THE COST OF DOING BUSINESS: MITIGATING INCREASING RECESSION WAGE AND HOUR RISKS WHILE PROMOTING ECONOMIC RECOVERY

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INTRODUCTION

According to the recent findings of a distinguished panel, evaluating the effectiveness of America's labor and employment laws with respect to the "low-wage labor" markets, "[t]he framework of worker protections that was established over the last 75 years is not working."[1] The findings—limited to a study of 4,387 low-wage workers in Chicago, Los Angeles, and New York City—allege rampant minimum wage,[2] overtime,[3] and meal break[4] violations, in addition to various pay deduction[5] and documentation[6] violations. Further, the report alleges widespread misclassification (particularly in the independent contractor context),[7] violations specific to employees who receive their income primarily through receipt of tips,[8] and illegal retaliation and intimidation.[9]

The results of such unscrupulous practices damage all segments of society, as this panel wisely notes:

> When impacted workers and their families struggle in poverty and constant economic insecurity, the strength and resiliency of local communities suffer. When unscrupulous employers violate the law, responsible employers are forced into unfair competition, setting off a race to the bottom that threatens to bring down standards throughout the labor market. And when significant numbers of workers are underpaid, tax revenues are lost.[10]

The solution according to this panel is threefold: (1) strengthen government enforcement of employment and labor laws; (2) update legal standards for the "21st century labor market"; and (3) establish equal status for immigrants in the workplace.[11]

While the intentions of this study are noble, the alarming facts this study focuses on and the concerns those facts present are not new discoveries; the suggestions in the preceding paragraph are not novel either. In fact, as discussed further herein, the timing of the second of those suggestions puts most employees and employers at further risk during this economic recession.

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1. ANNETTE BERNHARDT, ET. AL, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2 (2009).
2. *Id.*
3. *Id.*
4. *Id.* at 3.
5. *Id.*
6. *Id.*
7. *See id.* at 4.
8. *See id.* at 3.
9. *See id.*
10. *Id.* at 6, 51.
11. *Id.* at 6, 52-54.

With regards to the first suggestion, as is evident to employers and labor and employment practitioners, the government enforcement of employment and labor laws is dependent upon the Administration,[12] and President Obama's Administration has both pledged a strengthening of such enforcement and earmarked in his budget the funding to make that happen. Specifically, the new Obama Administration Labor Secretary Hilda Solis has pledged as follows:

> Calling the current national unemployment rate of 9.7 percent "unacceptable," Solis said the Labor Department must advocate for the needs of working people, breaking from the Bush administration's pro-business attitude and enforcing wage and safety laws.
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> *The Labor Department is adding 670 investigators, Solis said, returning enforcement to a level not seen since 2001. "The Department of Labor is back in the enforcement business*," she said, calling the defense of job safety and fair compensation "our moral obligation."[13]

The current administration continues to make good on these promises, as the federal budget proposed at the beginning of 2010 "builds on the [Department of Labor's] 2010 budget policy of beefing up worker protection programs to 2001 staffing levels, after years of decline[, and t]he depart-

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12. Perhaps nothing could be more evident in the differences between Administrations than the Department of Labor's "withdrawal" of numerous wage and hour opinion letters prepared by the Bush Administration officials on their final day before the Administration change which were apparently unwittingly left in the DOL's mail room but were not actually sent and subsequently "withdrawn" by the Obama Administration DOL officials when they arrived for their first day and located them:

> The Department of Labor (DOL) announced on Friday, March 6, 2009, that they were simultaneously publishing and withdrawing 18 wage and hour opinion letters issued during the waning days of the last administration.
>
> Former Acting Wage and Hour Administrator Alexander J. Passantino signed the letters between January 14 and 16, but according to the DOL they do not appear to have been mailed before President Obama's inauguration. "In any event," the DOL stated, "we have decided to withdraw [these opinions] for further consideration by the Wage and Hour Division."
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> The Department can always reconsider and withdraw a previously-issued opinion letter, but this kind of mass withdrawal appears to be unprecedented. The DOL has not withdrawn 18 other opinion letters issued around the same time, but that apparently were mailed. The Administrator issued a total of 36 opinion letters during the Bush Administration's final two weeks in office, half of which have now been withdrawn. By contrast, only 19 opinions were issued during all of 2008.

Daniel Thieme, *Favorable DOL Opinion Letters Lost for Want of a Stamp,* March 16, 2009, *available at* http://www.wageandhourcounsel.com/2009/03/articles/department-of-labor-opinion-le/favorable-dol-opinion-letters-lost-for-want-of-a-stamp/.

13. Bebe Raupe, *AFL-CIO: Solis Touts Changed DOL, Urges Passage of Health Care Overhaul Legislation, EFCA*, 176 DAILY LAB. REP. C-1 (2009) (emphasis added).

ment's Wage and Hour Division will receive $244 million, an increase of almost $20 million from last year, including funding to hire 90 new investigators."[14]

Given such commentary and action, and the obvious disagreements between the most recent two Administrations, it is clear that the first suggestion of this panel is already occurring and will continue to occur—strictly due to the public's vote in November 2008.

With regards to the second suggestion, more important than the extreme (and unlikely to occur) remedies proposed, an approach to resolving employment issues can begin immediately by implementing widespread employer education both about (1) their actual obligations under the law, as many violations are born out of ignorance, and (2) the extreme risks that they face in the event of either willful or accidental violations, which generally outweigh any benefits gained through willful violations. Such a basic alternative approach will help to protect workers immediately while allowing employers to function free of fear of new legislation which will be expensive to come into compliance with or fear of further legislative interference with their workforces.

Specifically, over the past decade, employers have become targets of massive wage and hour lawsuits with potential liability totaling into the billions. Employment litigation in this same area has soared in the meantime, and, unfortunately, made employers even more wary of their own workforces.

These immense costs and risks—the result of wage laws designed to both protect workers and promote fair competition among employers—function as a deterrent to the expansion of business precisely when more jobs and revenue are needed during this economic recession. "[E]veryone has a stake in addressing the problem of workplace violations,"[15] but at the same time, as President Obama has recently recognized, job-creation and maintenance is the most central aspect to promoting economic recovery, which is why the "first step [the administration] took was to pass a[n economic] recovery plan to jump-start job creation and put money in people's pockets."[16]

Perhaps one of the most important aspects to solving the economic crisis, as President Obama put it, is recognizing that "one of the most important lessons to learn from this [economic] crisis is that our economy only

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14. Abigail Rubenstein, *Obama Allots $25M for DOL to Fight Misclassification*, Employment Law360 (Feb. 1, 2010), at *1.

15. BERNHARDT, *supra* note 1, at 51.

16. President Obama, Transcript, White House Press Conference (March 24, 2009) (emphasis added).

works if we recognize that we're all in this together, that we all have responsibilities to each other and to our country."[17]

As such, this article will (1) analyze the recent explosion of wage and hour law and the reasons behind it, (2) examine the various current and pending federal and state laws putting employers at the greatest risk of extreme liability if they were to commit inadvertent or willful violations, and (3) discuss various solutions for employers which allow them to reduce their litigation risks so as to concentrate on expanding their businesses, creating jobs, and doing their part to end the recession.

THE RECENT EXPLOSION OF WAGE AND HOUR LAWSUITS

In the most simplistic terms, the economic well-being of the worker and that of the employer are inextricably and undeniably linked. When the employer is doing poorly financially, the worker's employment is at risk. When the worker's employment is at risk or terminated, the worker has no money to inject into other areas of commerce that serve as employers to that area's workers. The end result is economic stagnation, recession, or depression, and this is a vicious cycle which is difficult to halt or reverse, as evidenced by the current economic situation.

Contributing to the negative "bottom-line" of many of those employers is the risk of litigation and severe liability pursuant to large scale wage and hour lawsuits. Such liability is caused by non-compliance (or, notably, in some cases, improperly alleged non-compliance) with laws designed to protect workers against employer abuses. While some unscrupulous employers certainly exist, the recent explosion in wage and hour law cannot and should not solely be attributed to "bad behavior" on the part of employers, as discussed further herein. However, often, the results are the same for the employers and employees regardless of the motivation for bringing suit.

