Commonwealth of Massachusetts
Appeals Court
No. 2021-P-0301

ZUCCHINI GOLD, LLC d/b/a RICE BARN and

CHALERMPOL INTHA,

Defendants /Appellants

v.

RUTCHADA DEVANEY, THEWAKUL RUEANGJAN AND

THANYATHON WUNGNAK,

Plaintiffs/Appellees

Appeal from the Suffolk County Superior Court
Docket No. 1584CV02839

Appellants' Brief

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Corporate Disclosure Statement

On behalf of Zucchini Gold, LLC, there are no parent corporations or publicly held corporations that own 10% of the corporate appellant.

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STATEMENT OF ISSUES

The issues on appeal are: (1) whether a Trial Judge properly instructed a jury on how to calculate damages in a situation whether a restaurant owner was found to not have paid his workers a time and a half of their regular rate pursuant to 29 U.S.C. 207(a)(1); (2) whether or not the plaintiffs' damages should be reduced by the fact they were all paid their regular hourly rate for each hour worked; (3) whether expert testimony was necessary, permissible and/or unduly influenced the jury; (4) whether the Trial Judge acted appropriately in allowing the plaintiffs' expert to supplement his flawed opinion, which was the only opinion defendants had notice of, in the middle of trial; (5) whether it was error that the Judge used a state statutory scheme to penalize the defendants when the industry is excluded from that scheme; and (6) whether there was enough evidence to support a jury finding in the first instance.

STATEMENT OF THE CASE

The plaintiffs sued the defendant claiming: (1) a violation of the Fair Labor Standards Ct (FLSA) under 28 USC s. 207 by failing to pay them overtime wages; (2) a violation the Massachusetts Wage Act (Wage Act), G.L. c. 149, s. 148 for failing to pay them for all hours worked and by failing to pay them in a timely manner; and (3) a violation of 29 USC s. 206 of the FLSA and Minimum Wage Law of G.L. c. 151, s 1 for failing to pay minimum wage. (Appendix Exhibits Vol. 1 at page 17-28 or hereinafter "Ex.V.1" 17-28)

As a result of a summary judgment motion, Judge Ames found that there was a violation of the FSLA because there was never any overtime rate paid to the three plaintiffs for any hours worked over 40 hours a week. (Ex.V.1 41) This violation of the FLSA was found to constitute a Wage Act violation because if defendants never paid an overtime rate, then it would follow that they did not pay that rate timely. (Ex.V.1 44)

Judge Ames also found that 29 USC s. 207 (a)(1) called for the plaintiffs receiving one and one half time their "regular rate" for hours worked over 40 a

week. In citing 29 CFR 778.109, and because these plaintiffs were paid a daily rate, she noted that the "regular rate is generally calculated by 'dividing [the] total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked…in that workweek for which such compensation was paid.'" (Ex.V.1 42) Because of the summary judgment ruling, the only trial question was that of damages. (Ex.V.1 39-44)

A multi-day jury trial was had in September and October of 2019 and the final judgment being appealed was entered by the court on or about January 31, 2010. (Ex.V.4 181)

Statement of Facts

The plaintiffs were all employees of the defendant restaurant, Rice Barn, which was and is owned by the individual defendant, Mr. Intha. (Appendix Transcripts at pages 102-104 or hereinafter "Tr.V.1" 102-104) Mr. Intha purchased the restaurant in September 2013 when he was 73 years old. (Tr.V.1 262; Tr.V.3 6-7) All three plaintiffs were already working there at the time. (Tr.V.3 15)

Prior to purchasing, Mr. Intha worked as an architect and owner of a non-profit organization who had no experience in the restaurant business. (Tr.V.3 7-8) He learned about the possibility of purchasing the Rice Barn from his nephew who had worked at that time at the restaurant. (Tr.V.3 9)

Mr. Intha did not change one aspect of the restaurant or its operation. He kept every single aspect of the restaurant that existed prior to his ownership intact when he purchased it. He did not so much as close for one day. (Tr.V.3 15-17, 19) He kept the workings of the kitchen, including its staff, the exact same as they had with the prior owner. (Tr.V.3 19-23) All of the plaintiffs' manner, amount and method of payment remained the same as when they worked with the prior owner. (Tr.V.3 19-23) Their schedules remained the exact same regarding the hours they worked, the work they performed and the days off they each had. (Tr.V.3 19-23)

To the public, Rice Barn was only open for 44.5 hours a week. (Tr.V.3 34) Rice Barn was open for lunch on Monday through Friday and served dinner seven days a week. (Tr.V.1 263-268) For Monday through Friday,

lunch service went from 11:30 am until 2:30 pm, at which point the restaurant would close from 2:30 to 5:00 pm. On Mondays through Wednesdays, the dinner service went from 5 pm until 9 pm. On Thursdays through Saturdays, dinner service lasted from 5 pm until 9:30 pm and on Sundays, Rice Barn was only open from 5 until 9 pm. (Tr.V.1 263-268)

For weekdays, the plaintiffs were only expected to work at most 2 hours above that which the restaurant was open to the public. This time was for preparation, eating their own meals, side work and to cook. (Tr.V.3 24-32) For weekends, there was only an expectation that the staff would work one hour above that which the restaurant was open. As such, the maximum amount of time that any plaintiff could work on any given week was 56.5 hours. (Tr.V.3 96-97) Much of their side work or prep could be done while the restaurant was still open but slow. (Tr.V.3 29)

However, for each of the plaintiffs, their actual hours worked were irrelevant to their pay, as they were each paid a daily rate. (Tr.V.3 40-42) All three got paid a day rate, which was their agreement with the prior owner inherited by Mr. Intha. For Ms.

