducting wage hour audits should ensure only employees who meet all of these requirements are classified as exempt executive employees.

6. Misclassifying Office Workers as Exempt Administrative Employees

Employers sometimes believe all salaried office workers are exempt administrative employees. Not all office workers, however, will qualify for this exemption.

Exempt administrative employees are limited to employees (1) who are paid on a salary or fee basis and meet the applicable compensation requirements ($455 per week), (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200. (Different requirements apply to administrative employees in educational establishments. See 29 C.F.R. § 541.204.)

"To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing

production line or selling a product in a retail or service establishment. Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, [and] legal and regulatory compliance." 29 C.F.R. § 541.201(a), (b). Also, "an employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt." 29 C.F.R. § 541.201(c). Therefore, an employee who works primarily as a receptionist, secretary, or personal assistant, for example, would not meet the primary duty requirement. Likewise, for example, a claim agent for an insurance company would not meet this requirement, his job is in the nature of "production" work in the context of an insurance company.

In addition to the preceding management or general business operations requirement, "to qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a). The FLSA regulations state:

> The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the

employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

29 C.F.R. § 541.202(b) - (f).

Obviously, many office workers, including ones performing administrative work, will not satisfy these requirements. Employers conducting wage hour audits should ensure only employees who meet all of these requirements are classified as exempt administrative employees.

7. Classifying All Employees Who Work With Computers as Exempt Computer Employees.

Employers sometimes classify all employees whose work heavily involves computers or software as FLSA exempt "computer employees." Doing so, however, is a mistake.

The computer employee exemption applies only to certain "computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field." C.F.R. § 541.400(a). "The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities." 29 C.F.R. § 541.400(b). "The section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate of not less than $27.63 an hour. In

addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills." 29 C.F.R. § 541.400(b).

Not all employees who work with computers or software will satisfy these requirements. The FLSA regulations specifically provide that "the exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment." 29 C.F.R. § 541.401. In addition, "employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming

or other similarly skilled computer-related occupations identified in § 541.400(b), are also not exempt computer professionals." 29 C.F.R. § 541.401. Employers conducting wage hour audits should ensure only employees who meet all of the applicable requirements are classified as exempt computer employees.

8. Classifying All Commissioned Employees as Exempt Outside Sales Employees.

Employers sometimes classify all commissioned employees as exempt "outside sales" employees. Not all commissioned or sales employees, however, will meet the requirements of the "outside sales" exemption.

FLSA section 13(a)(1) exempts from the minimum wage and overtime requirements "any employee employed ... in the capacity of outside salesman." The FLSA regulations provide the following requirements for the "outside salesman" exemption:

> The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 500(a). "In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences." 29 C.F.R. § 500(b). (There is no requirement that outside sales employees be paid on a salary or fee basis, or on any other specific basis.)

The most important concept in the outside sales exemption is "outside." "An outside sales employee must be customarily and regularly engaged away from the employer's place or places of business. The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered

one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business." 29 C.F.R. § 502.

Employers conducting wage hour audits should ensure only employees who meet all of the applicable requirements are classified as exempt outside sales employees.

9. Overlooking State and Local Laws.

The Fair Labor Standards Act is the most well known wage hour law. Many states and localities, however, have their own laws governing wages and hours, and many of them are more demanding, and can impose greater liability, than the FLSA.

Virginia, for example, has its own minimum wage law, the Virginia Minimum Wage Act, Va. Code § 40.1-28.8 *et seq*.

In 2021, Virginia adopted (and in 2022 amended) the Virginia Overtime Wage Act, Va. Code § 40.1-29.2, which in its current form provides:

> Any employer that violates the overtime pay requirements of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended, and any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of such federal act or any related governing case law shall be liable to the employee for the applicable remedies, damages, or other relief available under the federal Fair Labor Standards Act in an action brought pursuant to the process in subsection J of § 40.1-29. For the purposes of this section, "employer" and "employee" shall have the meanings ascribed to them under the federal Fair Labor Standards Act and all applicable exemptions, overtime calculation methods, methods of overtime payment, or other overtime provisions within the federal Fair Labor Standards Act and any attendant regulations, guidance, or rules shall apply. Any action brought pursuant to this section shall accrue according to the applicable limitations set forth in the federal Fair Labor Standards Act.

In 2022, Virginia adopted Virginia Code § 40.1-29.3 ("Overtime for Certain Employees"), which provides:

> A. As used in this section:
>
> "Carrier" means an air carrier that is subject to the provisions of the federal Railway Labor Act, 45 U.S.C. § 181 *et seq*.
>
> "Derivative carrier" means a carrier that meets the two-part test used by the federal National Mediation

Board to determine if a carrier is considered a derivative carrier.

"Employee" means an individual employed by a derivative carrier.

B. An employer shall pay each employee an overtime premium at a rate not less than one and one-half times the employee's regular rate for any hours worked by an employee in excess of 40 hours in any one workweek. An employee's regular rate shall be calculated as the employee's hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that would be excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations for an individual covered by such federal act, divided by the total number of hours worked in that workweek.

C. If an employer fails to pay overtime wages to an employee in accordance with this section, the employee may bring an action against the employer in a court of competent jurisdiction to recover payment of the overtime wages, and the court shall award the overtime wages owed, an additional equal amount as liquidated damages, and reasonable attorney fees and costs; however, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of this section, the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount of the unpaid overtime wages.

D. An action under this section shall be commenced within two years after the cause of action accrued,

> except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

In 2021, Virginia adopted Virginia Code § 40.1-28.7:7 ("Misclassification of Workers"). It provides, *inter alia*:

> A. An individual who has not been properly classified as an employee may bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. An individual's representative may bring the action on behalf of the individual. If the court finds that the employer has not properly classified the individual as an employee, the court may award the individual damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in bringing the action.
>
> B. In a proceeding under subsection A, an individual who performs services for a person for remuneration shall be presumed to be an employee of the person that paid such remuneration, and the person that paid such remuneration shall be presumed to be the employer of the individual who was paid for performing the services, unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.

Prior to 2021, the Virginia Payment of Wage Law, Va. Code § 40.1-29, provided, *inter alia:*

> A. All employers operating a business or engaging an individual to perform domestic service shall establish regular pay periods and rates of pay for employees except executive personnel. All such employers shall pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice in each month.... Upon termination of employment an employee shall be paid all wages or salaries due him for work performed prior thereto; such payment shall be made on or before the date on which he would have been paid for such work had his employment not been terminated.

Va. Code § 40.1-29(A). In 2021, Virginia amended Virginia Code § 40.1-29 to add:

> J. In addition to any civil or criminal penalty provided by this section, and without regard to any exhaustion of alternative administrative remedies provided for in this section, if an employer fails to pay wages to an employee in accordance with this section, the employee may bring an action, individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), against the employer in a court of competent jurisdiction to recover payment of the wages, and the court shall award the wages owed, an additional equal amount as liquidated damages, plus prejudgment interest thereon as provided in subsection G, and reasonable attorney fees and costs. If the court finds that the employer knowingly failed to pay wages to an employee in accordance with this section, the court

> shall award the employee an amount equal to triple the amount of wages due and reasonable attorney fees and costs.
>
> K. As used in this section, a person acts "knowingly" if the person, with respect to information, (i) has actual knowledge of the information, (ii) acts in deliberate ignorance of the truth or falsity of the information, or (iii) acts in reckless disregard of the truth or falsity of the information. Establishing that a person acted knowingly shall not require proof of specific intent to defraud.
>
> L. An action under this section shall be commenced within three years after the cause of action accrued. The period for filing is tolled upon the filing of an administrative action under subsection F until the employee has been informed that the action has been resolved or until the employee has withdrawn the complaint, whichever is sooner.

Va. Code § 40.1-29(J), (K), (L).

Employers conducting wage hour audits should ensure their policies and practice comply with all applicable state and local wage hour laws.

***Mitchel v Crosby Corp.*, Case No. 10-2349,**
2012 U.S. Dist. LEXIS 128362 (D. Md. 2012)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONNA MITCHEL, et al.,	:	
v.	:	Civil Action No. DKC 10-2349
CROSBY CORPORATION, et al.	:	

MEMORANDUM OPINION

Presently pending and ready for review this Fair Labor Standards Act ("FLSA") case is the motion for conditional certification of a collective action and facilitation of notice filed by Plaintiffs Donna Mitchel, Kenya Farris, Sylvia Wheeler, and Christina Wilson.[1] (ECF No. 57). The issues have been fully briefed, and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, Plaintiffs' motion for conditional certification of a collective

[1] Defendants contend that Donna Mitchel should be barred by the doctrine of judicial estoppel from asserting her claims and from representing the purported class because she failed to disclose her involvement in this lawsuit in a subsequent filing for bankruptcy. The court will not address this argument now, because it is not relevant to the motion pending, and the parties have not briefed the issue. *See Calafiore v. Werner Enter. Inc.*, 418 F.Supp.2d 795, 797 (D.Md. 2006) (noting that "the Fourth Circuit apparently has not addressed the application of judicial estoppel to a case in which a debtor fails to schedule a potential claim in a bankruptcy filing but later asserts that claim," and requires a close examination of "the legal test for intent in this context").

action and facilitation of notice will be granted in part and denied in part.