THE BASIC FRAMEWORK OF THE MINIMUM WAGE AND OVERTIME EMPLOYEE PROTECTION PROVISIONS OF THE FAIR LABOR STANDARDS ACT

Signed into law by President Franklin Roosevelt on June 25, 1938, the basic framework and purpose of the Fair Labor Standards Act—to provide appropriate regulation relating to important areas such as minimum wage, overtime requirements, and child labor—remain unchanged today.[18] However, "the scope of coverage and exemptions has changed

17. *Id.*

18. ELLEN C. KEARNS, THE FAIR LABOR STANDARDS ACT 15 (BNA Books 1st ed. 1999) (describing the history of the Fair Labor Standards Act).

significantly" since the FLSA's inception[19]—and "[a]mendment of the FLSA has been a topic of legislative initiative, if not law, in virtually every year since 1938."[20]

Simply put, among its many protections and functions, the FLSA guarantees employees minimum wage[21] and overtime pay[22] for hours worked over 40 in a workweek,[23] which are among the most pressing issues for employers and employees (and consequently exposes the employer to the greatest liability in the event of violation). Further, where a state wage and hour law provides for greater benefits or protections than the FLSA, the employee receives benefit of the law with the greater protection.[24]

In the event of a minimum wage or overtime violation, the FLSA provides a private right of action for back wages and overtime.[25] In addition to the wages due to the employee, this provision specifically allows employees to seek mandatory liquidated damages (except in the event of an affirmative showing of "good faith"[26] on the part of the employer), attorney's fees, and the costs expended in litigation.[27]

Finally—and what should be most alarming to employers—this provision allows for one or more individual allegedly aggrieved plaintiffs to file a "collective action,"[28] which is merely a class action lawsuit where other employees are required to affirmatively "opt-in" to the lawsuit,[29] as opposed to, in a traditional class action (*i.e.*, pursuant to Rule 23), where they become and remain part of the class unless they "opt-out."[30] Unlike with a standard class action, the FLSA states that "[n]o employee shall be a party plaintiff to any 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,"[31] which gives rise to the "opt-in" requirement. Notably, though—and an important reason for the recent explosion of the filing of wage and

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19. *Id.*
20. *Id.* at 16.
21. 29 U.S.C. § 206(a)(1).
22. 29 U.S.C. § 207(a)(1).
23. Notably, a workweek is defined under the FLSA as any consistent 7 day period– it does not need to start on a Monday and end on a Sunday, but instead is a based on a "fixed and regularly occurring period of 168 hours – seven consecutive 24-hour periods." 29 C.F.R. § 778.105. Also, "[i]t need not coincide with the calendar week but may begin on any day and at any hour of the day." *Id.*
24. 29 U.S.C. § 218(a).
25. 29 U.S.C. § 216(b).
26. *See* 29 U.S.C. § 259.
27. 29 U.S.C. § 216(b).
28. *Id.*
29. *Id.*
30. *See* FED. R. CIV. P. 23(c)(2)(B)(v).
31. 29 U.S.C. § 216(b).

hour lawsuits—the threshold to gain "conditional" class status under the FLSA is much lower than under a traditional Rule 23 class action.[32]

Finally, the statute of limitations to bring a private cause of action pursuant to the FLSA is two years,[33] except in the case of "willful"

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32. This oft-explained "two-tiered" standard regarding class certification in FLSA collective actions is explained below:

> For a collective action under FLSA, Plaintiffs must "establish: (1) that the named plaintiffs and proposed members of the class must be 'similarly situated,' and (2) that the proposed class members consent in writing to be bound by the result of the suit." Abrams v. Gen. Elec. Co., 1996 WL 663889, at *1 (N.D.N.Y. Nov. 4, 1996). Within the Second Circuit and in other circuits as well, district courts have adopted a two-stage approach to determine whether a cause may be certified under FLSA. This two-step process is comprehensively articulated in Lynch v. United Servs. Auto Ass'n.
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> The first step is the notice stage in which the court determines, based on plaintiffs' pleadings and affidavits, whether the plaintiffs and potential opt-in plaintiffs are sufficiently "similarly situated" to issue notice and allow the case to proceed as a collective action through discovery. *See* Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 367 (S.D.N.Y.2007). Once the court determines that potential opt-in plaintiffs may be "similarly situated" for the purposes of authorizing notice, the court "conditionally certifies" the collective action, and the plaintiff sends court-approved notice to potential members. *Id.* Those potential plaintiffs may then elect to opt-in pursuant to section 216(b) by filing Consent Forms with the court. *Id.* Once notice is accomplished, the action proceeds as a collective action throughout the discovery process. Lee v. ABC Carpet & Home, 236 F.R.D. 193, 197 (S.D.N.Y.2006).
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> During the second stage, the court undertakes a more stringent factual determination*158 as to whether members of the class are, in fact, similarly situated. *La Belle Farm,* 239 F.R.D. at 367. This stage typically occurs on a defendant's motion for decertification. As a result of this two-step stage, the initial "conditional certification" determination is merely a preliminary finding. *Lee,* 236 F.R.D. at 197. If, after discovery, it is apparent that plaintiffs and others are not similarly situated, the court may "de-certify" the class and dismiss the claims of the opt-in plaintiffs without prejudice. *See La Belle Farm,* 239 F.R.D. at 367.

Ruggles v. WellPoint, Inc., 591 F. Supp. 2d 150, 157-59 (N.D.N.Y. 2008); *but see* Baas v. Dollar Tree Stores, Inc., No. C 07-03108 JSW, 2009 WL 1765759, at *5 (N.D.Cal. June 18, 2009).

Although the standard to grant conditional certification of a collective action under the FLSA is more lenient than the standard to certify a class pursuant to Rule 23, Plaintiffs must still demonstrate that they are "similarly situated" to the other members of the proposed collective action. *See* 29 U.S.C. § 216(b). Other courts have denied certification of a collective action on the grounds that individual issues predominate. *See* Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D.Or.2002) (finding putative class members were not similarly situated where each claim would have required extensive consideration of individualized issues); Castle v. Wells Fargo Financial, Inc., 2008 WL 495705, *2 (N.D.Cal. Feb.20, 2008) (denying certification because individual issues predominated); McElmurry v. U.S. Bank National Ass'n, 2005 WL 2492932 (D.Or. Oct.7, 2005).

violations (a burden which plaintiff must prove), which are subject to an extended three year statute of limitations.[34]

Despite its long and relatively quiet history as a means of massive employer liability, as discussed below, the Fair Labor Standards Act has recently been rediscovered as a law with "teeth," making it increasingly attractive to both aggrieved employees and plaintiffs' lawyers alike—and wreaking havoc on employers' ability to navigate companies to the point where it would be possible to create jobs and contribute to economic recovery.

THE CAUSES OF THE INCREASE IN WAGE AND HOUR LITIGATION

Over the past two decades, the number of wage and hour collective actions has increased exponentially, and this increase can be traced to several different sources, which have numerous different causes.

First and foremost, employers' actions, both witting and unwitting, are the central source of this litigation—which is why the most important ways to remedy such issues are through (1) education about what the law actually requires and (2) providing employers with a clear understanding that the risk of willful violations does not allow such business practices to be beneficial in the long-term. Some companies are certainly attempting to tighten their belts during the recession, but incurring a huge litigation risk—potentially totaling in the millions of dollars—will likely offset any of the temporary benefits from a violation such as those discussed in Part III, *infra*. Other employers may determine that even if they were able to recognize wage and hour compliance issues, depending on the enormity of the potential violation, they may believe it is better to ignore the potential issue rather than "fan the flames" by alerting workers through major operational changes.[35]

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33. 29 U.S.C. § 255(a).

34. *Id.*

35. This point is inapplicable to fields where an historic non-exempt employment structure, such as in the financial services industry, has caused current issues under wage and hour laws. The commissioned employee status in the financial services industry, for example, has been challenged throughout, and the effects have been financially catastrophic for the industry as a whole. *See* Westerfield v. Washington Mutual, Inc., No. 06-CV2817, 2007 WL 2162989 (E.D.N.Y. July 26,2007) (reached $38 million worth of settlements for hybrid FLSA minimum wage/overtime claims and Rule 23 meal/rest break claims for putative class of "loan consultants" on or about June 19, 2009 and plaintiffs' counsel moved unopposed for 30% in fees and costs, or $11.4 million). Despite similar cases where exemptions have successfully been applied (i.e. Hogan v. Allstate Ins. Co., 361 F.3d 621 (11th Cir. 2004) (applying administrative exemption to insurance agents); *see also* Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997); *see also* Wilshin v. Allstate Ins. Co., 212 F. Supp. 2d 1360 (M.D. Ga. 2002)), the huge potential liability has caused employers to pour hundreds of millions of dollars into class/collective action litigation and settlements and

Failure to safeguard against such violations, through the use from the outset of experienced counsel, may result in an unwitting failure to comply on a class-sized level, particularly when trying to conserve corporate resources given the recession.[36]

These issues were only magnified by the August 23, 2004[37] revisions to the FLSA, which were intended to clarify the FLSA exemptions in order to discourage and decrease litigation.[38] However, these revisions are likely part of the cause for the FLSA's explosion as one of the fastest growing areas of litigation.[39] Further, despite the inference from the aforementioned expert report that increased agency action is needed to protect workers' rights, employers and legal experts already expect increased activity by the Obama administration through these very agencies. For example:

> President-elect Obama has expressed a desire to increase the enforcement and inspection roles of various labor-related agencies with responsibility for regulating the workplace, including the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor and the Equal Employment Opportunity Commission.
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> * * *
>
> The Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing federal law on minimum wage, overtime pay, recordkeeping, family and medical leave and child labor. Under the Obama administration, the WHD would likely be more aggressive in its enforcement actions.
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> In a July 27, 2008 letter to the Department of Labor, President-elect Obama set forth his vision for a WHD that listens to worker advocacy organizations and more actively initiates its own investigations. President-elect Obama also indicated his desire to expand the scope of WHD's activities, criticizing the Bush administration's emphasis on only four industries (agriculture, accommodation and food services, manufacturing, and health care and social services). He also indicated his desire to increase funding for the WHD in order to actualize the enhanced role he

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placed the corporations into an adversarial position against their own employees, while not actually resolving the issues of whether various commissioned workers (such as brokers/financial advisors, loan consultants, loan officers, loan originators, mortgage brokers, etc.) are actually properly classified or not.