Devaney, she got paid $135 daily from the date of purchase until December 2014, at which time she got a raise to $151.50 a day. Mr. Rueangjan was paid $168 daily for the entirety of the relevant time period. Ms. Wungnak earned $100 daily from Mr. Intha's purchase until the end of 2013. Then she earned $105 daily in January 2014 and then $110 daily in January 2015. She left Rice Barn on July 4, 2015. At trial, the parties agreed on the day rate paid to each plaintiff, as well as the dates of their employment. (Ex.V.2 55)

Each employee was supposed to clock in and out of work using a software system also inherited from the prior owner. However, since the specific hours worked was irrelevant to their pay, they would be paid fully even if they clocked in for one minute. (Tr.V.3 100-102) For their payment, each plaintiff would complete and submit a sheet listing the shifts worked and each shift would equate to one half of their daily rate. (Tr.V.3 39-40) (Ex.V.3 30) The specific hours that any plaintiff worked did not change the amount they were paid. (Tr.V.3 40)

At all times, Mr. Intha always had either a

separate company or a separate bookkeeper to effectuate payroll. (Tr.V.3 15)

Throughout the relevant time period, each plaintiff was paid for every single day that they worked and for each hour that they worked. (Tr.V.1 344, Tr.V.2 73, 183) If they worked a full day, which was defined by both the lunch shift and dinner shift, then they got paid their full day rate, regardless of specific hours worked. On Saturdays and Sundays, the restaurant was only open for dinner service, so if an employee worked on a Saturday night, that person would be paid half of their day rate. (Tr.V.1 287-288) Each half day was defined by one shift, no matter if it was lunch or dinner. If a plaintiff worked a catering shift at a time that the restaurant was not open (i.e. Saturday morning), they would be paid one half of their daily rate. (Tr.V.1 291) In essence, each shift worked translated to one-half of their day rate, no matter how long that shift took. The specific amount of hours that were worked did not change their pay at all. If lunch service was busy or empty, they would be paid for that shift in the entire amount.

The Rice Barn was closed for 4 days each July 4

and also on Thanksgiving, Christmas and New Year's day (Tr.V.2 70-71)

For each plaintiff, they testified at trial that their work schedule did not fluctuate throughout the relevant time period of approximately two years. For Devaney, she only claims that she took one vacation from September 19, 2013 until November 21, 2015 and claims that she only took one hour off for only 2 to 4 times over two years. (Tr.V.2 165, 173-174) Ms. Wung-nak claimed that she worked every single day and only sometimes took a day off during the relevant period. (Tr.V.2 73) For Mr. Rueangjan, he claimed he worked 7 days a week, and only took "some days off" because he remembered having two appointments. (Tr.V.1 268, 345, 347)

The plaintiff Devaney testified that she had no idea how many hours she was supposed to work and also that she did not know what she claimed was owed in overtime. (Tr.V.2 171, 180) She also testified that she was paid for every day that she worked and for ca-tering jobs, she was paid ½ day rate lump sum. Her compensation had nothing to do with the specific hours worked (Tr.V.2 163, 183-184) In the relevant time

period, Ms. Devaney went to Thailand for one a month. (Tr.V.2 172) When she worked there, there was always a system to report the days worked and she would get paid her daily rate based on what she submitted. (Tr.V.2 185)

Mr. Rueangjan also testified that Intha honored the agreement he already had with the prior owner relative to both the payment agreement of a day rate as well as the days that he was to work. (Tr.V.1 327-328) Mr. Rueangjan claimed that he was owed overtime from the very first day of Mr. Intha's ownership but did not testify that he had any idea of how much his damages were. He too was paid for every single day he worked. (Tr.V.1 344)

Ms. Wungnak also had the same compensation agreement and schedule with Mr. Intha as she had with the prior owner. (Tr.V.2 57-62) Though she answered "no" at trial when asked if the working hours were kept the same when purchased, she was reminded that she admitted as much in her deposition. (Tr.V.2 66-67) Ms. Wungnak stated that she was paid for each day that she worked for Mr. Intha. (Tr.V.2 73) When specifically asked about what her claimed damages were, she simply

did not know because she "never thought about that." (Tr.V.2 73-75)

Throughout the litigation, the only number given by plaintiffs as to what they claimed their actual damages were came from an expert whose report had the factual foundation for his opinion that each plaintiff got paid for every day that they worked for the defendant. (Tr.V.2 258)(Ex.V.1 45)(Ex.V.2 32) In the report, Mr. Rueangjan's claimed damage was $61,236, which ignored that he was already paid $40,824 of that figure. Ms. Wungnak's claimed damage of $31,311 ignored that she was already paid $20,874 of that figure. For Ms. Devaney, the expert's opinion was that she was owed $34,732, which ignored that she was already paid $23,154.67. (Ex.V.2 32-36)

Therefore, all throughout litigation, the plaintiffs presented a combined damages figure of $127,279. Because they each always knew they were paid for each hour worked, the correct best case scenario for the plaintiffs throughout litigation was a combined $42,426.33, which is one-third of their claimed damage. (Ex.V.2 32-36)

SUMMARY OF THE ARGUMENT

I. The Appropriate Standard of Review

The rulings of law and instructions and factual findings based on incorrect rulings of law can be reviewed de novo. (Page 18)

II. Judge Wilson Applied the Incorrect Law to the Jury Instructions

By failing to allow evidence of the uncontested fact that plaintiffs were all paid for each hour worked and then compelling the jury to multiply their regular rate by 1.5 to calculate damages, the plaintiffs were incorrectly awarded 2.5 their regular rate for each hour over 40 they worked in a week. The statutory scheme, which is designed not to create a windfall to plaintiffs, widely calls for various offsets to time and half, which includes normal pay actually received for hours worked. (Page 20)

III. The Trial Judge Erred in Allowing Expert Testimony

Because the nature of the trial being damages and a formula given to the jury, an expert was not duly preserved by the plaintiffs, was then allowed to

testify on the ultimate question for the jury and actually created an undue influence on the jury. (Page 30)

IV. The Trial Judge Erred in Allowing the Plaintiffs' Expert to Amend his Report in the Middle of Trial

When the Trial Judge ruled on a damages formula, he allowed the expert to supplement and update a clearly flawed opinion in the middle of the trial. To allow the amendment, the judge ultimately took away all power of the defendants in any cross-examination, gave inherent credit the opinion of the expert, which ultimately provided undue influence on the jury. This opinion, which served as a trial by ambush, presented the only numerical evidence of any damages. (Page 32)

V. By so instructing, Judge Wilson rendered moot the Massachusetts law relative to overtime compensation for restaurant workers

By using a Massachusetts statutory scheme of Title XXI that encapsulates G.L. ch. 149, s. 148, G.L. ch. 149, s. 150 and G.L. ch., 151, s. 1A, it was improper for the Judge to allow harsher triple damages and attorneys' fees for behavior that is excluded from that same statutory scheme under the same Title. The correct path, which would not render moot the

Massachusetts' legislative scheme, would be to use the federal statute to penalize the defendants who violated that same statute. (Page 42)

VI. Whether there was sufficient evidence to support the jury finding of damages for each plaintiff.

The only evidence of a numerical damage was given by an expert that was not necessary to trial, was removed from plaintiffs' witness list and then was allowed to amend his opinion in the middle of trial and testify. As his testimony meant a determination that it was necessary to assist the jury in their role, then the ultimate award is not based on permissible evidence and also truly led to a miscarriage of justice. (Page 48)

ARGUMENT

I. The Appropriate Standard of Review

In appellate questions such as the one at bar, the Trial Judge's legal conclusions are reviewed de novo. T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 569 (2010). "In a civil trial, a judge should instruct the jury fairly, clearly, adequately, and correctly concerning principles that ought to guide and control their action." Doull v. Foster, 487

Mass. 1, 5-6, (2021) "The judge is not bound to instruct in the exact language of the [parties'] requests, however, and has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law". Id. When reviewing jury instructions, an "appellate court considers the adequacy of the instructions as a whole, not by fragments" (citation omitted). Id.