I. Background

A. Factual Background

For present purposes, the facts are taken as follows:

Defendant Crosby Corporation ("Crosby") provides temporary staffing services to corporate clients, including The Federal Home Loan Mortgage Corporation ("Freddie Mac"). Plaintiffs are loan underwriters who were hired by Crosby to work for Freddie Mac in its McLean, Virginia facility beginning in May 2009. Plaintiffs and other loan underwriters reviewed previously underwritten loan files, and were supervised by both Freddie Mac and Crosby employees. Crosby also provided underwriters for Freddie Mac in its Chicago and Atlanta facilities. These temporary employees were paid an hourly wage for their work.

Plaintiffs allege that both Crosby and Freddie Mac "have implemented a nationwide policy wherein underwriters are not paid minimum wage or overtime pay." (ECF No. 57, at 4). As part of this policy, Defendants required underwriters to meet certain production quotas. Plaintiffs assert that both Freddie Mac and Crosby supervisors told underwriters that they must meet their required weekly loan review quotas, or risk losing their jobs. Defendants were aware that underwriters would need to work more than forty hours per week to meet these quotas.

Crosby and Freddie Mac supervisors instructed underwriters not to submit time sheets reflecting more than forty hours worked in a week, because they would not pay employees for overtime hours. This policy resulted in Plaintiffs and other underwriters working uncompensated overtime hours to meet their quotas. Plaintiffs aver that they can demonstrate that they routinely worked more than forty hours a week and were not paid for those excess hours. Finally, Plaintiffs declare that they have personal knowledge of other underwriters who have been victims of the same policy.

B. Procedural Background

Plaintiffs filed a complaint against Crosby on August 25, 2010, on behalf of themselves and similarly situated others. In the complaint, they sought to bring an FLSA overtime claim as a collective action pursuant to 29 U.S.C. § 216(b), as well as state overtime and unpaid wage claims as class actions pursuant to Federal Rule of Civil Procedure 23. (ECF No. 1). Plaintiffs amended the complaint on October 19, 2011 to include Freddie Mac as a Defendant. (ECF No. 39). Defendants then answered the complaint, and the parties began limited discovery. (ECF Nos. 44, 47). On February 15, 2012, Plaintiffs moved for conditional certification of a collective action for all underwriters employed by either Crosby or Freddie Mac nationwide, since June 28, 2007, who have not been properly compensated for their

overtime work or have not been paid a minimum wage for all hours worked. (ECF No. 57). They also requested facilitation of notice to potential opt-in plaintiffs.[2] On February 27, 2012, the parties entered a joint motion for proposed limited discovery. (ECF No. 59). The court held a telephone conference on April 24, 2012, at which time it limited the scope of the potential class to underwriters employed by Crosby who were assigned to work for Freddie Mac. The parties then took depositions of Plaintiffs Donna Mitchel, Kenya Farris, Sylvia Wheeler, and Christina Wilson; Defendant Howard Crosby, and Freddie Mac supervisor Ronald Fiegles. They also obtained declarations of a number of current underwriters working for Crosby and Freddie Mac. (*See* ECF No. 75-1 through 75-13). Plaintiffs filed a motion for extension of time to respond to Defendants' oppositions to their motion for conditional certification of the class without first meeting and conferring with opposing counsel. (ECF No. 77). This motion was unopposed by Defendant Freddie Mac. (ECF No. 78).

II. Motion for Conditional Certification and for Court-Facilitated Notice

"Under the FLSA, plaintiffs may maintain a collective action against their employer for violations under the act

[2] On September 23, 2010, one additional Crosby underwriter working at Freddie Mac – Vonnese Masembwa - filed a consent form seeking to opt-in as a plaintiff. (ECF No. 8).

pursuant to 29 U.S.C. § 216(b)." *Quinteros v. Sparkle Cleaning, Inc.*, 532 F.Supp.2d 762, 771 (D.Md. 2008). Section 216(b) provides, in relevant part, as follows:

> An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

"This provision establishes an 'opt-in' scheme, whereby potential plaintiffs must affirmatively notify the court of their intentions to be a party to the suit." *Quinteros*, 532 F.Supp.2d at 771 (citing *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 519 (D.Md. 2000)).

When deciding whether to certify a collective action pursuant to the FLSA, courts generally follow a two-stage process. *Syrja v. Westat, Inc.*, 756 F.Supp.2d 682, 686 (D.Md. 2010). In the first stage, commonly referred to as the notice stage, the court makes a "threshold determination of 'whether the plaintiffs have demonstrated that potential class members are 'similarly situated,' such that court-facilitated notice to the putative class members would be appropriate.'" *Id.* (quoting *Camper*, 200 F.R.D. at 519). In the second stage, following the close of discovery, the court conducts a "more stringent

inquiry" to determine whether the plaintiffs are in fact "similarly situated," as required by § 216(b). *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. 298, 300 (D.Md. 2007). At this later stage, referred to as the decertification stage, the court makes a final decision about the propriety of proceeding as a collective action. *Syrja*, 756 F.Supp.2d at 686 (quoting *Rawls*, 244 F.R.D. at 300). Plaintiffs here have moved for conditional certification of a collective action, and they have requested court-facilitated notice to potential opt-in plaintiffs.

A. Conditional Certification Is Appropriate Because Plaintiffs Have Made a "Modest Factual Showing" that Underwriters Hired by Crosby to Work at Freddie Mac's McLean, Virginia Facility Are "Similarly Situated"

"Determinations of the appropriateness of conditional collective action certification . . . are left to the court's discretion." *Id.*; *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989). The threshold issue in determining whether to exercise such discretion is whether Plaintiffs have demonstrated that potential opt-in plaintiffs are "similarly situated." *Camper*, 200 F.R.D. at 519 (quoting 29 U.S.C. § 216(b)). "'Similarly situated' [does] not mean 'identical.'" *Bouthner v. Cleveland Constr., Inc.*, No. RDB-11-0244, 2012 WL 738578, at *4 (D.Md. Mar. 5, 2012) (citing *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001)). Rather, a

group of potential FLSA plaintiffs is "similarly situated" if its members can demonstrate that they were victims of a common policy, scheme, or plan that violated the law. *Mancia v. Mayflower Textile Servs. Co.*, No. CCB-08-0273, 2008 WL 4735344, at *3 (D.Md. Oct. 14, 2008); *Quinteros*, 532 F.Supp.2d at 772. To satisfy this standard, plaintiffs generally need only make a "relatively modest factual showing" that such a common policy, scheme, or plan exists. *Marroquin v. Canales*, 236 F.R.D. 257, 259 (D.Md. 2006).

To meet this burden and demonstrate that potential class members are "similarly situated," Plaintiffs must set forth more than "vague allegations" with "meager factual support" regarding a common policy to violate the FLSA. *D'Anna, v. M/A COM, Inc.*, 903 F.Supp. 889, 894 (D.Md. 1995); *Bouthner*, 2012 WL 738578, at *4. Their evidence need not, however, enable the court to determine conclusively whether a class of "similarly situated" plaintiffs exists, *Bouthner*, 2012 WL 738578, at *4, and it need not include evidence that the company has a formal policy of refusing to pay overtime, *Quinteros*, 756 F.Supp.2d at 772. Plaintiffs may rely on "[a]ffidavits or other means," such as declarations and deposition testimony, to make the required showing. *Williams v. Long*, 585 F.Supp.2d 679, 684-85 (D.Md. 2008); *Essame v. SSC Laurel Operating Co.*, --- F.Supp.2d ---, 2012 WL 762895, at *3 (D.Md. Mar. 12, 2012).