36. *See, e.g.,* Fluctuating Workweek Section at Part III.A.3, *infra*.

37. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 19 C.F.R. pt. 541).

38. "In 2004, the Department of Labor modernized the FLSA by making it easier for employers to determine overtime exemptions and by raising the salary threshold below which workers automatically qualify for overtime pay. Rather than decreasing the number of overtime lawsuits as the Labor Department had hoped, the changes added 'a lot more fuel to the fire because people started talking about it more'. . . ." Sally Roberts, *Time Is Big Bucks, Class-Action Wage Lawsuits Show* (December 21, 2007) *available at* http://www.workforce.com/section/00/article/25/28/07.html (internal quotations omitted).

39. *Id.*

> envisioned for it. With the support of a Democratic Congress, the Obama administration could make this vision a reality.
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> In addition to increasing the role of WHD, President-elect Obama will also likely push for two wage and hour-related legislative initiatives: increasing the minimum wage and instituting paid sick leave.
>
> *Minimum Wage Increase*
>
> President-elect Obama has written that "[e]ven though the minimum wage will rise to $7.25 an hour by 2009, the minimum wage's real purchasing power will still be below what it was in 1968." Consequently, he wants to further raise the minimum wage to $9.50 an hour by 2011. In addition to raising the minimum wage, President-elect Obama endorses a "living wage" where the minimum wage would be indexed to inflation. Under a "living wage" paradigm, the minimum wage could then rise without subsequent Congressional action.
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> *Paid Sick Days*
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> Under the Family Medical Leave Act, employers are required to give employees up to 12 weeks of unpaid leave to deal with serious health conditions. As a senator, President-elect Obama cosponsored the Healthy Families Act (H.R. 1542, S. 910), which would amend the FMLA to require employers to provide 7 days of paid sick leave for full-time employees (30 hours or more) and pro-rated paid sick leave for part-time employees.[40]

Given President Obama's stated intentions to strengthen enforcement through the wage and hour division of the Department of Labor, his goal of even further increasing the minimum wage and pegging it to purchasing power, and mandating paid sick leave, the Obama administration's policies should also lead to increased litigation.

Secondly, the emergence of "mill" wage and hour specialist firms over the past decade have undoubtedly added to the risk to employers. For example, the federal dockets in Florida and several other states have been inundated with wage and hour collective action complaints.[41] In fact, the

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40. Bob Lian, AKIM GUMP STRAUSS HAUER & FELD, LLP, THE POTENTIAL IMPACT OF THE OBAMA ADMINISTRATION ON THE LABOR AND EMPLOYMENT LEGAL LANDSCAPE, ¶1, 13-17 (Nov. 11, 2008), *available at* http://washlaborwire.com/2008/11/11/the-potential-impact-of-the-obama-administration-on-the-labor-and-employment-legal-landscape-3/.

41. Roberts, *supra* note 38.

> Wage and hour litigation pursued under the federal Fair Labor Standards Act produced more rulings in 2007 than any other type of workplace class action, and the pursuit of such litigation is expected to continue through 2008, according to an annual report by Chicago-based law firm Seyfarth Shaw.
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> The report, Annual Workplace Class Action Litigation Report: 2008 Edition, analyzes 508 class action rulings on a circuit-by-circuit and state-by-state basis during the past 12 months. According to the report, the U.S. District Courts for the Southern and Middle Districts of Florida experienced more wage and hour filings than any other federal jurisdiction. But the most significant growth in wage and hour litigation was at the state court level, with California, Florida, Illinois, New Jersey, New York, Pennsylvania and Texas taking center stage.

continuous filing of wage and hour class/collective actions have resulted in the judges in the United States District Court for the Middle District of Florida implementing special FLSA Scheduling Orders just to be able to sort potentially viable or meritorious claims from the purely frivolous claims.[42] The same court implemented a Standing Order preventing one particular wage and hour firm from even filing any more cases without leave of the court itself.[43] And, furthermore, federal courts across the country have been forced to discipline numerous of these wage and hour firms for continued solicitation of putative collective action members—who in many cases remain members of the defendant corporation's active workforce.

The purpose of these firms, particularly considering the aggressive behavior for which many of them have been or are currently being punished, has certainly contributed to the increased litigation. Recently, the Eleventh Circuit Court of Appeals affirmed the ruling of Judge Ryskamp of the Southern District of Florida, severely sanctioning one of the most prominent wage and hour plaintiffs' firms for improperly soliciting putative class members through non-legal staff members, claiming they were contacting putative class members solely to "corroborate" a client's overtime claim and not to solicit them to join the lawsuit.[44] The Eleventh Circuit did not believe that the plaintiffs' firm had such innocuous intentions,[45] and affirmed the district court's finding that the firm's having filed 23 percent of the FLSA cases in the Southern District of Florida (which is inundated with such cases—making the percentage only more shocking) was further evidence that the "logical conclusion is that FLSA cases are heavily weighted in favor of the plaintiffs," so "*[i]t is clear that the volume of [FLSA] cases in the Southern District is attorney-driven."*[46]

The sanctions imposed by Judge Ryskamp and affirmed by the Eleventh Circuit were that the firm (1) cannot represent anyone who did not work with the named plaintiffs; (2) cannot receive any fees or costs for

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In 2007, the 10 largest class-action wage and hour settlements totaled $319.3 million, compared with $282.1 million for the 10 largest class-action employment discrimination settlements, the report said. The 10 largest Employee Retirement Income Security Act workplace settlements, however, totaled $1.82 billion in 2007. It is the first time in five years that the top 10 wage and hour and ERISA class-action settlements outpaced employment discrimination settlements in overall values, Seyfarth Shaw said.

42. *See* Sample FLSA Scheduling Order, attached at *Appendix A*.

43. *See* Standing Order, attached at *Appendix B*.

44. Hamm v. TBC Corp., 597 F. Supp. 2d 1338, 1353 (S.D. Fla. 2009), *aff'd* No. 09-11221, 2009 WL 2599663, at *4 (11th Cir. Aug. 25, 2009).

45. Hamm v. TBC Corp., No. 09-11221, 2009 WL 2599663, at *4 (11th Cir. Aug. 25, 2009).

46. *Hamm*, 597 F. Supp. 2d at 1340 (emphasis added).

work performed for the plaintiffs they are allowed to represent; (3) implement a formal solicitation policy; and (4) pay all the defendant's fees and costs in bringing the motion for sanctions.[47]

The problem of attorney-driven wage and hour litigation has become so severe in some areas that it is perhaps best exemplified by the subsequent recusal of the same Judge Ryskamp in another wage and hour case filed by the same firm against Abercrombie and Fitch.[48] The comments he made which the plaintiffs firm, Shavitz Law Group, turned on him and cited in the motion to disqualify were:

> . . . I have had our law clerk check and the Shavitz firm has filed 1,332 cases in the Southern District of Florida since 2000, so we see these things continually, virtually never see them go to trial, I think that I have had one trial with all the cases that have been filed.
>
> In looking at the statistical numbers, they are usually closed within three months of the time they are filed, so what is very clear to me is that most defendants are saying how much is it going to cost me to defend this case and what is the claim and the claim is so small it would cost most to have the lawyers defend it, *so they are basically nuisance type claims that get bought off*, of course the lawyer's fees are always—not always, but very often considerably more than the claim itself—and I think this is certainly an area for some Congressional oversight, I think there ought to be written into the statute a provision that a letter demand must be made upon the employer before a lawsuit can be filed because *the way this thing is working is just a lawyer's retirement bill. . . . this has gotten out of hand, I think we have more of these cases in the Southern District of Florida than there are anyplace else in the country and that's probably because of the Shavitz law firm.* . . . I think the problem needs to be resolved.[49]

Of course, the counter-argument is that these firms are in fact finding plaintiffs and potential plaintiffs who have meritorious claims and otherwise would not bring suit. I do not necessarily disagree, although the reality is probably somewhere in between such a view and the exasperated view expressed by Judge Ryskamp. Firms such as these certainly assist putative plaintiffs who have been subjected to wage law violations—as is evident based on the jury trials they have won in the past. However, on the flip side, the solicitation issues and concerns of negligence as expressed by the federal courts are concerning.

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47. *Id.* at 1353.

48. *See* Guttentag v. Abercrombie & Fitch Stores, Inc., 9:09-cv-80160-JIC, Docket No. 17, at *1 (S.D. Fla. Mar. 31, 2009) (recusal).