For this case, an appeal's court should apply to claims of error a "prejudicial error" standard of review. Wahlstrom v. JPA IV Mgmt. Co., Inc., 95 Mass. App. Ct. 445, 448 (2019) Specifically, if an error occurred, reversal may be appropriate and also a new trial ordered unless it can be said "with substantial confidence that the error would not have made a material difference." Id. *citing* DeJesus v. Yogel, 404 Mass. 44, 49 (1989). That is to say, there would be no reversal or new trial if the error is found to have been "harmless." Id. *citing* Comeau v. Currier, 35 Mass. App. Ct. 109, 112 (1993).

The "'[c]learly erroneous' [standard] does not protect findings of fact resting upon or induced by an incorrect legal standard." Karam v. Skeff's, Inc., 84

Mass. App. Ct. 1131, 2 (Mass. App. Ct. 2014).

II. Judge Wilson Applied the Incorrect Law to the Jury Instructions

Both parties agreed that the plaintiffs were paid a day rate and also agreed that the FLSA required that they be paid 1½ times their regular rate for each hour over 40 they proved to have worked in any given week. 29 U.S.C. 207(a)(1) The parties' biggest differences centered around two aspects: (1) how to calculate the regular rate per 29 CMR 778.109; and (2) whether the plaintiffs' damages could be reduced because they were already paid for the "one" in the required "one and half times" their regular rate.

As to the first issue, that only became one at trial. Throughout the litigation, and as evinced by their own first set of requested jury instructions, even the plaintiffs seemingly agreed that the regular rate should have been calculated by "dividing the employee's total compensation for employment in any workweek by the total number of hours actually worked by the employee in that work week for which such compensation was paid" (Ex.V.4 95 *citing* 29 CFP s. 778.109)

The defendants consistently argued that the regular rate was consistent with 29 CMR 778.109 and the summary judgment holding written by Judge Ames also said:

> When an employer does not compensate employees on an hourly rate basis, the regular rate is generally calculated by "dividing [the] total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked .. .in that workweek for which such compensation was paid. (Ex.V.1 42 *citing* 29 C.F.R. s. 778.109)

Judge Ames also noted within footnote 10 that:

> In instances where the employee is paid a flat sum for a day's work regardless of the number of hours worked in the day and receives no other form of compensation for services, the regular rate is calculated 'by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. (Ex.V.1 42 *citing* 29 C.F.R. s. 778.112)

At trial, the plaintiffs changed their argument instead claiming that the regular rate should be calculated by dividing weekly pay by 40 as opposed to the hours actually worked. (Tr.V.1 300-304) Mathematically, this would increase the hourly rate by which damages would then be calculated leading to padding of their claimed damages. In noting the plaintiffs actually changing their theory of damages at trial, Judge

Wilson said:

> I've got to decide it now. But as I also just pointed out, you said in the jury instructions that you submitted, just before this trial started, not the latest ones, that that is how you calculate the denominator, is hours actually worked. That's what you also said in your demand letter that there is some dispute about as well, and in your brief about prejudgment security, you said the same thing. So my ruling on that, is the regular rate is divided by the - it is the hours actually worked divided by - pardon me -It is the - you divide the total payment for the week in any workweek by the total number of hours actually worked in that workweek, so that's the first half of the calculation. That's my ruling on that one. (Tr.V.2 111-112)

After this decision, the Judge then needed to decide the second disagreement. After comprehensive briefing and argument, Judge Wilson ruled that the jury would be compelled to multiply their regular rate by 1.5 times for each hour worked above 40, no matter if they were already paid their regular hourly rate for each hour worked. (Tr.V.2 133) For authority, the judge cited "the statute itself" and specifically held that Section 778.112 did not apply to this case but gave no factual findings to support this critical ruling of law. (Tr.V.2 134) Whether he needed to or not, the judge found that because the parties could either get a day rate or half-day rate, that Section 778.112

was inapplicable and therefore defendants could not argue that they were already paid for the hours they worked. (Tr.V.2 131-132)

Because it is and was uncontested that the plaintiffs were each paid for every hour they worked, the Judge's decision and eventual instruction actually compelled the jury to award the plaintiffs 2.5 times their regular rate for each hour proven worked over 40 hours, as opposed to the required 1.5 times codified in 29 U.S.C. 207(1).

Judge Wilson recognized the seriousness of his decision when he noted that "based on the amount of money at stake, particularly with the trebling of the damages and the vociferousness of the disagreement between counsel about how the damages are to be calculated here, that no matter what I decide about that, there is going to be an appeal." (Tr.V.2 5)

While Judge Wilson seemingly relied heavily on the Code of Federal Regulations, they have been noted as being "an interpretative bulletin that 'does not command formal deference from this court.'" O'Brien v. Town of Agawam, 440 F. Supp. 2d. 3, 20 (2006).

29 C.F.R. a. 778.112, which illustrates a pay structure most analogous to the plaintiffs', states:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

However, no matter what is written in the Department of Labor's interpretive bulletins, or whether or not the pay structure of this case fits squarely within any regulation, the law as should be applied was actually clearly written in Lalli v. General Nutrition Centers, Inc., 814 F.3d 1, (1st Cir. 2016). The Lalli court noted that "[t]hough week by week the regular rate varies with the number of hours worked," it is "regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week." Id. *citing* Overnight Motor Transportation Co., v. Missel, 316 U.S. 572, 580 (1942). To calculate what is owed, the employer would then multiply the regular rate by 50% to produce the additional overtime compensation

that must be paid for every hour worked beyond forty that week. O'Brien v. Town of Agawam, 350 F.3d 279, 287 (1st Cir. 2003). Only an additional "half" is required to satisfy the statute because the "time" in "time-and-a-half" has already been compensated under the salary arrangement. Lalli, *supra*, 814 F.3d at 2-3.