Here, through Plaintiffs' declarations, they have made a "modest factual showing" that they are "similarly situated" to other Crosby-employed underwriters working at Freddie Mac's McLean facility who have worked more than forty hours per week since May 1, 2009,[3] but have not received appropriate proper compensation, including overtime pay. First, Donna Mitchel, Kenya Farris, Sylvia Wheeler, and Christina Wilson have all submitted declarations attesting that they and other Crosby underwriters working for Freddie Mac were required to meet certain production quotas. (ECF Nos. 57-1 through 57-4). Second, Plaintiffs assert that supervisors told all underwriters that they must meet their required weekly loan review quotas, or risk losing their jobs. (*Id.*). Third, Plaintiffs all attest that the Defendants were aware that underwriters could not meet their quotas in a forty-hour workweek. (*Id.*). Fourth, all four Plaintiffs who submitted declarations contend that Crosby and Freddie Mac supervisors affirmatively instructed underwriters not to submit time sheets reflecting more than forty hours

[3] Plaintiffs' proposed notice requests certification for a class of Crosby underwriters who began work after both June 28, 2007 and June 27, 2008. (ECF No. 57-8, at 1-2). Neither of these dates relate to the facts of this case. The earliest date that the Plaintiffs suggest prospective class members began working for Crosby at Freddie Mac's McLean facility is May 1, 2009. (ECF No. 80, at 2). Therefore, the proposed class may only include those Crosby-employed underwriters working at Freddie Mac's McLean facility after May 1, 2009.

worked in a week, because they would not pay the underwriters for that additional time. (*Id.*). Finally, Plaintiffs all aver that they were not fully compensated by the Defendants for all hours worked, and that they have personal knowledge of other underwriters who also were not paid overtime. (*Id.*). Taken together, these facts attested to in Plaintiffs' declarations establish the "modest factual showing" necessary for conditional certification of a class of underwriters who worked for Crosby in Freddie Mac's McLean facilities since May 1, 2009.

Plaintiffs contend that the class should include all Crosby-employed underwriters working at Freddie Mac facilities nationwide. Because Plaintiffs have offered no evidence of Defendants' failure to pay overtime at any other Freddie Mac facilities, they have failed to meet their burden with respect to Defendants' policies outside of the McLean, Virginia facility. *See Faust v. Comcast Cable Comms. Mgmt., LLC.*, No. WMN-10-2336, 2011 WL 5244421, at *4 (D.Md. Nov. 1, 2011) (limiting conditional certification of FLSA class to one of eight Maryland call centers because even though employees at all call centers perform the same tasks and are subject to the same company policies, "Plaintiffs have failed to provide any concrete evidence" demonstrating that employees at other facilities had been victims of the same illegal policies); *Camper*, 200 F.R.D. at 520-21 (holding that although plaintiffs

preliminarily established the existence of a company-wide policy concerning use of time clocks, notice to the potential class was warranted with respect to only the one facility where the plaintiffs made a factual showing); *see also Shabazz v. Asurion Ins. Serv.*, No. 3:07-0653, 2008 WL 1730318, at *5 (M.D.Tenn. Apr. 10, 2008) (denying certification for Houston facility when evidence only demonstrated violations at Nashville locations); *Hens v. ClientLogic Operating Corp.*, No. 05-CV-381S, 2006 WL 2795620, at *5 (W.D.N.Y. Sept. 26, 2006) (limiting certified class to employees from eight of the defendant's fifty-two call centers, because the plaintiffs only presented evidence, in the form of declarations from employees working at these locations, that potential FLSA violations occurred). As in *Faust* and *Camper*, absent some evidentiary showing of FLSA violations at other Freddie Mac facilities, this court will not enlarge the opt-in class as Plaintiffs request.

Defendants present several counterarguments in an effort to avoid conditional certification entirely. First, they argue that Crosby's formal "policy has always been to pay its consultants for all hours worked and submitted." (ECF No. 76, at 4). "[I]t is well-settled," however, "that the promulgation of written policies, *per se*, is insufficient to immunize an employer from conduct that otherwise contravenes the FLSA." *Essame*, 2012 WL 762895, at *6); *see also Espenscheid v.*

DirectSAT USA, LLC, No. 09-cv-625-bbc, 2010 WL 2330309, at *7 (W.D.Wis. June 7, 2010) (finding that the defendants' formal wage and hour policies, which complied with the FLSA, did not preclude conditional certification where there was evidence of an informal policy to deny overtime (citing 29 C.F.R. § 785.13)). By affirming in their declarations that Defendants refused to pay overtime hours and instructed Plaintiffs not to record all of their work on timesheets, Plaintiffs have adduced enough evidence to establish, preliminarily, that a common policy existed at the McLean facility.

Defendants also argue that Plaintiffs' situations are so factually distinct both from one another and from all other Crosby-employed underwriters at the Freddie Mac facility in McLean that they require individualized treatment. (ECF Nos. 75, at 36-44; 76, at 12). Specifically, they note that a class should not be conditionally certified because it would be unmanageable: underwriters worked at different time periods, under varying policies, for different managers, and for different amounts of time. (*Id.*). Defendants cite *Syrja v. Westat, Inc.* to support these arguments. 756 F.Supp.2d 682. *Syrja* is inapposite to this case because the *Syrja* court denied conditional certification to a group of independent employees who worked in multiple geographic locations around the country, over different time periods, in offices run by different

managers, without any showing of a national policy. *Id.* at 688. Here, conditional certification will be granted to a group of employees who have worked in a single location, in identical positions, under a single management structure. *See Robinson v. Tyson Foods, Inc.*, 256 F.R.D. 97, 102 (S.D.Iowa 2008) (conditionally certifying a class of meat processors who worked in a single location under a single management structure). Further, this argument "delves too deeply into the merits of the dispute" at this initial notice stage. *Essame*, 2012 WL 762895, at * 4 (refusing to conclude that numerous dissimilarities in the plaintiffs' evidence counseled against granting conditional certification); *see also, e.g., Wlotkowski v. Mich. Bell Tel. Co.*, 267 F.R.D. 213, 219 (E.D.Mich. 2010) ("Defendant's arguments about the predominance of individualized inquiries and dissimilarities between plaintiff and other employees are properly raised after the parties have conducted discovery and can present a more detailed factual record for the court to review."); *De Lune-Guerrero v. N.C. Growers Ass'n, Inc.*, 338 F.Supp.2d 649, 654 (E.D.N.C. 2004) ("Differences as to time actually worked, wages actually due and hours involved are . . . not significant to [the conditional certification] determination."). Defendants' argument also fails to recognize that "[i]ndividual circumstances are inevitably present in a collective action." *Espenscheid*, 2010 WL 2330309, at *4. To

proceed as a collective action at this stage, Plaintiffs need only make "a modest factual showing" that they were victims of a common policy or practice that violated the FLSA. *Essame*, 2012 WL 762895, at *4. Based on their declarations asserting that they were instructed not to record all of their overtime work and that they did not regularly receive overtime compensation despite working more than forty hours per week, Plaintiffs have made that showing.

Defendants next argue that the court should deny Plaintiffs' request for conditional certification because Plaintiffs' declarations are not credible and because Defendants have submitted declarations and testimony of other potential class members to contradict Plaintiffs' assertions. (ECF No. 75, at 29). Defendants contend that "Plaintiffs have each given multiple versions of their experiences as a Crosby [underwriter] in sworn declarations, depositions under oath, verified interrogatory responses, and other statements or writings." (*Id.* at 11). It is not entirely clear that the purported incongruity actually exists between Plaintiffs' declaration and deposition testimony, because personal knowledge of facts may be inferred from Plaintiffs' statements of first-hand experience and their observations. *See Sjoblom v. Charter Commc'ns, LLC*, 571 F.Supp.2d 961, 968-69 (W.D.Wisc. 2008) (refusing to discard plaintiffs' evidence for lack of personal knowledge and

inconsistencies between declarations and deposition testimony where declarants did not actually know whether coworkers were actually paid for overtime work because this fact could be inferred from declarants' observations and personal experience of not being paid for overtime) (citing *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 1991) (concluding that personal knowledge includes reasonable inferences grounded in observation or first-hand experience)). For example, Defendants posit that Ms. Mitchel's declaration affirms personal knowledge that coworkers were not paid for overtime work, yet Ms. Mitchel later admitted that she did not know what hours other Crosby underwriters worked. (ECF No. 75, at 18). Ms. Mitchel's deposition testimony evinces that she did not know the specific number of overtime hours worked by her colleagues, but that she had numerous conversations with them to discuss that they were regularly working overtime hours. (ECF No. 75-3, at 41-42). Therefore, for purposes of conditional certification, Plaintiffs' assertions of personal knowledge seem to be grounded in reasonable inferences based on their observations and experience. *Sjoblom*, 571 F.Supp.2d at 968-69; *Pauley*, 337 F.3d at 772.

Even if purported discrepancies did cast some doubt on Mitchel, Farris, Wheeler, and Wilson's credibility, conditional certification would not be denied on that basis alone because

"credibility determinations are usually inappropriate for the question of conditional certification." *Essame*, 2012 WL 762895, at *3 (citing *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F.Supp.2d 200, 205 (N.D.N.Y. 2009)). Defendants' reliance on purported discrepancies between Plaintiffs' declarations and deposition testimony is, therefore, unavailing.