49. *See Guttentag*, 9:09-cv-80160-JIC, Docket No. 15, at *8-9 (S.D. Fla. Mar. 27, 2009)(motion to disqualify, citing to Transcript of Proceedings, Case No. 07-80829-CIV-RYSKAMP, at pp. 28-30 (emphasis in motion to disqualify)).

Third, closely linked with the availability of potential plaintiffs, reductions in force are certainly stirring-up litigation as the economy is creating a larger pool of disgruntled former employees who are potential plaintiffs and opt-in FLSA collective action members.[50]

Fourth, given the lack of new jobs in the face of such extreme reductions in force, with no other new job prospects so desperate for any income and desperation breeds litigation viewed as "easy" money.[51]

THE ADDITIONAL RISK—STATE WAGE AND HOUR LAWS PROVIDING GREATER EMPLOYEE PROTECTIONS THAN THE FLSA

Many states provide greater employee protections in the event of non-compliance with state wage and hours laws than that provided by the FLSA. These states have intended to protect their workers in various ways above and beyond the federal protections provided through federal laws such as the FLSA. In such states, there is an increased risk of liability in the event of litigation of wage and hour matters.

For example, Ohio is not a state where wage and hour litigation has been as prevalent as some others. However, the Ohio Constitution and wage and hour statute were recently amended to provide greater liability in the event of minimum wage and/or overtime violations.[52] Now, the Ohio statute provides for unpaid wages, *plus* additional liquidated damages in an amount up to double the amount of back wages (*i.e.* triple damages), *plus* costs and attorney's fees.[53] Because the potential damages are greater than

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50. *See* Simona Covel, *Businesses Face Threat of Lawsuits From Laid-Off Employees,* (WALL ST. J. Feb. 18, 2009), *available at* http://blogs.wsj.com/independentstreet/2009/02/18/businesses-face-threat-of-lawsuits-from-laid-off-employees/ (citing to recent article in Human Resource Executive); *see also* Martha Graybow, *Tough times spur laid-off workers to sue,* (Nov. 11, 2008) *available at* http://www.reuters.com/article/newsOne/idUSN0640986220081111; Ben James, Wage-And-Hour Suits Increase Picks Up Steam in '09, Employment Law360 (Jan. 4, 2010), at *1 ("Rocky economic conditions spurred a rise in federal discrimination litigation and helped the explosive proliferation of wage-and-hour cases continue in 2009, which saw a sharp spike in the number of new Fair Labor Standards act cases popping up on federal dockets. [Further, i]t came as no surprise to employment attorneys, who pointed to the high unemployment rate as a major driver behind the increases between 2008 and 2009.... Some laid-off workers would be less inclined toward retribution and less likely to get involved in litigation, either over wage-and-hour issues or discrimination allegations, in a more robust economic environment….").

51. *See id.*

52. OHIO CONST. am. II, § 34a; OHIO REV. CODE § 4111.14.

53. OHIO CONST. am. II, § 34a ("Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages . . . . Payment under this paragraph shall not be stayed pending any appeal."); *see also* OHIO REV. CODE § 4111.14.

those allowed under the FLSA, it is more of an incentive to workers (particularly jilted former employees) to bring wage and hour complaints—meritorious or not. The statute of limitations is also 3 years—or within 3 years of when the violation ceased if it is deemed a "continuing violation"—under Ohio law.[54] Thus, the potential liability can far exceed an identical claim brought under federal law. Additionally, plaintiffs' firms now will have an easier time finding such class plaintiffs and their costs and fees are provided for by law, as noted above.

In fact, the Ohio Attorney General's office recently filed a massive complaint against a chain of day-care centers that allegedly underpaid 150 workers based on the state minimum wage, allegedly seeking over $1.2 million in damages.[55] While the alleged wages due are approximately $408,415, the state is seeking an additional $816,830 in required statutory penalties.[56]

Other states, such as Massachusetts, arguably have even more menacing laws which can subject a typically compliant employer to extreme risk. The Massachusetts Minimum Fair Wage Act mandates triple damages for violations of minimum wage or overtime statutes.[57] In addition,

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54. OHIO CONST. am. II, § 34a ("An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person . . . for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.").

55. Ohio v. Angels Learning Ctr., LLC, No. 09CVH09-13411 (Franklin County Ct. Com. Pl. filed Sept. 4, 2009), *available at* http://.www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/Septempber-2009/Complaints-Filed-in-Cases-of-Underpaid-Workers/Angels-Time-Stamped-Complaint.

56. *Id.;* by way of example regarding the extreme difference between a double and triple damages statute, on the very same day, the state of Ohio also filed another complaint seeking over $1 million dollars from a development company and its contractors for violating the state's prevailing wage statute. *See generally* Ohio v. 770 W. Broad AGA, No. 09CVH09-13412 (Franklin County Ct. Com. Pl. filed Sept. 4, 2009), *available at* http://www.ohioattorneygeneral.gov/Briefing-Room/News-Releases/September-2009/Complaints-Filed-in-Cases-of-Underpaid-Workers/Anchor-Time-Stamped-Complaint (claiming that the defendants misclassified construction workers and paid them $8 to $12 per hour for work where the "prevailing wage" is approximately $30 per hour. In that case, based on a different statute which actually has a similar liquidated damages provision to the FLSA, the alleged damages are $508,456 in unpaid wages and the total amount sought, which is double the actual damages is $1,016,913. Employing the same method in the day-care case, the total alleged damages would be a more manageable $816,830.

57. MASS. GEN. LAWS. CH 149 § 150 ("An employee claiming to be aggrieved by a violation of [sections including the Massachusetts wage and hour statute] may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so

Massachusetts has an extremely restrictive independent contractor statute,[58] which was recently interpreted by the attorney general's office and now leaves little room for imagination—essentially overreaching and classifying many previously obvious independent contractors as employees. The bottom line is that an employer needs to be extremely careful in Massachusetts that many traditional (and actual under any other state law) independent contractors meet this statute and interpretation. The risk of noncompliance can destroy a business structure which may be perfectly legitimate in almost every other state.

Strictly in the failure to pay overtime context, many states employ similar wage and hour statutes putting employers at a risk of greater liability—in some cases regardless of a showing of willfulness—in the event of a violation. By way of example, several of those state laws are set forth below:

- Connecticut—The general statutes provide for a discretionary award of double damages.[59] The statute itself does not require evidence of bad faith, arbitrariness, or unreasonableness.[60]
- California—While under California law, the remedies for a wage and hour violation are similar to those under the FLSA,[61] the statute of limitations is 3 years for any minimum wage or overtime claim.[62]
- Florida—A very tenuous argument could be made that the relatively new Florida Minimum Wage Act implicitly allows for overtime claims, and it is important to note that there is currently no case law supporting this position. The reason whether overtime can be sought under the Florida Minimum Wage Act is of interest in that the statute of limitations if 4 years and 5 years for willful violations.[63] Thus, employers need to be wary of the statute of limitations for minimum wage violations also.
- Maine—The Maine Employment Practices Law provides that if an employer is found liable for unpaid wages, the employee is entitled to recover the unpaid wages, interest,

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aggrieved who prevails in such an action **shall** be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.") (alternation in original) (emphasis added).

58. MASS. GEN. LAWS. CH 149, § 148B.
59. CONN. GEN. STAT. §§ 31-72.
60. *Id.*
61. CAL. LAB. CODE § 206, 1194.2(a); 29 U.S.C. §201 (1938).
62. CAL. CIV. PROC. CODE. § 338(a).
63. FLA. STAT. § 95.11(2)(d), (3)(q).

costs, attorneys fees, and liquidated damages in an amount equal to twice the amount of unpaid wages.[64] Further, there is no express statute of limitations and some case authority for 6 years, although the record keeping requirement is 3 years and a 3 years laches defense is possibly available.[65]

- Maryland—The Maryland Wage and Hour Law provides that the court may award a successful employee an amount not exceeding 3 times the wage, and reasonable attorneys fees and costs.[66] In addition, the statute of limitations is 3 years.[67]
- New York—The New York Minimum Wage Act has no provision for double damages but in the case of willful violations, liquidated damages in the amount of 25% of the total delinquent wages due may be awarded.[68] The notable point is that the New York statute provides for a unique express 6 year statute of limitations.[69]
- North Carolina—The North Carolina Wage and Hour Act provides that if an employee is successful in proving a violation, the court is required to double the actual damages unless the employer can show that it acted in good faith/reasonable belief actions not in violation.[70] If such a showing is made by the employer, court may reduce or eliminate liquidated damages amount.[71] The employee is also entitled to interest at statutory rate from the date each amount became due.[72]
- Pennsylvania—The Pennsylvania Minimum Wage Act provides that liquidated damages are available for violations of overtime provisions in the amount of the greater of 25% of the total wages due or $500 per violation.[73] Costs and attorneys fees are also available, but the notable point is the applicable 3 year statute of limitations.[74]

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64. ME. REV. STAT. ANN. tit. 26, § 626-A.