It is uncontested that all plaintiffs were paid a daily rate for each day that they worked. For damages, the Trial Judge first calculated an hourly wage based on dividing the amount actually paid by the number of hours actually worked in any given week. The "regular rate" under the FLSA is a rate per hour. Lalli, *supra*, at 3. Definitionally, the first step of Judge Wilson's damages calculations equals the hourly rate actually paid to the plaintiffs for the hours they actually worked. Each shift equated to one half of their daily rate, no matter what they did or how long it took them. They did not receive any bonuses or commissions and their sole compensation was the daily rate that was run through payroll. They were not on a salary. If they did not work, they did not get paid and they got paid for each hour they worked at what was determined to be their regular or hourly rate.

There can be no justification to ignore the law, the uncontested facts or the plain language of 29 CFR 778.112 to allow these plaintiffs to recover 2.5 times their regular rate. By allowing such a ruling, the Trial Judge committed reversable error entitling the defendants to have a new trial.

The Eleventh Circuit has also explained that all sections that followed section 778.109 were examples, not only section 778.112. Allen v. Board of Public Education for Bibb County, 5 F3.d 1306 (11th Cir. 2007). And such a notion was relied upon by the Tampa Division of the U.S. District Court for the Middle District of Florida in Thomas v. Waste Pro USA, Inc. which specifically stated:

> Here, the Court concludes that section 778.112 need not be followed exactly with respect to paying employees a day rate. Instead, consistent with the Eleventh Circuit's decision in *Allen*, it is only an example of how to calculate the regular rate when a worker is paid a day rate. 495 F.3d at 1313. Thus, the fact that Plaintiff and Helpers received other compensation in the form of bonuses or for additional tasks does not mean they were not paid a day rate. Moreover, the payment of half day rates for tasks outside of Helpers' usual tasks does not take Plaintiff or other Helpers outside the scope of day rate employees. As the Court explained in *Bunday*, the primary payment to Plaintiff and Helpers was through a day rate, and that amount could vary based on additional tasks. Accordingly, payment of

> overtime to Plaintiff or Helpers at a half rate, instead of a time and a half rate, is permissible.
>
> Thomas v. Waste Pro USA, Inc., Case No: 8:17-cv-2254-T-36CPT, 40 (M.D. Fla. Sep. 30, 2019

Even if 29 CFR 778.112 is inapplicable as Judge Wilson believed, there is no legal justification to foreclose the possibility of arguing to a jury that although a certain amount is owed for overtime, that a certain amount was actually paid already. Such a distinction has been made in caselaw where a defendant would be responsible "only for the unpaid portion" when a partial payment was already made. Roman v. Maietta Constr., 147 F.3d 71, 77 (1st Cir. 1998) Courts should attempt to look at a case to determine what is a "better and fairer approach" in calculating damages. O'Brien, *supra*, 440 F. Supp 2d. at 20.

The statute has been said to be "inherently flexible" and such flexibility should lead to a conclusion that the instruction was incorrect because it ignored the fact that the plaintiffs were already paid for each hour worked. Such a logical approach was noted in Lalli, which observed that "the fact that Lalli was given additional commission as straight-time pay for whatever eligible sales he made does not detract at

all form the fact that he was given his salary as straight time pay for whatever hours he worked." Lalli, *supra*, 814 F.3d at 15.

Cases interpreting proper damages seem to deal with what can be considering in a payment for overtime that is other than their regular pay. For example, the First Circuit in Lupien v. City of Marlborough answered the question of whether the City could have "comp time" or paid time off received by officers offset that which is owed in overtime wages. 387 F.3d 83, 85 (2004). It was reiterated that pursuant to 29 U.S.C. s. 207, the true damage is their "unpaid overtime compensation". Id. In this area of law, "plaintiffs are entitled to be made whole, not to a windfall at the [defendant's] expense." Id. at 87.

As noted by the Lupien court, there can sometimes be confusion between the issues of liability and the issue of a remedy. Here, no one argues that the liability of the defendants was to pay 1 ½ times the regular rate for hours worked over 40 in a week. However the remedy was incorrectly instructed to the jury. As to the remedy, any liability may be offset by a rate of pay that is not at overtime rates. Id. at 88

citing Roman v. Maietta Constr., Inc., 147 F.3d 71, 77 (1st Cir. 1998). Other regulations actually use the same illustrative logic. 29 CFR 778.325[1]

As made clear with the law, the Judge erred in instructing the jury that they were compelled to multiply each hour over forty in a week by 1 ½ times their regular rate without regard to what they were paid. It mathematically equaled 2.5 times their regular rate for each hour worked over 40 and 3 times what they were not paid. It translated to a windfall for plaintiffs at the hands of the

[1] 29 CFR 2778.325 says in part "The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40."

defendants. Such a result is inequitable and contrary to the law justifying a new trial.

III. The Trial Judge Erred in Allowing Expert Testimony

To even allow expert testimony, Judge Wilson was to make the preliminary assessment that the theory or methodology underlying the proposed testimony is sufficiently reliable to reach the trier of fact. Commonwealth v. Shanley, 455 Mass. 752, 761-62, 919 N.E.2d 1254, 1263 (2010) A judge's decision to admit expert testimony is subject to review only for abuse of discretion. Canavan's Case, 432 Mass. 304, 312 (2000). The question to answer for the allowance of an expert to testify is whether an expert was needed to assist jurors in interpreting evidence that "lies outside their common experience." Commonwealth v. Shanley, 455 Mass. 752, 761 (2010). The use of an expert to testify is a statement that one is needed to "assist the trier of fact to understand the evidence or to determine a fact in issue," Id. *citing* Mass. G. Evid. § 702 (2008-2009). However, the expert opinion may not be on issues that the jury are equally competent to assess. Simon v. Solomon, 385 Mass. 91, 105 (1982). To be admissible at trial, expert testimony must be of

assistance to the jury in reaching a decision, though an "expert may not . . . offer his opinion on issues that the jury are equally competent to assess." When that occurs, "the influence of an expert's opinion may threaten the independence of the jury's decision." Commonwealth v. Mendrala, 20 Mass. App. Ct. 398, 403 (1985).

In this case, this would mean that the expert was deemed absolutely necessary to create an opinion as to the plaintiffs' claimed damages because he was the only evidence presented that gave a damages figure. If the Judge allowed the testimony, which he did, that necessarily means that the jury was determined to not be able to create the damages figure without the expert testimony, or else there would be no reason for the expert at all. Id. Because the instruction as to damages was simply a formula, the use of the expert, especially in the manner that it was used, clearly influenced the jury to an unfair verdict.