Defendants' presentation of other Crosby underwriters working for Freddie Mac who "were not aware of any policy or practice at Freddie Mac or Crosby Corporation where they were encouraged or required to work overtime hours without accurately recording the hours or receiving payment for them," is unpersuasive at this stage. (ECF No. 76 at 12). Indeed, "[t]he fact that [Plaintiffs'] allegations are disputed by . . . [D]efendants does not mean that [P]laintiffs have failed to establish a colorable basis for their claim that a class of similarly situated plaintiffs exist[s]." *Quinteros*, 532 F.Supp.2d at 772; *Essame*, 2012 WL 762895, at *3 (noting that "the court does not . . . resolve factual disputes" at the conditional certification stage (quoting *Colozzi*, 595 F.Supp.2d at 205)); *Lewis v. Wells Fargo & Co.*, 669 F.Supp.2d 1124, 1128 (N.D.Cal. 2009) (conditionally certifying a collective action even though the defendant had submitted fifty-four declarations – many from current employees – that contradicted the plaintiffs' evidence).

Defendants argue that if a class is conditionally granted, that class should be limited only to those underwriters who worked for Crosby at Freddie Mac's McLean facility contemporaneous to the named Plaintiffs. Making this determination inquires too deeply into the merits of the case and is best addressed after the facts have been more fully developed with the benefit of full discovery. Defendants point out that since the Plaintiffs have left its employ, Crosby has issued a new formal policy regarding overtime pay. Plaintiffs argue, however, that Crosby's policy of underpaying underwriters was informal, and a change in formal policy may have no bearing on its actual practices. Plaintiffs require discovery to determine whether and when Defendants' policies and practices changed. Therefore, the class will not be as limited at this stage as the Defendants suggest.

Despite Defendants' assertions to the contrary, the evidence presented by Plaintiffs is sufficient to make the "minimal evidentiary showing" that a common policy or scheme to violate the FLSA existed for Crosby-employed underwriters working at Freddie Mac's McLean, Virginia facility.[4] *Rawls*, 244

[4] Defendants also argue that Crosby has already paid Plaintiffs and other underwriters for any potential overtime that they may have worked for Freddie Mac. (ECF Nos. 75, at 41-42). Because this argument cuts directly to the heart of the

F.R.D. at 300. This conclusion is in line with numerous cases in this district and throughout the country that have conditionally certified collective actions based on analogous circumstances. *See, e.g.*, *Essame*, 2012 WL 762895, at *3-4 (granting conditional certification where the plaintiffs submitted declarations that the defendant required them to work through their unpaid meal breaks); *Faust*, 2011 WL 5244421, at *5 (finding that the plaintiffs had made the "modest factual showing" necessary regarding an unlawful compensation policy by submitting evidence that they were "encouraged to work off the clock, [were] in fact working of the clock with their supervisor's knowledge, and [were] not being properly compensated for that time"); *Espenscheid*, 2010 WL 2330309, at *7-8 (conditionally certifying a nationwide class of technicians where the plaintiffs submitted affidavits from several putative class members that the defendants did not compensate them for overtime involving pre- and post-shift work and affidavits from company managers acknowledging this practice); *Kautsch v. Premier Commc'ns*, 504 F.Supp.2d 685, 689 (W.D.Mo. 2007) (concluding that the plaintiffs had made "a modest factual showing" that they were "similarly situated" by submitting affidavits and deposition testimony indicating that their

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merits of the case, the court will not consider it at this stage.

managers directed them not to record overtime and prohibited them from recording time spent on several non-production tasks). Conditional certification pursuant to § 216(b) is, therefore, warranted for the class of Crosbyy underwriters who were employed as temporary staff for Freddie Mac at its McLean, Virginia facility since May 1, 2009 and worked more than forty hours a week without receiving proper compensation, including overtime pay.

B. Court Supervised Notice to Potential Opt-In Plaintiffs is Proper

Because Plaintiffs have made a preliminary showing that Crosby-employed underwriters working at Freddie Mac's McLean facility are "similarly situated," notice of this action will be provided to underwriters who currently work, or have worked since May 1, 2009, at that facility. Plaintiffs have submitted a proposed notice form. (ECF No. 50-8). Defendants requested an opportunity to suggest comments to the proposed notice form. (ECF No. 76, at 14 n.2).

The district court has broad discretion regarding the "details" of the notice sent to potential opt-in plaintiffs. *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 202 (S.D.N.Y. 2006) (citing *Hoffmann-La Roche*, 493 U.S. at 171). "The overarching policies of the FLSA's collective suit provisions require that the proposed notice provide 'accurate and timely notice

concerning the pendency of the collective action, so that [potential plaintiffs] can make informed decisions about whether to participate.'" *Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F.Supp.2d 445, 450 (S.D.N.Y. 2011) (quoting *Fasanelli v. Heartland Brewery, Inc.*, 516 F.Supp.2d 317, 323 (S.D.N.Y. 2007)). Notice to the proposed class will be approved without receiving additional comments from Defendants. They could have included any comments in their opposition. Presumably, Defendants request the ability to suggest comments to Plaintiffs' notice because it fails to assert Defendants' position in the lawsuit and to advise potential plaintiffs adequately about the right to join this suit with their own attorney and the possibility of having to participate in the discovery process and the trial. These considerations are important. *See, e.g.*, *Wass v. NPC Int'l, Inc.*, No. 09-2254-JWL, 2011 WL 1118774, at *10 (D.Kan. Mar. 28, 2011) (requiring the plaintiffs to amend a notice to include a statement about the defendant's position); *Whitehorn*, 767 F.Supp.2d at 450-51 (requiring amendment of proposed notice to inform potential opt-in plaintiffs "of the possibility that they will be required to participate in discovery and testify at trial" and "to state that participating plaintiffs may retain their own counsel").[5]

[5] Plaintiffs have also requested that the court appoint

Accordingly, the court will modify the proposed notice to potential class members to correct these deficiencies.[6]

The parties do not comment on the length of the notice period, and leave this to the court's discretion. Notice periods may vary, but numerous courts around the country have authorized ninety-day opt-in periods for collective actions. *See, e.g.*, *Wass*, 2011 WL 1118774, at *11 (denying the defendant's request to shorten the opt-in period to fewer than ninety days); *Calderon v. Geico Gen. Ins. Co.*, No. RWT 10cv1958, 2011 WL 98197, at *2, 8-9 (D.Md. Jan. 12, 2011) (authorizing a ninety-day notice period); *Pereira v. Foot Locker, Inc.*, 261 F.R.D. 60, 68-69 (E.D.Pa. 2009) (finding a ninety-day opt-in period to be reasonable). Plaintiffs may, therefore, notify other potential plaintiffs of this action by first-class mail using the court-approved notice appended to this memorandum opinion.[7]

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their counsel as counsel for this collective action. Defendants have not opposed this request. Thus, any potential opt-in plaintiff who does not enter an appearance through his own counsel, or indicate a desire to represent himself, will be represented by Plaintiffs' counsel.

[6] The notice will also clarify the scope of the collective action to make clear that it covers only underwriters who worked for Crosby at Freddie Mac's McLean, Virginia facility since May 1, 2009.

[7] To effectuate this notice, Defendants will be required to produce a file containing the full names and last known home

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for conditional certification and for court-facilitated notice will be granted in part and denied in part. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

addresses of potential opt-in plaintiffs within fourteen days of the issuance of the accompanying Order. Defendants will not, however, be required to provide phone numbers for potential opt-in plaintiffs at this time because Plaintiffs have made no showing of any "special need" for the disclosure of this information. *See Calderon*, 2011 WL 98197, at *9 ("[A]bsent a showing by plaintiffs of 'special need for disclosure of class members' telephone numbers,' ordering such disclosure is not appropriate." (quoting *Arevalo v. D.J.'s Underground*, No. DKC 09-3199, 2010 WL 4026112, at *2 (D.Md. Oct. 13, 2010))).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONNA MITCHEL, et al.	:	
v.	:	Civil Action No. DKC 10-2349
CROSBY CORPORATION, et al.	:	

NOTICE OF COLLECTIVE ACTION LAWSUIT

TO: UNDERWRITERS WHO HAVE WORKED FOR CROSBY CORPORATION AT FREDDIE MAC'S MCLEAN, VIRGINIA FACILITY SINCE MAY 1, 2009

I. INTRODUCTION

A lawsuit, captioned *Mitchel et al. v. Crosby Corporation et al.*, has been filed in the United States District Court for the District of Maryland, Civil Action No. 10-2747. Donna Mitchel, Kenya Farris, Sylvia Wheeler, Christina Wilson, and Vonnese Masembwa (the "Named Plaintiffs") bring their claims on behalf of all underwriters who currently work or have worked for Crosby Corporation ("Defendants") in the McLean, Virginia facility of The Federal Home Loan Mortgage Corporation ("Freddie Mac") since May 1, 2009. You are receiving this Notice because you might be "similarly situated" to the Named Plaintiffs and eligible to join this lawsuit. This letter advises you how this suit may affect your rights and instructs you on how to join if you choose.