65. GREGORY K. MCGILLIVARY, WAGE AND HOUR LAWS, A STATE-BY-STATE SURVEY 2035 (BNA Books 1st ed. 2004).

66. MD. CODE ANN., LAB. & EMPL. § 3-507.1(b).

67. MD. CODE ANN., CTS. & JUD. PROC. § 5-101.

68. N.Y. LAB. LAW § 198 (2009).

69. *Id.*

70. N.C. GEN. STAT. § 95-25.22 (2009).

71. *Id.*

72. *Id.*

73. 43 PENN. CONS. STAT. §§ 260.10, 333.113 (2009).

74. Although there is no language in the Pennsylvania statute regarding the applicable statutes of limitations, but 3 years has been applied in Pennsylvania's federal

- Rhode Island—Rhode Island law provides for unpaid wages, costs, and attorney fees, but notably has a 3 year statute of limitations.[75]

Thus, employers who have workers operating in these states must remain vigilant of running afoul of these laws which provide for penalties beyond those under the FLSA at the same time that are attempting to grow business and employment opportunities as needed to end the present economic predicament.

METHODS TO REDUCE LITIGATION RISK AND ASSURE EMPLOYEES RECEIVE LEGALLY MANDATED WAGES—IN ORDER TO CONCENTRATE ON ENABLING GROWTH AND EXPANDING BUSINESS

One of the biggest concerns employers have today, particularly given these wage and hour laws coupled with the severe economic recession, is the effective management of their workforces. Without their employees, they cannot do business. Workforces are not only the most important asset of a corporation, but they are also the largest cost and one of the largest risks. In order for employers to concentrate on enabling growth and expanding their businesses, they need to be sure they are not sitting on a time-bomb of liability.

VARIOUS CIRCUMSTANCES WITH THE GREATEST POTENTIAL CLASS LIABILITY

The Misclassification Scenario

The FLSA requires that employees who work over 40 hours per week be paid overtime—unless they fall into one of the approved exemptions, such as the administrative,[76] executive,[77] professional,[78] or outside sales[79] exemptions, the details of which vary widely per exemption. Such employees are referred to under the FLSA and similar state laws as "exempt," while all employees entitled to overtime are referred to as "non-exempt."

Misclassifying employees as exempt when they are in fact non-exempt is among the costliest mistakes an employer can make, as the employer can

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district courts. *See, e.g.*, In re Cargill Meat Solutions Wage and Hour Litigation, 632 F.Supp.2.d 368 (M.D.Pa. 2008).

75. R.I. GEN. LAWS § 28-12-19 (2009).
76. 29 C.F.R. § 541.200
77. *Id.* at § 541.100
78. *Id.* at § 541.300
79. *Id.* at § 541.500

be found liable for at least two or three years-worth of past overtime for its entire non-exempt workforce, and they would possibly be required to pay automatic double damages. Accordingly, whether done in a willful manner (with the intention of saving money on overtime payments) or by simple error,[80] the liability under the FLSA and comparable state laws can be extreme. Further, those exemptions were recently revised in 2004, which has caused even more employers to find themselves out of compliance when they believed themselves to be operating within the requirements of the law. Given the current political climate, employers should expect to face misclassification challenges, and preemptively focus on defending themselves accordingly.[81]

The various complications caused by nuances in the law only exacerbate the problem and potential for great liability. For example, the FLSA requires that exempt employees earn at least $455 per week in set salary.[82] Failure to meet this requirement compromises the salary basis element of the exemptions, and the employee could therefore be entitled to overtime.[83] Further, the FLSA provides particular scenarios in which deductions from a worker's are permissible,[84] and any other deductions can compromise the exempt status of such workers.[85] Particularly during the recession, where furloughs and workweek reductions (such as from 5 to 4 days) have become the norm, employers need to be concerned that they do

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80. This is the case, for example, when employees are in training for their actual exempt positions but not performing the exempt duties. *See, e.g.*, Jacobsen v. Stop & Shop Supermarket Co., No. 02 Civ. 5915(DLC), 2003 WL 21136308, at *1-2 (S.D.N.Y. May 15, 2003) (plaintiff and defendant agreeing that managerial trainees are non-exempt employees as a matter of law where court granted collective action status to putative class of Stop & Shop managers and trainees).

81. *See* Lawrence E. Dube, *'Misclassification' Cases Draw More Attention as States Take Action, Plaintiffs File Lawsuits*, 225 DAILY LAB. REP. C-1 (Nov. 25, 2009) (noting that in this "new front," there is "vulnerability everywhere for employers") (internal citations omitted).

82. *See* 29 C.F.R. § 541.602.

83. This is precisely the problem with many of the positions in the financial industry–like financial advisors, who have historically been paid on a full commission basis. *See* Part III.A.3, *infra*, and note 85, *infra*. When the stock market declined so sharply, the income of countless financial services employees who relied upon commissions also declined sharply. At that point, the environment was primed for lawsuits by employees who had recently been earning hundreds of thousands of dollars per year but then claimed to be entitled to minimum wage and overtime when the economy faltered and their "salary basis" status was questioned.

84. *See* 29 C.F.R. § 541.602.

85. *Id.*; *see also* Takacs v. A.G. Edwards and Sons, Inc., 444 F. Supp. 2d 1100, 1108-10 (S.D. Cal. 2006) (denying defendant's motion for summary judgment because defendant failed to establish that paying financial advisors commissions against a "draw" met the salary basis test required to establish the administrative exemption).

not compromise the exempt status of a significant amount of their workforces.[86]

In the event of a misclassification where non-exempt employees are treated as exempt and do win a recovery, there is certainly additional mixed news. As discussed further herein,[87] most courts permit the application of the fluctuating workweek to calculate overtime due.[88] On the flip side, while this will allow the employer to save money on the ultimate value owed to the claimants, the numbers owed can still be significant. Further, employers typically do not keep time sheets or other relevant time records for exempt employees,[89] so not only are the employers typically without a way to evidence time actually worked by misclassified employees, but the courts often end up taking an adverse inference against the employer as a result (as the "best" evidence would arguably be the employees' own testimony).

FAILURE TO APPROPRIATELY KEEP TIME AND/OR COMPENSATE NON-EXEMPT EMPLOYEES

Similar to the misclassification scenario, employers run into class-wide potential liability when they fail to adequately compensate employees for time actually worked. Such liability can have a variety of causes (such as, by way of example, (1) management issues allowing employees to work outside of their scheduled times or (2) record keeping issues which do not adequately protect either the employees' or employers' interests), but the large potential liability outcome is likely the same regardless of fault. For example, two such "hot" areas of major concern for employers include (1) automatic deductions for meal breaks and (2) preliminary or postliminary uncompensated work.

Automatic deductions are not per se illegal—but they certainly open any employer up to the potential of a collective action (which, aside from the fact that some employees may not receive the full benefit of their meal

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86. *See, e.g.,* Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, U.S Department of Labor Employment Standards Administration, Wage and Hour Division (July 2009), *available at* http://www.dol.gov/esa/WHD/flsa/FurloughFAQ.pdf; *see also* Advisory Opinion, California Department of Industrial Relations, Division of Labor Standards Enforcement (August 19, 2009), *available at* http://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf.

87. *See* Fluctuating Workweek discussion, at Part III.A.3, *infra*.

88. *See, e.g.,* Clements v. Serco, Inc., 530 F.3d 1224 (10th Cir. 2008); *but see* Department of Labor opinion Letter, FLSA2009-24 (Jan. 16, 2009) (withdrawn Mar. 2, 2009), *available at* http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_16_24_FLSA.htm (withdrawal of Bush Administration Department of Labor opinion letter supporting this practice, as explained in note 12, *supra*).

89. *See* 29 C.F.R. § 516.2 (explaining requirements regarding the recordation of hours worked by non-exempt employees).

break, is the major liability concern). Because the FLSA requires that employees be compensated for all "hours worked,"[90] if an employee is interrupted for work purposes during a lunch break (like non-exempt hospital staff employees whose lunch break may be interrupted because he or she has to attend to a hospital emergency), that time needs to be compensated as a matter of law.[91] The result is that unless the automatic deduction is adjusted through whatever reporting procedure the employer has in place (and inadequate such procedure is another source of potential exposure), the employee has not been compensated in accordance with the law.

Additionally, when employees come into work prior to the start of a regularly scheduled shift for any reason (common reasons specific to lower income employees may include bus schedules or carpooling with a family member/co-worker/friend) and actually start working, the law requires that they be compensated for all such time,[92] which (as a side matter) may require the re-consideration of whether time is compensated to the minute through an automated time keeping system or whether employers are allowed to round time to the nearest increment.[93] To the extent that the employees continue performing work for the benefit of the employer after the end of a regularly scheduled shift, they similarly are required to be compensated for such time under the same provision of the FLSA.

In addition to the numerous forms of "off the clock" concerns an employer must face (*i.e.,* particularly given the age of "remote access" and mobile communication devices), one example of where these two aforementioned areas have been the source of much recent litigation is with regards to hospital systems throughout the country.

Given the "patient-first" attitudes of hospitals and medical care employees, plaintiffs' counsel appear to believe they have identified a "soft spot" common to some hospitals that they can try to exploit on behalf of employees under both the FLSA and comparable state law (which as explained earlier, may have greater remedies for employees than those

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90. *See generally* 29 C.F.R. § 785.