The Trial Judge stated that the calculation as to the plaintiffs' damages was a "legal task" that needed to be explained to the jury. (Tr.V.2 171) However that cannot be reconciled with the eventual instruction that the jury was the sole decider of fact. (Tr.V.3

145) It is clear that a jury could have easily found hours worked and amount paid and used the formula by itself. By introducing an expert as the sole evidentiary source for damages, allowing for a trial amendment of opinion, limiting the scope of cross-examination and then giving the case to the jury, it is clear that undue and improper influence of this jury was allowed by the judge.

Lastly, the opinion itself presented to the jury was compelled to have been based on personal knowledge, evidence already in the record or evidence that would be put into the evidentiary record at trial or some combination of the two. Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990). In the case at bar, the expert testimony was not at all based on the trial record and therefore it should not have been permitted. (Tr. 657-662)

IV. The Trial Judge Erred in Allowing the Plaintiffs' Expert to Amend his Report in the Middle of Trial

The plaintiffs caused this litigation to go as long as it has because of their posture throughout litigation. This court, who allowed the plaintiffs to disclose their damages only by way of expert disclosure after the

third day of trial, more than guaranteed an unfair and prejudicial trial for the defendants. By ruling as it did and then precluding the defendants from testifying that he did pay for each hour of work, including overtime, the Court took away the defendant's right to argue for the entry of the plaintiff's true damages. (Tr.V.1 190-195)

Throughout litigation, the sole source of a figure for their claimed damages came from an expert. In their pretrial memorandum, the plaintiffs preserved two expert witnesses. The first, Anthony Gabinetti, was only testifying as to the absence of records from the defendants. The second, Craig Moore, was the only person listed to testify "as to the calculations of overtime compensation that should have been paid to Plaintiffs". (Ex.V.1 52-53)

At the final pretrial conference, plaintiffs' counsel maintained this same distinction that the CPA Gabinetti was only going to testify as to what recorded existed or not and the economist, Moore, was going to testify as to the calculation of damages based on his opinion from the first expert report dated July 9, 2018. (Tr.V.1 36-37) On the first day of trial, the

plaintiff only stated they were going to call Mr. Gabinetti, thereby effectively offering no expert testimony as to the specific calculations offered for damages. (Tr.V.1 72) The expert that was disclosed to discuss the numerical calculations of the initial report was not going to testify as per plaintiffs' counsel on day one of trial. (Tr.V.1 72, 257)

Per their initial expert report July 9, 2018, which was attached to the joint pretrial memorandum, Moore was going to opine as to an estimate of overtime wages claimed owed. (Ex.V.1 60) In terms of process, expert first created a "regular rate" that came from the daily rate divided by 8, which would create a higher hourly wage than if he used actual hours worked and divided that into their day rate. Next, the expert then made an estimate of average weekly hours worked, took the number of hours above 40 and multiplied that figure by 1 ½ times the regular rate. The charts within the expert report for each plaintiff mirrored this process. (Ex.V.1 62, 163)

By looking at the chart relied upon by the plaintiffs until trial, and using Ms. Devaney as an example, there was 61 weeks between 9/22/2013 and

12/7/2014. The expert used the daily rate to create the hourly rate of 16.88 per hour. Then averaging 12.04 hours above 40 worked for those 61 weeks, the expert multiplied the 12.04 by 25.32, which is 1 ½ times the regular rate of 16.88 an hour. By using this formula, the expert ignored the important fact that each plaintiff was paid for each hour they worked, as it is uncontested that they were paid a daily rate for each day worked. (Ex.V.1 162)

Ignoring this uncontested fact essentially gives the plaintiffs a windfall because their damages should only be what they were not paid, which was the "one half" in the time and a half calculation. For Ms. Devaney, as an example, her total claimed damages of $34,732 in the initial expert report claimed the entire time and a half without regard of the fact they were paid their hourly wage already. Because they were paid two-thirds of their claimed damage, at most Ms. Devaney could only recover $11,577.33. And this figure was even created by using an inflated hourly "regular rate" because the daily rate was divided by 8 instead of the actual hours worked. (Ex.V.2 34-36)

Because triple damages sought by the plaintiffs

were a known factor in this case since its inception, this miscalculation by the expert would ultimately give the plaintiffs 9 times of what their sole evidence is of what was not paid in overtime, which was a combined $42,426.33.

Given that this was only a damages trial, this mistake ultimately forced this case to trial in a leverage play against someone who was compliant with Massachusetts law and someone who honored each wage commitment that each plaintiff had when he purchased the restaurant.

The fact that the plaintiffs' sole evidence leading into trial was from an expert concluding a clearly erroneous number ignoring the plaintiffs' own factual testimony that they were all already paid their hourly wages for each hour worked would and that they worked more than 8 hours a day, the defendants planned to rely on that mistake as a major part of their cross examination, defense at trial with damages as well as a justification to limit "reasonable" attorneys' fee should they be awarded. (Tr.V.1 212, 213) (Tr.V.2 234, 239) Simply put, if there was a finding that the plaintiffs were continuing the litigation in bad

faith, then there could have been an argument to mitigate or limit the putative damages of multiple damages and attorneys' fees.

At the start of trial, the plaintiffs asserted that the expert that made the mistake was not going to testify. (Tr.V.1 72, 257) After the judge determined the formula for damages, he then allowed the plaintiff to call the expert and actually directed the plaintiff on how the expert should testify. (Tr.V.2 116) The judge specifically allowed the plaintiffs to amend their report and opinion in the middle of trial. After being allowed to amend their report, counsel for the defendants specifically stated "Again, I object that I don't know what their numbers are on the fourth day of trial, so for the record, I object as to this." (Tr.V.2 135)

The judge then amazingly stated that in light of the fact that defense counsel "did not protest what you saw [in the original report], which we've now - which I've agreed is opaque, and the - so that the expert didn't really describe as near as I can tell, how he did the first step according to the law as I've interpreted it, which is to say the denominator is the

house actually worked." (Tr.V.2 135)

Over continual objections, the trial judge actually told plaintiff's counsel, in the middle of a damages trial, how she was to have the expert testify to justify having them change an "opinion". (Tr.V.2 116) The Judge said, "Since he didn't do that, and if that changes the numbers, I think you should re-do this report tonight." (Tr.V.2 135)

In response, on October 2, 2019, defendants' counsel stated his comprehensive objection on the record of the trial, which can be found in full withing the addendum to this brief as well as in the appellate record.