II. DESCRIPTION OF THE LAWSUIT

On August 25, 2010, the Named Plaintiffs filed this lawsuit alleging Defendants violated the Fair Labor Standards Act (the "FLSA") by failing to pay its underwriters the proper overtime compensation for all the time they worked in excess of forty (40) hours per week. Specifically, the Named Plaintiffs allege that Defendants required them to meet weekly production quotas that were impossible to meet in a forty (40) hour work week, yet refused to pay them for any overtime hours. The Named Plaintiffs ask the court to order Defendants to pay them and anyone else who joins this lawsuit for work that Plaintiffs allege constitutes compensable overtime, plus interest,

statutory penalties, attorneys' fees, and litigation costs. Defendants have responded to the lawsuit, denying the Named Plaintiffs' allegations that they violated the FLSA and contending that they have properly compensated underwriters for all compensable working time.

III. WHO CAN JOIN

The Named Plaintiffs have sued on behalf of:

1. Themselves; and,

2. Anyone who is, or has been, at any time since May 1, 2009, employed by Crosby Corporation as an underwriter in Freddie Mac's McLean, Virginia facility.

IV. HOW TO JOIN

You may join this lawsuit by completing and sending a signed copy of the attached "Consent to Join Lawsuit" form to counsel for the Named Plaintiffs via email, facsimile, or U.S. mail:

Crosby Corporation Overtime Action c/o
Offit Kurman, P.A.
8171 Maple Lawn Blvd., #200
Fulton, MD 20759
Tel: (301) 575-0300
Fax: (301) 575-0335
stodman@offitkurman.com

If you choose to join this lawsuit, this consent form must be returned to Named Plaintiffs' counsel by the ___ day of ____, 2012, to have the Named Plaintiffs' counsel file it with the court on or before the ___ day of ____, 2012.

V. EFFECT OF JOINING THIS SUIT

If you choose to join the suit and return the "Consent to Join" form on or before the ___ day of _____, 2012, you will be bound by the judgment or settlement, whether it is favorable or unfavorable. After joining the suit, you may be required to respond to written questions, and otherwise provide information, including the giving of testimony at a deposition and/or in court.

VI. NO LEGAL EFFECT IN NOT JOINING THIS SUIT

You may choose to do nothing. By doing nothing, you retain your legal rights to bring a separate lawsuit against Defendants (within the applicable statute of limitations period) for alleged violations of the FLSA. If you do not return the "Consent to Join" form on or before the ___ day of _____, 2012, you will not be a party in this case and will be entitled to no recovery from this lawsuit. In determining whether you want to be included or excluded from this lawsuit, you may want to consult with your own attorney. A decision not to participate in the lawsuit will not affect your rights to pursue possible claims on an individual basis.

VII. NO RETALIATION PERMITTED

If you choose to join the lawsuit, federal law prohibits Defendants from retaliating against you because you have done so.

VIII. YOUR LEGAL REPRESENTATION IF YOU JOIN

You have the right to obtain your own counsel to represent you in this action. If you do not choose to join this lawsuit with your own attorney, your interests will be represented by counsel for the Named Plaintiffs as listed below:

Steven Bennett Gould Jesse D. Stein Brown and Gould LLP 7316 Wisconsin Avenue Suite 200 Bethesda, MD 20814 Tel: (301) 718-4548 Fax: (301) 178-8037 sgould@brownandgould.com jstein@brownandgould.com	Stanley I. Todman Maurice B. VerStandig Offit Kurman P.A. 8171 Maple Lawn Blvd. Suite 200 Fulton, MD 20759 Tel: (301) 575-0300 Fax: (301)575-0335 stodman@offitkurman.com mverstandig@offitkurman.com

If you choose to be represented by the attorneys above, you will not be required to pay any portion of the attorneys' fees.

IX. FURTHER INFORMATION

The information in this Notice is only a summary of the litigation. You may review and copy the pleadings and all other records of this lawsuit during regular business hours in the Office of the Clerk, United States District Court for the

District of Maryland, Southern Division, 6500 Cherrywood Lane, Greenbelt, Maryland, 20770. **Do not call the court. The court takes no position regarding the merits of this lawsuit.**

Further information about this Notice or this lawsuit may also be obtained by contacting the attorneys for the Named Plaintiffs listed above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONNA MITCHEL, et al.	:	
v.	:	Civil Action No. DKC 10-2349
CROSBY CORPORATION, et al.	:	

CONSENT TO JOIN

I work(ed) as an underwriter for Crosby Corporation at Freddie Mac's McLean, Virginia facility since May 1, 2009, and I want to be part of this lawsuit to collect unpaid wages;

I believe that I am a member of the collective class in this lawsuit;

I consent to join the lawsuit and will submit to the court's jurisdiction;

I understand that I will be bound by the judgment of the court as to all issues in this lawsuit; and

I believe that I am entitled to relief against the Defendants in this lawsuit.

_____
Full Legal Name (please print clearly)

_____
Full Address

_____
Telephone Number

_____
Email Address

_____
Signature and Date

Maddy v. GE, **Case No. 14-0490, 59 F. Supp. 3d 675 (D.N.J. 2014)**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD MADDY, KURT FREDRICK, FREDRICK R. SHELLHAMMER, III, FRANK MICHIENZI, MARIO LAUREANO, ANOTHONY CHELPATY, WILLIAM MADDEN, STEVEN LE BLANC, JEFFREY SCOTT WILKERSON, JEFFREY NACARETTE, PHILLIP ERIC BENSON, BRADLEY PALMER, THOMAS KISS, Individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, a New York corporation,

Defendant.

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 14-0490
(JEI/KMW)

OPINION

APPEARANCES:

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1601 Cherry Street, Suite 1400
Philadelphia, Pennsylvania 19102
Counsel for Defendant General Electric Company

IRENAS, Senior District Judge:

Plaintiffs bring this putative collective action pursuant to § 216(b) of the Fair Labor Standards Act ("FLSA") to recover allegedly unpaid overtime compensation from Defendant General Electric Company ("Defendant" or "GE").

Currently pending before the Court is Plaintiffs' motion for conditional collective action certification. For the reasons explained herein, Plaintiffs' motion is **GRANTED.**

I. FACTS

The Court recites those facts relevant to deciding Plaintiff's pending motion for conditional certification.

Scope of Employment

Plaintiffs in this case are currently, or have worked as, service technicians for GE's Appliances Division, in a business segment called GE Consumer Home Service, since January 2011. (Plaintiff's Statement of Facts ("P.S.F.") ¶ 1; Defendant's Opposition ("Def. Opp.") at 2) GE's service technicians make

service calls to customers' homes to repair GE appliances in 96 different "zones." (Def. Opp. at 2) These zones are further assigned to one of two regions – East or West. (Id.) Zones are supervised by 20 Consumer Service Managers ("CSMs"), who typically manage three to eight zones. (Id.) Defendant presently employs 900 service technicians. (Id.) Over the last three years, Defendant has employed approximately 1,200 service technicians across the 96 zones. (Id.)

In 42 of the zones, service technicians are represented by various unions though collective bargaining agreements ("CBAs"). (Id.) In the 54 non-union zones, service technicians participate in GE's "Solutions" alternative dispute resolution program. (Id.) As part of the Solutions program, non-union service technicians agree to resolve all disputes with GE through arbitration and to bring any claims against GE in an individual capacity only. (Id. at 2-3).

Service technicians receive an hourly wage, plus overtime for hours worked in excess of 40 per week, or as otherwise required by local law or applicable CBAs. (Declaration of Kristin Mathers ("Mathers Decl."), Ex. A to Def. Opp., at ¶ 10) The procedures for notifying CSMs about and obtaining permission for overtime work vary across the different CSMs. (Def. Opp. at 6) Some CSMs require service technicians to ask for permission

beforehand, while others ask only to be notified after service technicians work overtime. (Id.)