91. 29 C.F.R. § 785.13 ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.").

92. *Id.*

93. *See* 29 C.F.R. § 785.47; *see also* Department of Labor Opinion Letter, FLSA2008-7NA, *3 (May 15, 2008) (*available at* http://www.dol.gov/whd/opinion/FLSANA/2008/2008_05_15_07NA_FLSA.pdf).

provided by federal law). In fact, plaintiffs' firms have recently filed complaints against dozens of hospitals, in federal courts.[94]

Whether potential liability can actually entirely be eliminated in such a high-stress and consequence-driven medical care environments remains to be seen—but one thing is certain. Regardless of their intent, given the rise of these suits, hospitals, like many employers, need to be on a heightened guard on a going-forward basis for two reasons: (1) if there is in fact any actual miscalculation of hours worked, it is likely a mistake as hospitals are in the business of caring for people—both their patients and clients—and would want to remedy any such inadvertent shortfalls regardless of whether they were subject to future liability if they did not remedy it, and (2) the consequences of failing to adequately compensate employees can be dire based on the scope of the allegations made and the actual practices and records of the employer.

MISCALCULATION OF OVERTIME RATE OF PAY

Another complicated area which can lead to widespread liability on the part of an employer is miscalculation of the required overtime to pay employees—due to, for example, a miscalculation of the employees' "regular rate of pay" or due to misapplication of the fluctuating workweek method of calculating overtime.

The FLSA requires that employees who work over 40 hours in a work week be paid "overtime"—which is 1.5 times their "regular rate of pay" under a standard overtime calculation method,[95] or an additional 0.5 times the same regular rate of pay under the "fluctuating workweek method."[96]

One of the first situations where employers may face liability is when determining the regular rate of pay upon which the overtime rate of pay is based. The FLSA is clear—all payments to an employee must be included

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94. *See, e.g.,* Civil Action No. 1:09-cv-11463 (D. Mass. filed Sep. 3, 2009); Civil Action No. 1:09-cv-11464 (D. Mass. filed Sep. 3, 2009); Civil Action No. 1:09-cv-11466 (D. Mass. filed Sep. 3, 2009); Civil Action No. 1:09-cv-11461 (D. Mass. filed Sep. 3, 2009); Civil Action No. 4:09-cv-40152 (D. Mass. filed Sep. 3, 2009); Civil Action No. 3:09-cv-85 (W.D. Pa. filed April 1, 2009); Civil Action No. 2:05-mc-2025 (W.D. Pa. filed April 1, 2009); Civil Action No. 2:09-cv-377 (W.D. Pa. filed April 1, 2009); Civil Action No. 1:08-cv-380 (W.D.N.Y. filed May 23, 2008); Civil Action No. 08-cv-378 (W.D.N.Y. filed May 22, 2003); Civil Action No. 5:08-cv-1220 (N.D.N.Y. filed Nov. 13, 2008); Civil Action No. 5:08-cv-1221 (N.D.N.Y. filed Nov. 13, 2008); Civil Action No. 6:08-cv-1219 (N.D.N.Y. filed Nov. 13, 2008) (federal complaints filed against hospital systems in various jurisdictions).

95. *See* 29 U.S.C. § 207(a)(1).

96. *See* 29 C.F.R. § 778.114(b); *see also* C.W. Von Bergen, *Reducing Overtime Expenditures Using the Fluctuating Workweek Method,* 33 EMP. REL. L. J. 70 (Spring 2008) (discussing the potential "applicability of [this] relatively obscure provision of the" FLSA).

when calculating the regular rate of pay unless it is subject to one of the FLSA's exemptions.[97] Those exemptions are:[98]

1. sums paid as gifts, not measured by or dependent on hours worked, production, or efficiency;
2. payments for occasional periods when no work is performed (*e.g.,* vacation, holidays, illness, lack of sufficient work);
3. entirely discretionary payments about which an employee has no expectation;
4. contributions to certain benefits, such as retirement and life-insurance plans;
5. extra compensation paid working overtime;
6. extra compensation paid based on a premium rate of pay (*i.e.,* Sunday or holiday pay);
7. extra compensation paid for working beyond the time required by an employment contract or collective bargaining agreement;
8. income received through stock options, stock appreciation rights, or an employee stock purchase plan (subject to various requirements).

Other than pursuant to such specific exceptions, failure to include any kind of payment to an employee in that employee's regular rate of pay is a violation of the FLSA.

If an employer successfully navigates the "rate of pay" minefield, the employer then needs to determine whether overtime is in fact due (*see* various issues regarding miscalculation of the actual hours worked, as set forth in section 2, *supra*). And the employer must then pay overtime in accordance with the applicable federal or state law.

In certain circumstances, however, the employer can apply the fluctuating workweek method and pay employees 0.5 times their regular rate of pay for every hour of overtime worked in a week.[99] The employee, though, must meet the requirements in order for the fluctuating workweek to be applied, which are described below:[100]

1. The employee must be paid a fixed salary regardless of hours worked each week;

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97. *See* 29 U.S.C. § 207(e) (listing the statutory exemptions which are not considered when calculating regular rate of pay).

98. *Id.* Note: These are simplifications of the statutory exemptions designed as an overview and do not encompass the numerous details of the various exemptions or their caveats.

99. 29 C.F.R. § 778.114.

100. Von Bergen, *supra* note 96, at 73 (summarizing the fluctuating workweek requirements based on 29 C.F.R. § 778.114).

2. The employee's workweek must "fluctuate" in number of hours actually needed to work;
3. Salary must be sufficiently large so that the regular rate of pay (compensation divided by hours worked) will never fall below the minimum wage;
4. There must be an "understanding" between the employer and employee that the employee will be paid using the fluctuating workweek method.

Under these circumstances, the employer is actually able to save a significant amount of money in overtime premiums. But in the event that the employer actually is determined to have inappropriately applied the fluctuating workweek to a class of employees, the employer can potentially be held liable for the difference between the pay received and they pay as would have been calculated under the traditional overtime method as well as possible liquidated and other available damages.[101]

WHAT EMPLOYERS CAN DO TO AVOID THESE POTENTIALLY LARGE LIABILITIES CAUSED BY "COLLECTIVE" AND "CLASS" ACTION LITIGATION, WHICH UNDERMINES EFFORTS TO INCREASE PROFITABILITY AND—ULTIMATELY—ENCOURAGE ECONOMIC RECOVERY AND THE NEED FOR GREATER EMPLOYMENT

Given the dire consequences of violating any of the aforementioned wage and hour laws—which can potentially wipe out years of business planning and concentrated efforts to increase productivity—education is certainly the most important aspect to avoiding such liability.

Employers need to be educated as to these risks because to the extent they inadvertently violate the law, they are exposing themselves to massive potential exposure. Alternatively, to the extent they are trying to skirt the law in order to further business interests, employers need to be made aware that the potential liability for any wage and hour class violation in most cases will far exceed any potential benefit.

In addition to education on wage and hour laws, employers need to be deeply concerned with their own compliance when the law is specifically applied to their own employees. For example, the proper exemption status of employees prior to August 23, 2004, may have actually become a violation on August 24, 2004, when the FLSA exemptions were amended.

One particularly striking change applies to the changes to the executive exemption, 29 C.F.R. § 541.100, which did not expressly require that the employee have the ability to hire and fire employees prior to the August 2004 amendments taking effect, but in fact became an express

101. *Id.* at 81.

requirement afterwards.[102] Specifically, prior to the amendments, the executive exemption's widely applied "short test" required:[103]

- The employee be paid on a salary basis of no less than $455 per week;
- The primary duty consists of managing the enterprise in which they are employed or a customarily recognized department or subdivision thereof; and
- They customarily and regularly direct the work of two or more other employees.

After the amendments, the exemption now requires as follows:[104]

- The employee be paid on a salary basis of no less than $455 per week;
- The primary duty consists of managing the enterprise in which they are employed or a customarily recognized department or subdivision thereof;
- They customarily and regularly direct the work of two or more other employees; and
- *They have the authority to hire and fire other employees, or make suggestions and recommendations that are given particular weight as to hiring, firing, advancement, promotion, or any other change of status of other employees.*

Regarding the "authority to hire and fire" language, the case law and applicable regulations indicate that the employee at issue does not actually need to be the person to make the final decision,[105] but only that the employee's recommendations be given "particular weight," evidence of which includes but is not limited to:

1. whether it is part of the employee's job duties to make such suggestions and recommendations;
2. the frequency with which such suggestions and recommendations are made or requested; and

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102. Despite the "new" language in the exemption, "[s]ome courts addressing the executive exemption under the new rules have found little substantive change," but this is not universal among the courts. *See* Kearns, The Fair Labor Standards Act, 2008 Cumulative Supplement at 332.

103. 29 C.F.R. § 541.100 (prior to amendment).

104. 29 C.F.R. § 541.100 (emphasis added).