Anthony Gabinetti was eventually called to testify on the subject matter and opinions originally said to be in the province of Mr. Moore. (Ex.V.1 52-53) His new opinion was that Mr. Rueangjan's regular rate was calculated by dividing the weekly wages by an average amount of hours worked of 64 hours. (Tr.V.3 218) He came to the number of 64 hours a week under the assumption that he worked every single day, which is a total of 12 shifts or 6 full day rates (five full day shifts for Monday through Friday and one-half day

for each Saturday and Sunday) (Tr.V.2 259-262) Mr. Gabinetti then took the 24 hours above 40 hours a week and multiplied that by 1.5 of the regular rate and multiplied that figure by 81 weeks of work. This resulted in a damages claim of $45,927 for Mr. Rueangjan by the expert. (Tr.V.2 220)

For Ms. Devaney, the expert opined that there was $29,163 in overtime compensation owed. (Tr.V.2 226) For Ms. Wungnak, the expert testified that there was $25,984.24 owed in overtime wages. (Tr.V.2 228-229) The expert testified that his opinions were within "reasonable economic certainty". (Tr.V.2 229)

The expert testified that he created his opinion on October 1, 2019 and that he never attended trial prior to that date. He never spoke to one plaintiff and never testified in court before. The expert testified that he did not physically type the supplemental report even though the expert claimed at trial that he used new facts to justify his new opinion in the October 1 supplemental report, he could not testify as to any new fact that would justify the supplementation. According to the expert, the only difference between the two reports is how he tried to calculate damages

per the Fair Labor Standards Act. He did not amend his report based on trial testimony, which he did not hear at all. The expert then testified that his trial opinion was a lot lower than it was in the original 2018 report even though both were based on a "reasonable economic certainty" because he learned more about "federal law". (Tr.V.2 243-248)

In citing such extraordinary numbers of damages and being the only source for a damage figure offered at trial, the expert had no idea what each plaintiff testified to at trial as to the hours they worked each week. (Tr.V.2 55-56) His use of numbers did not account for any break time, vacation time, the days the restaurant were closed or Ms. Devaney's two trips to Thailand. (Tr.V.2 244) The expert did not rely on the actual kitchen schedule for his opinion. For instance, the expert he did not lower his average weekly figure of 64 hours that was based on the mistaken belief that Mr. Rueangjan worked all 12 weekly shifts when he learned that Mr. Rueangjan had every Thursday morning off. (Ex.V.3 29)(Tr.V.2 219)

For his conclusion relative to Ms. Wungnak, the expert assumed she worked all seven days, which is 12

separate units, which was not consistent with the plaintiff's own testimony as to her time. (Tr.V.2 262)

The eventual jury verdict was the natural consequence of the court's ruling that the plaintiffs' damage could not be reduced by uncontested testimony of the money already received by them when they worked for the defendant. (Tr.V.3 162-163) It was also the natural consequence that the plaintiffs were allowed to present expert testimony on the subject of damages after being given the specific direction on how the opinion should read. Such a trial by ambush clearly prejudiced the defendants ability to defend a case that was premised on a bad faith attempt to collect money while ignoring that 2/3 of the claim was already received.

Ultimately what occurred was that the Trial Judge allowed a clearly flawed expert opinion to be amended at trial. There was no need for an expert to testify as to a damages calculation, as running numbers through a determined formula is clearly within a jury's mental capability. But by allowing an "expert" to offer his math, and then allowing him to correct obvious flaws in the middle of trial, the defendants' chances to only pay

what was owed and to mitigate their damages was as much as destroyed.

The allowance of the amendment in the middle of trial gave approval to the expert's opinion in the eyes of the jury, even though the law in an expert opinion should be irrelevant. This proved to create an insurmountable hurdle for defendants who were forced for years into a trial that was predicated on a clearly flawed opinion. Such actions of the judge more than guaranteed a prejudicial result for the defendants.

V. By so instructing, Judge Wilson rendered moot the Massachusetts law relative to overtime compensation for restaurant workers

Our Supreme Judicial Court has said that "[a]lthough we give respectful consideration to such lower Federal court decisions as seem persuasive," "we are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law." Commonwealth v. Pon, 469 Mass. 296, 308 (2014). The Trial Court was not bound by the First Circuit's interpretation of Massachusetts law. Harrison v. Town of Mattapoisett, 78 Mass. App. Ct. 367, 372 (2010).

M.G.L. ch. 151, 1A was enacted after the Federal Fair Labor Standards Act (FLSA). And it has been said

that where "the language of a statute differs in material respects from a previously enacted analogous Federal statute which the Legislature appears to have considered, a decision to reject the legal standards embodied or implicit in the language of the Federal statute may be inferred". Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 630-31, (2019).

Here, applying stricter Massachusetts' penalties for a violation of federal law renders moot the legislative intent as made clear in the unambiguous language of G.L. ch. 151, s. 1A, which excludes these plaintiffs as restaurant workers to receive time and a half for overtime. G.L. ch. 151, s. 1A (14).

"Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008). Where statutory language is clear, Courts must give effect to the plain and ordinary meaning of the language "in light of the aim of the Legislature," unless to do so would produce an "absurd" or "illogical" result. Malloch v. Hanover, 472 Mass. 783, 788 (2015) *quoting* Sullivan v. Brookline, 435 Mass. 353, 360 (2001). "A statute or ordinance should not be construed in a way that produces absurd

or unreasonable results when a sensible construction is readily available; nor should an enactment be construed in such a way as to make a nullity of pertinent provisions. Manning v. Bos. Redevelopment Auth., 400 Mass. 444, 453 (1987)

Simply following state law even though these defendants are exempt from it does not consider the aim of the Massachusetts legislature. Here, the plaintiff is seeking the harsher Massachusetts penalties of triple damages and attorneys' fees for a violation of a federal statute. And while in some contexts such enforcement may be justified, such a result is inequitable and clearly contrary to our legislative intent because of the exclusion given by G.L. ch. 151, 1A. Because of this exclusion alone, the plaintiff should be limited to the damages available to it under the federal statute, which has its own penalty provisions, and which was found to be violated. To do otherwise would absolutely make irrelevant the exclusion in Massachusetts for restaurant owners.

It should be legally impossible to be found guilty under a statutory scheme of not timely paying wages that are not owed under the same statutory scheme.