Service technicians self-report time worked on their company-issued laptops through an electronic time card system. (Id. ¶ 9) They record when they arrive at each service call and when each service call is completed. Defendant states that CSMs regularly direct service technicians to accurately report all working time. (Def. Opp. at 10)

During the relevant time period, GE's service technicians have operated under what Plaintiffs refer to as the Service Mobility System. Plaintiffs submitted an alleged "case study" of the system, which describes it as "management system for efficiently dispatching, scheduling, and communicating with operatives to boost efficiency and flexibility in delivering field services." (Service Mobility System Case Study, Ex. A to P.'s Memorandum of Law ("P.M.L.")) Service technicians connect to the system through their laptops, from which technicians can make and receive service calls, find information about the day's calls and necessary parts, and record work time. [1] (P.M.L. at 1) GE also provides service technicians with company vans, which can be tracked by GPS. (Def. Opp. at 12) Service technicians

[1] Defendant does not dispute the features of the system Plaintiffs describe, but states that GE "does not typically refer to these various features collectively as a 'Service Mobility System.'" (Def. Opp. at 12)

generally park these vans at their homes, though some use secure parking spots near their homes. (Def. Opp. at 4)

GE monitors the performance of service technicians through a Revenue Per Day ("RPD") metric. (Mather Decl. ¶ 13) RPD measures the revenue a service technician produces relative to the number of hours the technician works each day. (Id.) GE sets RPD goals in each zone, which service technicians are expected to meet. (Id.) RPD goals vary from zone to zone, but range from $700 to $815. (Id.) According to Defendant, RPDs are designed to be challenging, but attainable. (Def. Opp. at 8) If a service technician does not meet his RPD goal, a CSM may place him on a formal Personal Improvement Plan ("PIP").[2] (Id. at 8-9) Plaintiffs state that the failure to improve after being placed on a PIP results in the termination of a service technician's employment. (P.S.F. ¶ 9)

John Wills, who manages the East Region of service technicians, states in his Declaration that service technicians are told that they need to perform all of their work-related activities after they arrive at their first call and before they leave their last call. (Declaration of John Wills ("Wills Decl."), Ex. B to Def. Opp., at ¶ 6) On this basis, service technicians' paid time generally begins when they arrive at

[2] According to Defendant, services technicians are placed on PIPs after less formal measures do not succeed in improving performance. (Id.)

their first service calls and ends when they complete their last calls. Some CBAs permit service technicians to report driving time to the extent it exceeds a designated period of time (usually 30 minutes). (Def. Opp. at 5) Otherwise, non-union service technicians do not receive compensation for the time spent driving to their first call or home after their last call. (Id.)

Pre-Shift Computer Work

Despite the rule that service technicians' paid work does not begin until they arrive at their first customer call, there are certain tasks they must complete beforehand. Defendant submitted declarations from CSMs stating that service technicians are instructed to begin each day by putting their computers in their vans, and logging in to get their list of calls for the day. (Declaration of Rosa Walsh ("Walsh Decl."), Ex. C to Def. Opp., at ¶ 5; Declaration of Robert Brinzer ("Brinzer Decl."), Ex. D to Def. Opp., at ¶ 5; Declaration of Chris Miller ("Miller Decl."), Ex. F to Def. Opp., at ¶ 6; Declaration of Mark Urbin ("Urbin Decl."), Ex. L to Def. Opp., at ¶ 5) CSM Rosa Walsh states that service technicians can then either remain parked or begin driving while their computers boot up. (Walsh Decl. ¶ 5) Ms. Walsh states that, after their computers boot up, service technicians make contact with their first customer by cell phone or through the computer while en

route to that customer's home. (Id.) Other CSMs state in declarations that service technicians can boot up computers to get their list of calls at home while eating breakfast or getting ready for work. (Declaration of Bobby Nelson ("Nelson Decl."), Ex. E to Def. Opp., at ¶ 7; Declaration of Mike Andre ("Andre Decl."), Ex. J to Def. Opp., at ¶ 7; Declaration of Windy Jones ("Jones Decl."), Ex. K to Def. Opp., at ¶ 8)

Declarations from service technicians submitted by both Plaintiffs and Defendants indicate that service technicians generally log onto their computers and check their list of calls for the day before they leave their homes.[3] (Declaration of Benny Pruiett ("Pruiett Decl."), Ex. G to Def. Opp., at ¶ 6; Declaration of Dan McDermott ("McDermott Decl."), Ex. H to Def. Opp., at ¶ 6; Declarations of Lance Bergman ("Bergman Decl.") ¶¶ 16-17, Anthony Chelpaty ("Chelpaty Decl.") ¶¶ 16-17, Kurt Frederick (Frederick Decl.") ¶¶ 16-17, David Leppo ("Leppo Decl.") ¶¶ 16-17, Donald Maddy ("Maddy Decl.") ¶¶ 16-17, and Jacob Walters ("Walters Decl.") ¶¶ 16-17, all attached as Ex. B to P.M.L.)[4] These service technicians also state that, upon

[3] One service technician states that he performs such duties in the parking lot of a nearby grocery or gas station after he leaves his home but prior to arriving at his first call. (Declaration for Gary Wolf ("Wolf Decl."), Ex. I to Def. Opp., at ¶ 5)

[4] Plaintiffs also submitted additional declarations in their reply papers from service technicians Juan Ramos, Thomas Kiss, Bradley Palmer, William Madden, Jeffrey Navarette, and Steve Le Blanc, each of whom also claims their general practice to be logging into their computers and checking calls from home

logging into their computers, they also check to see if there are any issues with the parts they will need during the day's calls. (Id.)

In the declarations Plaintiffs submitted, service technicians state that it takes approximately 10-15 minutes to boot up and log into their computers, and another 15-30 minutes to check their call lists, read emails and call their first customers prior to heading out for the day. (Id.) Gary Wolfe, a service technician who submitted a declaration on behalf of Defendants, also admits that it takes 10-15 minutes to boot up and get his list of calls. (Wolfe Decl. ¶ 5) Declarations from CSMs acknowledge that service technicians' laptops need "several minutes" to boot up. (Nelson Decl. ¶ 7; Andre Decl. ¶ 7)

Plaintiffs claim that CSMs knew service technicians spent time organizing their days before leaving for their first calls. Plaintiffs Lance Bergman and David Leppo, both of whom work as service technicians in Florida, state in their declarations that, in December 2013, their new regional manager John Wills told them they could no longer check email and parts needs before leaving home for their first call. (Bergman Decl. ¶ 20; Leppo Decl. ¶ 20) According to former California service technician Bradley Palmer, his CSM Vince Guida told him that in

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prior to leaving for their first call. (Plaintiff's Reply Memorandum {"P.R.M."), at Exs. A-1 through A-6)

annual meetings, attended by all CSMs, the CSMs "knew and discussed" the time service technicians spent on their computers organizing their days. (Palmer Decl. ¶ 19)

Working Through Lunch

Plaintiffs also state that they often work through their lunch period to meet the RPD goals, even though Defendant automatically deducts a 30-minute lunch from employee pay. (P.S.F. ¶ 26) Plaintiffs are required to report whether or not they actually take lunch, but Plaintiffs claim that they do not note on their time logs that they regularly work through lunch because, if the lunch time were factored into their total hours worked, their RPDs would be lower. (Id. ¶¶ 26-27) Plaintiffs state that when service technicians report that they miss a lunch break, CSMs tell them that they must take lunch. (Id. ¶ 28) Plaintiffs vary in the number of days each week that they claim to work through lunch without notifying CSMs. (*See, e.g.*, Bergman Decl. ¶ 27 (4-5 days); Frederick Decl. ¶ 26 (3-4 days); Leppo Decl. ¶ 27 (2-4 days); Maddy Decl. ¶ 26 (1-2 days))

Defendant states that the only nationwide policy is that service technicians must report if they do not take their lunch so that they can be paid for the time spent working. (Def. Opp. at 7) Otherwise, lunch practices vary across different zones. (Id.) For example, in four of CSM Rosa Walsh's zones, service technicians are free to decide whether or not to take a lunch

break according to a letter of understanding between Defendant and the union representing these technicians. (Walsh Decl. ¶ 12)

Post-Shift Work

On top of work performed before their first calls and during lunch time, Plaintiffs state that, after returning home from their last calls of the day, service technicians use their laptops to check calls for the following day, read and respond to emails, and review lists of parts needed. (P.S.F. ¶ 31-32) The amount of time Plaintiffs spend on this work ranges from 30 minutes one day each week (LeBlanc Decl. ¶ 30), to 30-60 minutes every day of the week (Walters Decl. ¶ 30). Plaintiffs state that they were not compensated for post-shift work. (P.S.F. ¶ 32)

Part of service technicians' post-shift computer use was apparently spent using a program called "Crystal Ball," which let them perform certain parts management functions.[5] (Def. Opp. at 11) Benny Pruitt, a service technician who submitted a declaration on behalf of Defendant, states that he used Crystal Ball while watching television and that he did not consider it as work. (Pruitt Decl. ¶ 13) Dan McDermott, another service