105. In fact, the Code of Federal Regulations specifically states as follows regarding the definition of the "particular weight" requirement: "An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status." 29 C.F.R. 541.105

3. the frequency with which the employee's suggestions and recommendations are relied upon.[106]

Thus, it should be obvious to any employer that such evaluation must be undertaken with the assistance of competent counsel well-versed in the nuances of wage and hour law and particularly knowledgeable regarding the law within the jurisdictions in which such employer does business.

Further, most notably, to the extent that employers make good faith efforts to audit questionable position classifications and confirm that employees are being classified and compensated correctly, the FLSA has a "good faith" provision which, in the event of suit, allows a court to find that liquidated (*i.e.* double) damages are inappropriate.[107] For all of these reasons, such consistent auditing, monitoring, and compliance is in the best interest of both the employee and the employer.

In sum, even the best intentioned employers are unlikely to be able to avoid all potential wage and hour exposure given the number of employees to manage and the number of plaintiffs' law firms actively engaging in wage and hour practice and filing suits—but employers can take many preventative actions so as to diminish the risk that they could eventually be held liable on a class-wide basis for one of these violations. Putting a company in such a position reduces the risk of outstanding liability and allows the employer to exercise more freedom in business judgment at the precise time they need to do their utmost to "create" business and corresponding job opportunities.

As noted above, the most important factor to mitigate wage and hour risk and, accordingly, encourage business growth is education. Next, performing consistent wage and hour audits enables employers to ensure continued compliance and remain free of concern about running afoul of the law. Finally, the use of competent wage and hour counsel to reach such determinations will help insulate the employer from the potential for liquidated damages in the event of an accidental violation, and will concurrently assist in ensuring that the letter of the law is being carried out in good faith and to the fullest extent practicable.

CONCLUSION

When legal and social scholars make grand proposals like overhauling the system of labor and employment laws which have been a work in progress for the past 75 years, particularly given the troubling economic circumstances, it may be more prudent to focus those efforts on assisting

106. *See id.*
107. 29 U.S.C. § 259.

society as a whole in attempting to understand and comply with the strong laws we already have in place.

That is not to say that these laws cannot be updated or fine-tuned as appropriate to make them more effective or timely, but it is often the case that the larger the changes, the more problems they cause rather than fix.[108] Overhauls are fine when a current infrastructure is undeniably broken. But it appears in this case that the framework of employment laws—particularly in the wage-and-hour context—is healthy and robust, and, instead, the problem appears to be something much simpler.

We, as a society, appear to be forgetting the point that President Obama continues preaching—that "one of the most important lessons to learn from this [economic] crisis is that our economy only works if we recognize that we're all in this together, that we all have responsibilities to each other and to our country."[109]

While grandiose suggestions about "overhauls" of wage and hour law are interesting in theory, education regarding (1) the scope of the current wage and hour laws, (2) their subsequent application to each employer's specific employment situations, and (3) a clear understanding about the potential effects of failure to comply with such laws is the most effective and immediate step we can take with regard to fulfilling all of our duties to the American worker and—as a result—promoting economic recovery one employee and company at a time.

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108. Arguably, such is the case with the Americans with Disabilities Act Amendments of 2008, which was intended to undo the line of authority stemming from the Supreme Court's decision in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)(defining the term "disability"). The change now plunges employers, as well as legal scholars, into uncertainty as to the meaning of the central term to the ADA.

109. President Obama, Transcript, White House Press Conference (March 24, 2009).

APPENDIX A

Editors' Note: This sample order has been edited to fit in the following allocated space. The wording has not been changed in any way but the spacing and general format of the document has been altered. An actual copy provided by the author is available for download in the 'Past Publications' section of the *Journal of Business & Securities Law* website.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Plaintiff(s),

v. CASE NO: 8:

,
Defendant(s).
_____/

SCHEDULING ORDER

Pursuant to Fed. R. Civ. P. 16, the Court finds it necessary to implement a schedule tailored to meet the particular circumstances of this case which is based on the **Fair Labor Standard Act** ("FLSA"). Therefore, consistent with the just, speedy and inexpensive administration of justice (Fed. R. Civ. P. 1), it is

ORDERED that the provisions of Rule 26 (a)(1) and Local Rule 3.05 (c)(2)(B) and (d) concerning the initial disclosures and filing of a case management report are hereby waived. Instead, the parties shall comply with the following schedule:

1. No later than fifteen (15) days from the date of this Order, Plaintiff shall answer the Court's Interrogatories (attached to this Order) under oath or penalty of perjury, serve a copy on Defendant, and file the answers with the Court entitled "Notice of Filing Answers to Court's Interrogatories."

2. No later than fifteen (15) days after Plaintiff files Answers to the Court's Interrogatories, Defendant shall serve on Plaintiff and file with the Court a Verified Summary of all hours worked by Plaintiff during each relevant pay period, the rate of pay and wages paid, including overtime pay, if any. No later than fifteen (15) days after Plaintiff files Answers to the Court's Interrogatories, Defendant shall also serve on Plaintiff (but ***not*** file)

a copy of all time sheets and payroll records that support or relate to the time periods in the Verified Summary.

3. No later than thirty (30) days after Defendant files the Verified Summary, counsel for Plaintiff and Defendant shall meet and confer in person in a good faith effort to settle all pending issues, including attorneys fees and costs.[110] **No agreement, including one as to attorney's fees and costs, shall be binding until approved by the Court.** Counsel shall have full authority to settle, and shall set aside sufficient time for a thorough, detailed, and meaningful conference that is calculated to fully resolve the case by agreement.

4. No later than ten (10) days after the settlement conference, counsel shall jointly file a Report Regarding Settlement that notifies the Court whether: (1) the parties have settled the case; (2) the parties have not settled but wish to continue settlement discussions for a specific period of time; (3) the parties wish to engage in a formal mediation conference before a specific mediator on or before a specific date; (4) either party requests a settlement conference before the United States Magistrate Judge; or (5) the parties have exhausted all settlement efforts and will file immediately a Case Management Report[111] signed by counsel for all parties.

5. If the parties are able to agree on settlement in this case, they are directed to submit the terms of the resolution of this case within 11 (eleven) days from the date of the Notice of Settlement.

6. The parties may consent to the conduct of all further proceedings in this case by the United States Magistrate Judge (**consent form attached**).

7. Until further order of this Court, all discovery in this case is **STAYED**, except as provided in this Order.

8. Either party, for good cause shown, may move to alter this schedule should circumstances warrant.

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110. In the case of an individual party who is not represented by counsel, the individual shall comply with the provisions of this Order.

111. The CMR form is available online at http://www.flmd.uscourts.gov. Select Judicial Info, then select District Judge James S. Moody, Jr., then select Case & Trial Management Forms.

Copies furnished to:
Counsel/Parties of Record

Attachments:
Court's Interrogatories to Plaintiff
Magistrate Judge Consent Form

COURT'S INTERROGATORIES TO PLAINTIFF

1. During what period of time were you employed by the Defendant?
2. Who was your immediate supervisor?
3. Did you have a regularly scheduled work period? If so, specify.
4. What was your title or position? Briefly describe your job duties.
5. What was your regular rate of pay?
6. Provide an accounting of your claim, including: (a) dates (b) regular hours worked (c) over-time hours worked (d) pay received versus pay claimed (e) total amount claimed
7. When did you (or our attorney) first complain to your employer about alleged violations of the FLSA?
8. Was this complaint written or oral? (If a written complaint, please attach a copy).
9. What was your employer's response? (If a written response, please attach a copy).

_____
(Plaintiff's Signature)

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, on this day, personally appeared _____, who being first duly sworn, deposes and says that he/she has read the foregoing Answers to Interrogatories, knows the contents of same, and to the best of his/her knowledge and belief, the same are true and correct.

SWORN TO AND SUBSCRIBED before me on this _____ day of_____, 200___.

NOTARY PUBLIC

_____
Signature of Person Taking Acknowledgment

Notary Stamp

Print Name:
Title: Notary Public
Serial No. (if any):
Commission Expires:

APPENDIX B

Editors' Note: This standing order has been edited to fit in the following allocated space. The wording has not been changed in any way but the spacing and general format of the document has been altered. An actual copy provided by the author is available for download in the 'Past Publications' section of the *Journal of Business & Securities Law* website.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re
FLSA Cases

Case No. 6:08-mc-49-Orl-UA-GJK

_____/

ORDER TO SHOW CAUSE

This cause came on for consideration on the Court's own motion. On April 29, 2008, each of the District Judges for the Middle District of Florida, Orlando Division endorsed an Order ("Order") issued to the Pantas Law Firm, P.A. and Morgan & Morgan, P.A. (collectively the "law firms"). Doc. No. 1. The Order addresses counsel's routine failure to abide by the Court's standing orders. Specifically, counsel repeatedly fails to comply with the customary Related Case Order, the Interested Persons Order for Civil Cases, and the Fair Labor Standards Act ("FLSA") Scheduling Order (collectively, the "Standard Orders"). *Id.*1 The Order states that for a period of one year, "a search of the relevant dockets reflects a total of 120 show cause orders being issued for these two firms . . ." *Id.*[112] The Clerk opened a miscellaneous docket and referred this matter to the undersigned. Thereafter, this Court has still had to enter show cause orders against members of the law firms for failure to comply with the Standard Orders.[113]

The Court has been lenient in tolerating the repeated neglect and non-compliance of the law firms and lawyers. The Court has continually admonished the law firms and their respective counsel to no avail that further non-compliance would not be tolerated. The following attorneys have appeared in FLSA cases where show cause orders have been entered:

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112. *See*, e.g., attached Orders.