The plaintiffs were clever in drafting their complaint seeking liability under federal law, but stronger penalties of Massachusetts statute. By allowing such an application, the Court did not reconcile the use of one statute to award damages for the violation of an entirely separate statute.

The clear intent of the Massachusetts legislature was expressed by its choice not to penalize restaurant owners for the same claims as present in this case. Because of that, the correct law of the case should be through federal law, and thereby giving full weight and credit to the Massachusetts legislature regarding overtime pay within the Massachusetts restaurant industry.

A man bought a restaurant that had a kitchen staff. The same man honored the agreements and salary obligations that existed when he purchased the place. He did not negotiate them or alter them in any way. Rather, he simply honored them. Massachusetts law excludes these plaintiffs from overtime requirements that have been claimed by the plaintiffs pursuant to M.G.L. ch. 151, s. 1A.

Summary judgment already determined that the plaintiffs were entitled to damages because of a violation of 29 U.S.C. s. 207 as alleged in Count I of the Amended

Complaint. Per 29 U.S.C. s. 216, the plaintiffs would be entitled to the overtime compensation they prove to have not been paid, and an additional equal amount as liquidated damages. Ultimately, the statute allows for those double damages if there is not a showing that the defendant acted in good faith and had reasonable grounds for believing that its acts did not violate statute. See Chao v. Hotel Oasis, Inc. 493, F.3d 26, 35 (1st Cir. 2007) *quoting* 29 U.S.C. 260. The plaintiffs could also be entitled to federally imposed liquidated damages, which would be double the damages found at trial. See Id.

The stricter state penalties should not apply to any case where a defendant is excluded. The claimed wrong was for not paying the correct rate for overtime wages earned by the plaintiffs in violation of federal law. The right to triple damages, costs and reasonable attorney's fees are from the application of M.G.L. ch. 149, s. 150.

However, every single reiteration of the court's and plaintiffs' proposed (and eventual) jury instructions included only federal law and not state law. Had state law been contemplated for the damages calculation, the same statute that the plaintiffs seek enforcement of

now also would allow evidence that could be construed as a set-off for underpaid overtime wages. The statute also states:

> On the trial no defense for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid.

Though allowable by the very statute now claiming to be used to provide damages, the defendant was not entitled to present anything in the form of a set off to the wages claimed owed, thereby further prejudicing the defendants. It is suggested that the moneys actually given to the plaintiffs which was their hourly rate for each hour worked should have been allowed to have been presented in order to set-off the claimed damages. Since the entire case was seen through the lens of federal law, no such defense was allowed to be given to the jury.

Because of the foregoing, there should be a legal determination that when an industry is specifically excluded from our state statute but the same behavior is non-compliant with federal law, that federal law be

the exclusive source of damages for any such liability.

VI. Whether there was sufficient evidence to support the jury finding of damages for each plaintiff.

Through their expert, the plaintiffs only presented evidence of the following damages: (a) Devaney suffered exactly $29,163 in damage (Tr.V.2 226) (2) Rueangjan suffered exactly $45,927 in damage; (Tr.V.2 220) and (3) Wungnak suffered exactly $25,984.24 in damage. (Tr.V.2 228-229) As such, the combined presented damages was $101,074.24

It cannot be disputed that each plaintiff was already paid for each hour worked as they all testified to as much. (Tr.V.1 344)(Tr.V.2 73, 183) As such, according to their own testimony, they each were paid two thirds of their eventually claimed damages. According to their own evidence, they were ***not*** actually paid when they worked for the defendants $9,721 for Devaney, $15,309 for Rueangjan and $8,661.41 for Wungnak. Therefore, the combined damages per their trial testimony was $33,691.41.

Had the plaintiffs used the correct law and applied their clients' own undisputed facts to that law since

the beginning of this dispute, this case does not go to trial. Given the teeth inherent in the laws against employers, there was no inherent desire for plaintiffs to settle prior to trial even though the plaintiffs' own expert was wrong throughout the entire action with the calculation of his opinion.

Throughout litigation, however, the plaintiffs had another theory of damages per their pretrial memorandum (Ex.V.1 45), their July 2018 expert opinion (Ex.V.2 32), and as reiterated in the final pretrial conference. The only number given by the plaintiffs as to what they claimed their actual damages were $61,236 for Mr. Rueangjan, 31,311 for Ms. Wungnak and $34,732 for Ms. Devaney. (Ex.V.2 36). Their total claimed damages, therefore, were $127,279. (Ex.V.2 36)

They purposefully calculated this number by inflating the hourly rate and then ignoring the fact that Mr. Rueangjan was paid $40,824 of that figure, Ms. Wungnak was paid $20,874 and Ms. Devaney already was paid $23,154.67. (Ex.V.2 36) In total, therefore, the plaintiffs only presented wages earned, but not received throughout all of litigation was $20,412 for Mr. Rueangjan, $10,437 for Ms. Wungnak and $11,577.33 for Ms. Devaney, or a combined $42,426.33.

Because of their litigation strategy, the plaintiffs were therefore seeking 9 times the uncontested unpaid portion of their overtime wages, which would equal $381,836.97 plus 12% interest and plus attorneys' fees. (Ex.V.1 49-50, 53-54)

The jury returned verdicts that had no support by the evidence and was greater than what was even asked for by the plaintiffs themselves. First of all, none of the plaintiffs testified as to what their claimed damages were. Not one number was offered, and the manner in which their guesswork was explained was cloudy at best. Nevertheless, they requested and were granted permission to offer a brand new expert theory as to their claimed damages in the middle of trial that was not based upon the trial evidence or testimony.

When the defendants were finally given the plaintiffs' claimed damages figures, there were clear faults with the expert's work. First, the expert offered numbers based on the assumptions that the plaintiffs never took a day or shift off, even though the plaintiffs themselves testified to the opposite. One of the plaintiffs, Devaney, actually took a month off from work and the expert included that time in her

damage figure. In other words, their "expert" who did not even listen to the clients' testimony on the very subject of his opinion, sought (and received) overtime damages at one and one half times an hourly rate for an entire month that the plaintiff even admitted to not even working.

Further, the jury instructions included the instruction that the "burden of proof is on the plaintiffs to show affirmatively the amount of damages that they are entitled to collect from the defendants."(Tr. 843) The only affirmative evidence to satisfy this burden of proof that was determined to lie outside the scope of the jury's experience was the expert testimony that Devaney was owed $29,163, Rueangjan was owed $45,927 and Wungnak was owed $25,984.24. The jury was not tasked and could not be tasked with performing any function of math as that was already determined to be in the purview of the expert, or else there would be no need for one.