[5] Plaintiffs do not refer to this program by name, but CSMs and service technicians who submitted declarations on behalf of Defendants state that service technicians occasionally used Crystal Ball outside normal working hours for this purpose. (Def. Opp. at 12)

technician who submitted a declaration for Defendant, states that it usually took no longer than five minutes each evening to look for parts. (McDermott Decl. ¶ 8) In May 2014, Defendant adjusted Crystal Ball to eliminate off-hours usage by restricting access to the program outside 7:00 a.m. to 6:00 p.m. during the week and 8:00 a.m. to 1:00 p.m. on Saturdays. (Def. Opp. at 12; Mathers Decl. ¶ 17)

Other Unpaid Work

Plaintiffs state that service technicians were not paid for additional "off the clock" work, including accepting and organizing shipments of new parts, and vehicle maintenance. (P.S.F. ¶¶ 33-35) According to Defendant, service technicians receive shipments of new parts each week in plastic totes and are instructed to place the totes inside their vans and to unpack the totes during the work day only, i.e. between their first and last calls. (Def. Opp. at 4-5) Some Plaintiffs claim to have spent around one and one-half hours each week unpacking and organizing parts deliveries. (Decls. of Bergman ¶ 30; Walters ¶¶ 32-33; Frederick ¶ 32; Leppo ¶¶ 34-35; Ramos ¶¶ 34-35; Palmer ¶¶ 36-38; and Navarette ¶¶ 28-29) These Plaintiffs state that they dealt with these deliveries "off the clock" both to avoid recording work hours in which they were not bringing in revenue, and to make the work day more efficient, thereby increasing their RPD. (Id.) Defendants acknowledge that, from

time to time, technicians are too busy with service calls to handle parts deliveries during the normal work day. (Def. Opp. at 5) However, Defendants state that technicians can ask permission for overtime in these situations. (Id.)

Procedural Background

On January 23, 2014, Plaintiffs filed suit against Defendant individually and on behalf of others similarly situated. Plaintiffs have since amended their Complaint twice, once on May 29, 2014, and again on November 7, 2014. In their Second Amended Complaint, Plaintiffs assert claims under the Fair Labor Standard Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), and the wage and hour laws of multiple states, including New Jersey, Pennsylvania, Massachusetts, Florida, Maryland, New York, Rhode Island, Michigan, California, and Illinois. (Second Amen. Compl. ¶¶ 1-12)

Plaintiffs filed the instant motion to conditionally certify the lawsuit as a collective action on June 6, 2014. In support of their motion, Plaintiffs have submitted declarations from twelve service technicians who work for eight of the 20 CSMs in various zones across the country. None of the named plaintiffs are subject to the arbitration agreements. (Nov. 12, 2014 Letter from Plaintiffs' Counsel, Docket No. 64) At the time Plaintiffs submitted their reply to Defendant's opposition papers on July 17, 2014, 68 plaintiffs from 13 states had opted

into the lawsuit. (P.R.M. at 14) Discovery is ongoing. At this point, there are 100 named and opt-in Plaintiffs. (Oct. 31, 2014 Letter from Plaintiffs' Counsel, Docket No. 54)

II. REQUIREMENTS FOR CONDITIONAL CERTIFICATION

Under the FLSA, employers must pay overtime compensation for an employee's work in excess of 40 hours per week. 29 U.S.C. § 207. Employees who feel their right to overtime compensation has been violated may bring an action on behalf of themselves and "other employees similarly situated." *Id*. § 216(b). To become parties to a collective action, employees must affirmatively opt into a case. *Id*.

The FLSA does not define the term "similarly situated." As a result, courts in the Third Circuit follow a two-step process for deciding whether an action may properly proceed as a collective action under the FLSA. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013) As a first step, "[a]pplying a 'fairly lenient standard' . . . the court makes a preliminary determination as to whether the named plaintiffs have made a 'modest factual showing' that the employees identified in their complaint are 'similarly situated.'" *Id*. (citing *Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 536 (3d Cir. 2012)). "If the plaintiffs have satisfied their burden, the court will 'conditionally certify' the collective action for

the purpose of facilitating notice to potential opt-in plaintiffs and conducting pre-trial discovery." *Camesi*, 729 F.3d at 243. This "notice stage" occurs "early in the litigation when the court has minimal evidence." *Adami v. Cardo Windows, Inc.*, 299 F.R.D. 68, 78 (D.N.J. 2014).

As a second step, courts make "a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiffs." *Symcyzk v. Genesis Healthcare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011), *rev'd on other grounds*, *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1527 (2013). At this "final certification" step, which occurs after further discovery, plaintiffs must establish by a preponderance of the evidence that named plaintiffs and opt-ins are similarly situated. *Adami*, 299 F.R.D. at 78.

The "modest factual showing" Plaintiffs must make here at the first step in the process requires them to "produce some evidence, beyond pure speculation, of a factual nexus between the manner in which the employer's alleged policy affected [them] and the manner in which it affected other employees." *Symcyk*, 656 F.3d at 193 (internal quotations omitted). Courts in this Circuit consider all relevant factors and make a factual determination on a case-by-case basis. *Zavala*, 691 F.3d at 536. Courts do not assess the merits of plaintiffs' underlying claims

at this stage. *Goodman v. Burlington Coat Factory*, No. 11-4395 (JHR), 2012 WL 5944000, at *5 (D.N.J. Nov. 20, 2012). "A showing that opt-in plaintiffs bring the same claims and seek the same form of relief has been considered sufficient for conditional certification." *Pearsall-Dineen v. Freedom Mort. Corp.*, No. 13-6836, 2014 WL 2873878, at *2 (D.N.J. June 25, 2014).

Relevant factors include "whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." *Zavala*, 69 F.3d at 536-37. "Plaintiffs may also be found dissimilar based on the existence of individualized defenses." *Id*. at 537. Finally, "courts consider whether collective treatment will achieve the primary objectives of a § 216(b) collective action," i.e. (1) lowering costs to plaintiffs through pooling resources; and (2) resolving common issues of law and fact that arose from the same alleged activity in one efficient proceeding. *Adami*, 299 F.R.D. at 78-79.

III. ANALYSIS

Plaintiffs ask this Court to conditionally certify Plaintiffs' FLSA claims as a collective action and approve

notice to the following similarly situated plaintiffs: "Named Plaintiffs, 'opt-in' Plaintiffs and all other individuals who worked for Defendant in the United States as service technicians in the General Electric Consumer Home Service from January 2011 to the present." (P.M.L. at 2)

Plaintiffs allege two nationwide policies or procedures instituted by Defendant that affected named Plaintiffs and all other service technicians: (1) all service technicians are required to perform the same required pre-shift computer work off the clock and without payment; (2) Defendant's RPD and PIP policies require and encourage service technicians to perform work-related duties off the clock without compensation. Plaintiffs provide factual support for these allegations in declarations from twelve service technicians who work under eight CSMs.

Pre-Shift Computer Work

In regards to the unpaid pre-shift computer use policy, service technicians who submitted declarations on behalf of Plaintiffs all state that they are instructed to log into their computers each morning before arriving at their first calls, but are also instructed not to perform any work-related activities until they arrive at those calls. Defendants downplay the scope of the work service technicians must do before their first calls, but admit that service technicians must begin each day by

logging into their computers and checking their calls for the day. That Plaintiffs are similarly situated to all other service technicians in regards to this policy is clear – each must access his list of calls for the day before he can arrive at the first call.

Defendant argues that there is no policy in place requiring service technicians to do any pre-shift computer work, and that such work is not necessary. Defendant submitted declarations from CSMs stating that they instruct service technicians to place laptops in their vans, log in (which takes only a few second), and make contact with their first client while en route to that call. (Walsh Decl ¶ 5; Brinzer Decl. ¶ 5; Miller Decl ¶ 6; Urbin Decl ¶ 5) Out of these CSMs, only Rosa Walsh acknowledges the time it takes for computers to boot up and she states that technicians can wait in their car or begin driving while their computers boot up. (Walsh Decl. ¶ 5)

Yet, Defendant does not explain how a service technician can begin driving toward his first call before knowing the location of this call and whether the client is home. It is clear that some unpaid work-related activity must necessarily occur before service technicians arrive at their first calls and that all service technicians across all zones are similarly situated in this regard. Whether or not this activity actually satisfies the elements of a claim under the FLSA is a merits

question and thus inappropriate at this conditional certification stage. However, Plaintiff has provided sufficient evidence for conditional certification as related to pre-shift computer work.

Other Off-the-Clock Work

Plaintiffs allege that they perform other work off the clock without compensation as well. Declarations from Plaintiff service technicians state that the only way for them to meet Defendant's stringent RPD goals is to (1) work through lunch, even though lunch time is automatically deducted from paid time, (2) unpack and organize parts deliveries off the clock, (4) log into their computers after work in order to check on parts needed for future calls, and (3) take their work-issued vans for maintenance multiple times each year without recording time spent doing so. Plaintiffs do not allege that they were denied overtime when they recorded overtime hours worked, but that the effect overtime would have on their RPD forced them, and all other service technicians, to perform work off the clock, and that Defendant knew or should have known they were doing so.