113. *See* Case Nos. 6:07-cv-1978-PCF-KRS, Doc. No. 16; 6:08-cv-483-ACC-GJK, Doc. No. 5; 6:08-cv-156-JA-KRS, Doc. No. 22; 6:08-cv-370-JA-KRS, Doc. No. 11; and 6:07-cv-165-JA-KRS, Doc. No. 41.

Charles L. Scalise, Carlos V. Leach, Richard B. Celler, Kelly Allyssha Amritt, Janet P. Ochoa, Andrew Ross Frisch, and C. Ryan Morgan of Morgan & Morgan, P.A.; and K.E. Pantas, Jay M. Yenor, III, and Scott C. Adams of the Pantas Law Firm, P.A. In various orders to show cause the Court stated the following:

> Carlos V. Leach is listed as counsel in approximately 281 cases within the Middle District of Florida. The Orlando Division uses Related Case Orders and Interested Persons Orders in all it's [sic] Track Two or Fair Labor Standard Act cases. Counsel should be familiar with these deadlines. *See Johnson v. Total Marketing Concepts,Inc. and Andrew Dorko, Jr.*, Case No. 6:08-cv-97-Orl-31DAB, Doc. No. 6 (February 13, 2008).
>
> . . . .
>
> The Court would note that it issues constant Orders to Show Cause to the Pantas Lawfirm. In Case No. 6:07-cv-1884-Orl-31UAM Plaintiff's counsel has been directed to respond to an Order to Show Cause and include an explanation as to how his office intends to rectify the constant oversight. *See Enman v. Milwaukee Motorcycle Manufacturing Company, Inc. and Scott Yadro*, Case No. 7:07-cv-1614-Orl-31DAB, Doc No. 11. (January 7, 2008) (emphasis added).
>
> . . . .
>
> In the future, if counsel [Charles L. Scalise] seeks an extension for a deadline, the appropriate motion should be filed prior to the deadline to avoid the Court's repeated orders to show cause, instead of requiring the Court to track counsel's deadlines for him. *See David Marlow and Ralph Simon v. Cyrus Painting & Services, Inc., Timothy Cyrus and Angela Cyrus*, Case No. 6:07-cv-1340-Orl-31DAB, Doc. No. 20 (December 21, 2007) (emphasis added).
>
> . . . .
>
> The Court would note that K.E. Pantas was listed as counsel in approximately 827 cases filed in the Middle District of Florida. The Related Case Order and Interested Persons Orders are issued in every case filed in the Orlando Division yet the Court continues to issue Show Cause Orders for compliance with these standard orders. *See Fingar v. Mercedes Homes, Inc.*, Case No. 6:07-cv-849-Orl-31DAB, Doc. No. 5. (June 18, 2007) (emphasis added).
>
> . . . .
>
> K.E. Pantas law firm is listed as counsel in approximately 827 cases filed within the Middle District of Florida. The Orlando Division began using the Fair Labor Standard Act (FLSA) Scheduling Order in September, 2005. Interrogatories are required from every plaintiff in every FLSA case filed in Orlando yet the Court continues to issue Show Cause Orders for compliance with these standard orders. Counsel continues to cite administrative oversights or computer errors in it's [sic] responses to the Court's Show Cause Orders. Such excuses will no longer be tolerated. *See Id.*, Doc. No. 15. (July 25, 2007) (emphasis added).
>
> . . . .
>
> Plaintiff's counsel has been advised of his consistent failure to comply with the standard orders issued by this court. Accordingly, his response to the Order to Show Cause, counsel shall include an explanation to the Court as to how his office will rectify this constant oversight. *See Coleman v. Community Management Spe-*

cialists, Inc. and Kevin Davis, Case No. 6:07-cv-1884-Orl-31UAM, Doc. No. 4. (January 3, 2008) (emphasis added).

From March 1, 2007, through May 20, 2008, the respective counsel has been subject to following number of show cause orders issued by this Court:

1) K.E. Pantas – fifty-one (51) show cause orders;
2) Carlos V. Leach – forty-five (45) show cause orders;
3) Charles L. Scalise – thirty-two (32) show cause orders;
4) Jay M. Yenor, III – twelve (12) show cause orders; and
5) Richard B. Celler – ten (10) show cause orders.[114]

Unfortunately, these warnings and admonishments have been ignored and it is apparent no real effort has been taken to ensure compliance with this Court's Orders. On January 23, 2008, the Honorable Gregory A. Presnell issued an Order to Show Cause to Plaintiff Shirley D. Coleman, which directed her counsel, K.E. Pantas, to include in his response to the Order to Show Cause "an explanation to the Court as to how his office will rectify this constant oversight." *Coleman*, Case No. 6:07-cv-1884- GAP-GJK, Doc. No. 4. On January 14, 2008, K.E. Pantas filed a Response to Order to Show Cause ("Response") which stated the following:

a. The undersigned will require all attorneys employed by his firm to assign a redundant e-mail address to their respective CM/ECF electronic filing account. The redundant e-mail address will direct a copy of all future Orders (including Scheduling Orders) directly to the Senior Paralegal for the Firm so he can review each Order on a daily basis and provide daily direction to the paralegal staff regarding proper calendaring of the response to such Orders. Each paralegal will in turn provide the Senior Paralegal with a daily Calendaring Report at the end of each day reflecting that the Order has been properly calendared. The daily Calendaring Reports will be forwarded to the undersigned for review every day;

b. The undersigned has issued a standing directive to his staff and attorneys that responses to such Orders (including Scheduling Orders) must be presented to the undersigned for review an approval within five (5) calendar days of the issuance of such Order. Should there be some reason that a response cannot be provided within that time period, and compliance cannot be accomplished by the end of the next business day, then a draft Motion for Extension of Time shall be presented to the undersigned for review and approval in place of a draft response. Said Motion for Extension of Time shall contain a request for an appropriate extension of time when it is reasonably believed that compliance can be accomplished and the reason(s) compliance with the Order cannot accomplished [sic] within the original time period set forth in the Order;

c. The undersigned has also issued a standing directive to his Senior Paralegal to provide the undersigned with a daily CM/ECF Docket Activity Report for all cas-

114. [Note: The complete list of cases with identification numbers has been removed due to space considerations. See Editors' Note, *supra*, for information to download the original document.]

> es along with Daily Calendar Report from the Firm Calendaring Program. These Reports will be reviewed and discussed with the undersigned each morning during his daily case review with the Firm's Senior Paralegal to ensure proper calendaring and to double check for Orders that, for whatever reason, have been overlooked by the paralegal and attorney in charge of the management of the file;
>
> d. Each Monday the undersigned will personally compile and review a CM/ECF Docket Activity Report for the previous week and check each docket for Orders that have been issued and the properly filed response. The undersigned has recently learned that a report can be compiled from the CM/ECF system for all cases assigned to the CM/ECF participant that list the Orders issued by the Court and a separate report listing the responses filed during a selected time period. These reports will be carefully scrutinized for outstanding Orders and timely responses will be prepared and properly filed.

Id., Doc. No. 7. Following his Response, K.E. Pantas was subject to six (6) additional show cause orders.

It is well settled that a court may discipline and/or sanction an attorney for failure to comply with its orders. *See, e.g., Wouters v. Martin County, Fla.*, 9 F.3d 924, 933 (11th Cir. 1993) ("district courts have broad powers under the rules to impose sanctions for a party's failure to abide by court orders . . ."). Pursuant to the local rules of this Court, a member of the bar of this Court "may, after hearing and for good cause shown, be disbarred, suspended, reprimanded or subjected to such other discipline as the Court may deem proper." Local Rule 2.04(a). Because the law firms and respective attorneys have repeatedly failed to comply with multiple Court orders, they are directed to show cause in writing **within eleven (11) days** of the entry of this Order:

1. Why the law firms / attorneys repeatedly fail to comply with the various customary Court orders;
2. What sanction(s) can or should be imposed as a result of the foregoing misconduct;
3. Why the law firms / attorneys should not be banned from filing additional FLSA cases before this Court; and
4. In the alternative, what steps can and will be immediately taken to ensure future compliance with this Court's Standing Orders.

Each attorney and law firm subject to this Order to Show Cause shall file a response within the stated time period. Thereafter, this Court will schedule a hearing for each law firm and its members to address the issues outlined above.

DONE and **ORDERED** in Orlando, Florida on May 28, 2008.

/s/ Gregory J. Kelly
GREGORY J. KELLY
UNITED STATES MAGISTRATE JUDGE