Defendant makes two primary arguments against Plaintiffs' assertion that all service technicians are similarly situated in regards to this alleged policy. First and foremost, Defendant asserts that there is no actual "policy" to begin with that requires off-the-clock work. Second, Defendant argues the

declarations from certain service technicians who present their individual experiences do not warrant nationwide certification.

In arguing there to be no policy in place that violates the FLSA, Defendant suggests that, for conditional certification to be proper, Plaintiffs must present evidence of an actual policy that requires or encourages all service technicians to work off the clock. Defendant points out that GE Consumer Home Service technicians are actually required to report their time accurately. (Def. Opp. at 9) Further, Defendant emphasizes that its RPD requirements do not violate the FLSA and that Plaintiffs have not provided evidence that Defendant knew or should have known that Plaintiffs were working overtime without compensation.

In making these points, Defendant strays from the limited question at issue in this initial conditional certification stage and asks this Court to consider the merits of Plaintiffs' FLSA claims. At this step in the litigation, Plaintiffs must only allege a policy and present facts showing that the alleged policy affected them and all other service technicians similarly. That policy need not be written. Courts in this Circuit have conditionally certified collective actions in many cases where plaintiffs allege that an unwritten policy or practice led to off-the-clock work, particularly where that unwritten policy related to certain time-based goals set by

employers. *See, e.g., Vargas v. General Nutrition Ctrs., Inc.*, No. 2:10-cv-867, 2012 WL 3544733, at *8 (W.D.P.A. Aug. 16, 2012) ("An unwritten policy or practice resulting in unpaid overtime, such as making management pay dependent upon meeting hours targets may be actionable under the FLSA."); *Steinberg v. TD Bank, N.A.*, No. 10-cv-5600 (RMB-JS), 2012 WL 2500331, at *8 (D.N.J. June 27, 2012) ("Contrary to Defendant's contention, a written policy is not required, and an unwritten but companywide policy, as Plaintiffs offer here, is sufficient even where the unofficial policy is contrary to the official written policy"); *Sabol v. Apollo Group, Inc.*, No. 09-cv-3439, 2010 WL 1956591 (E.D.P.A. May 12, 2010) (conditionally certifying a collective action of enrollment counselors at a university even though the defendant's official policy was to pay overtime when plaintiffs alleged that they worked off-the-clock to meet enrollment goals set by management); *Pereira v. Foot Locker, Inc.*, 261 F.R.D. 60 (E.D.P.A. 2009) (conditionally certifying collective action where plaintiffs alleged that the hours budget allotted for certain employees at defendant's stores was inadequate for employees to perform all their duties without off-the-clock work, even though defendant's policies were explicitly against such work).

Here, Plaintiffs make a similar allegation to those made in *Vargas*, *Sabol*, and *Pereira* – Plaintiffs claim that Defendant's

RPD requirements, in their effect, constitute an unwritten policy encouraging service technicians not to report overtime hours, and that Defendant knew or should have known that service technicians worked off the clock. To show that they are similarly situated to all other service technicians in regards to this policy, Plaintiffs point to (1) the fact that all service technicians must meet RPD requirements or face potential adverse employment actions, (2) declarations from 12 service technicians working for eight of twenty CSMs who all state that they work off the clock consistently in order to meet stringent RPD requirements and that their CSMs knew about such work, (3) the declaration of service technician Bradley Palmer, who states that his CSM told him that at annual meetings, CSMs discussed service technicians' off-the-clock work (Palmer Decl. ¶ 19), (4) Defendant's ability to track all service technicians off-the-clock work through the GPS sensors in their vans and their computer log-in times, and (5) the fact that over 80 more service technicians from multiple states have since opted into the lawsuit.

Arguing that Plaintiffs have not presented enough evidence for conditional certification, Defendant also relies on a very similar FLSA case brought by a GE Consumer Home Services technician in the United States District Court for the Western District of Missouri, where the court rejected the plaintiff's

request for conditional certification. *Settles v. General Electric*, No. 12-00602-CV-W-BP, 2013 U.S. Dist. LEXIS 187008 (W.D. Mo. Feb. 19, 2013). In *Settles*, a single named plaintiff brought a claim on behalf of himself and all other service technicians for unpaid overtime. He made similar allegations to those Plaintiffs make here – namely, that service technicians performed certain tasks off the clock in order to meet RPD goals.[6] *Id*. at *7-10. The court held that conditional certification was improper because the plaintiff did not provide evidence that any managers knew about or facilitated illegal overtime practices and therefore failed to establish that all service technicians were victims of a single decision, policy or plan. Id. at *10.

First, the *Settles* opinion is not binding on this Court. Second, plaintiff in that case submitted only his own declaration and declarations from one former service technician and one former dispatcher. Here, we have ten named Plaintiffs who have submitted 12 declarations from service technicians. In addition, as outlined above, Plaintiffs have presented evidence that CSMs knew or should have known about service technicians'

[6] Significantly, as far as this Court can tell from the *Settles* opinion, the plaintiff did not raise the time spent logging into his computer each morning to check his list of calls. For this reason, this Court finds *Settles* irrelevant to the above discussion of that policy in the present case.

off-the-clock work. This Court will not rely on the *Settles* decision.

There are certainly differences between Plaintiffs and proposed collective action members. As Defendant points out, RPD requirements vary across different zones, each of which is "like its own little business." (Wills Decl. ¶ 2). The procedures for obtaining approval for overtime vary across different CSMs. Plaintiffs themselves vary in the amount of time they spend off-the-clock performing the tasks discussed above. The declarations Plaintiffs submitted generally discuss individual experiences and do not state that technicians have observed or spoken to others who have worked off the clock to make RPD requirements. Last, some service technicians, though none of the named Plaintiffs, signed arbitration agreements with Defendant.

However, Plaintiffs and the service technicians to whom they want to facilitate notice all work in the same GE Consumer Home Services business segment and share similar circumstances of employment. Common issues of law and fact arise from their collective experiences, and they seek the same relief. Plaintiffs' declarations demonstrate that all service technicians must find time to check on parts orders, organize parts deliveries, and service their vans while meeting challenging revenue goals. Plaintiffs have presented evidence

that CSMs could track technicians' off-the-clock work, and knew enough about off-the-clock work to change procedures and limit access to Crystal Ball in the evening. That Plaintiffs have submitted declarations from service technicians in nine states who have worked for eight different CSMs provides sufficient evidence that service technicians across the United States, not just in a few individual zones, are affected similarly by the RPD goals.

Defendant's arguments against certification, specifically the individual questions that arise regarding particular zones and service technicians, may win the day when this Court considers final certification. But, at this stage, such concerns are premature.[7] *See Steinberg*, 2012 WL 2500331, at *8

[7] It is appropriate here to outline the procedure this Court will use with regards to service technicians who signed arbitration agreements pursuant to GE's Solutions Program. That some service technicians have signed arbitration agreements does not preclude conditional certification of all service technicians across the United States. Opt-in Plaintiffs subject to such agreements do not themselves bring claims on behalf of those similarly situated. However, at the final certification stage, if this Court grants certification, this Court may create two separate groups: (1) union service technicians who have not signed arbitration agreements, and (2) non-union service technicians subject to GE's Solutions Program. The union service technicians' claims will proceed to trial first, and, barring any challenges to the validity of the arbitration agreements, this Court will stay the arbitration of individual non-union service technicians' claims. Following the disposition of union service technicians' claims, individual non-union service technicians may arbitrate their individual claims pursuant to the Solutions Program. At that point, this Court will consider any relevant issues regarding claim or issue preclusion.

This procedure acknowledges the inherent similarities in all potential Plaintiffs' claims, whether or not they are subject to arbitration agreements, but also maintains the integrity of the arbitration agreements certain service technicians have signed. It also constitutes the most efficient use of this Court's and the parties' resources. Plaintiff's counsel may even represent both union service technicians at the initial trial and non-union technicians at the subsequent individual arbitrations.

("[I]ssues of individualized proof and defenses are more appropriately addressed at the second stage of certification."); *Bishop v. AT&T Corp.*, 256 F.R.D. 503 (W.D.P.A. 2009) (finding defendant's argument that plaintiffs' claims were too individualized to be a stage two inquiry). This Court therefore holds that Plaintiffs have made the modest factual showing necessary to satisfy the lenient standard for conditional certification.

IV.

For the reasons set forth above, the Court will **GRANT** Plaintiffs' Motion for Conditional Class Action Certification. An appropriate Order accompanies this Opinion.

Date: November 14th, 2014

s/ Joseph E. Irenas
Joseph E. Irenas, S.U.S.D.J.