Since July 2018, the plaintiffs sole evidence presented was that they were not paid $42,426.33. This was plaintiffs' case and because attorneys' fees and multiple damages were a part of their case, there was no inherent desire to consider any fault in that

opinion. Even with their initial claim of $127,279, all plaintiffs and the expert knew they were paid for each hour worked and that was already calculated within their regular rate.

Simply because the defendants believed in good faith that the law requires that a Court take into account what was owed as well as what was actually paid to them like any other contract case, this judgment ballooned to $548,982.21 for presented unpaid wages in the amount of $33,691.41. This result is the exact miscarriage of justice that the law should seek to avoid. (Ex.V.4 181-182) (Tr.V.2 220, 226, 228-229)

CONCLUSION

Because of the foregoing, the defendants respectfully request a determination as to the correct manner to calculate damages, a finding that federal law can only be used for liquidated damages, a determination that a new trial is compelled, and at that trial, evidence for the federal law of liquidation be allowed, and finally that if any hearing to determine reasonable attorneys' fees is allowed, that the Trial Court is able to consider whether or not the continuation of

litigation in bad faith or in error can reduce the attorneys' fees award.

Respectfully Submitted,
The Defendants/Appellants,
By Their Attorney,

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Dated: 5/13/21

Addendum to the Brief

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-2839

RUTCHADA DEVANEY and others[1]

vs.

ZUCCHINI GOLD, LLC and another[2]

ORDER AND JUDGMENT AFTER TRIAL

On October 4, 2019, a jury returned a verdict in this case concerning overtime pay. The jury found that Defendant Zucchini Gold, LLC and its president and owner, Defendant Intha, had violated the federal Fair Labor Standards Act, 29 U.S.C. § 207, by failing to pay overtime to the three Plaintiffs for their work in the kitchen of the restaurant owned and operated by Defendants. The jury awarded damages of $27,463.68 to Plaintiff Devaney; $46,768.65 to Plaintiff Rueangjan; and $40,265.68 to Plaintiff Wungnak.

Plaintiffs also sued Defendants under the Massachusetts Wage Act, G.L. c. 149, § 148. That statute requires that an employer (and certain of its officers, in this case including Defendant Intha) pay its employees their wages within strict time limits, long since passed in this case. More than a year before trial, Judge Ames granted summary judgment to Plaintiffs as to liability on that Wage Act claim. See Memorandum of Decision and Order on Plaintiff's Motion for Partial Summary Judgment dated June 7, 2018, at 6 ("Because the plaintiffs did not receive overtime compensation, there can be no genuine dispute that they did not receive all 'wages

[1] Thewakul Rueangjan and Thanyathon Wungnak

[2] Chalermpol Intha

JUDGMENT ENTERED ON DOCKET Dec 2 19
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

earned' in a timely manner. The defendants, therefore, also violated the Wage Act when they failed to pay the plaintiffs in accordance with the FLSA."). Left for trial was the determination of the amounts of unpaid overtime owed by Defendants to each Plaintiff. The jury's verdict has now supplied that information.

Under the Wage Act, employees deprived of timely payment of their wages are entitled to a mandatory award of treble damages, plus reasonable attorney's fees and costs. See G.L. c. 149, § 150. After the jury rendered its verdict on the FLSA claim, Plaintiffs' counsel sought entry of judgment under the Wage Act for three times the amounts awarded by the jury (plus costs and reasonable attorney's fees). Defendants' counsel argued that an award of treble damages is legally unjustified. After some discussion, at the request of Defendants' counsel, I set a briefing schedule for legal argument about the propriety of employing the state Wage Act to treble the damages awarded under the federal FLSA. Those briefs did not immediately reach my courtroom, but I have now received and reviewed them.

Treble Damages

Defendants argue that the Massachusetts overtime statute does not apply here because it specifically exempts from its coverage "any employee who is employed . . . in a restaurant." G.L. c. 151, § 1A(14). But Plaintiffs did not sue for overtime under state law. They brought their overtime claims under the federal FLSA, which does create a right to overtime for restaurant workers. Plaintiffs' only relevant state law claim was that Defendants violated the Wage Act by failing to pay them overtime wages, owed to them under federal law, on the strict schedule for the payment of all wages imposed by the Wage Act.

Defendants apparently believe that Plaintiffs are attempting to execute an end run around the Massachusetts overtime law by using federal law to collect overtime and then using the state law Wage Act to treble the overtime payments to which they were entitled under federal law. In so arguing, Defendants fail to deal with two legal realities.

First, Defendants ignore the law of the case. Judge Ames decided last year that Defendants' failure to pay overtime wages to Plaintiffs on the schedule required for the payment of wages violated the Wage Act. To adopt Defendants' position, I would have to undo that earlier decision in this case that Defendants are liable for violating the Wage Act.

Second, while neither party has pointed to any relevant decisions from the Massachusetts appellate courts, trial judges in both the Superior Court and the federal court have uniformly adopted the position of Plaintiffs, not Defendants, on the precise question at issue here. For example, in *Frost* v. *Malden/Dockside, Inc.*, 2017 Mass. Super. LEXIS 183 (Mass. Super. 2017) (Leibensperger, J.), Judge Leibensperger stated, "Thus, if the FLSA requires Defendants to pay premium pay for work more than 40 hours per week, the Wage Act may be used to enforce that obligation." *Id.* at *3. In support, Judge Leibensperger cited two federal district court decisions to the same effect. *Id.* at *2, discussing *Lambirth* v. *Adv. Auto, Inc.*, 140 F. Supp. 3d 108 (D. Mass. 2015) and *Carroca* v. *All Star Enters. & Collision Ctr., Inc.*, 2013 U.S. Dist. LEXIS 96913 (D. Mass. 2013). (Judge Ames also cited these two federal cases in her summary judgment ruling that Defendants violated the Wage Act.)

Lambirth is particularly relevant here. In that case, Judge Hillman (himself a former Superior Court judge) defined "the disputed issue [as] whether the Wage Act can be used as a means of collecting treble damages for unpaid overtime wages due under federal law." 104 F. Supp. 3d at 111. After discussing the legislative intent behind the Wage Act at some length,

Judge Hillman concluded that the answer to this question is "yes": "The above-cited decisions, and a close reading of the Wage Act, lead to the conclusion that the statute applies to the untimely payment of all wages to which an employee is entitled under either state or federal law." *Id.* at 112.

I now join Judge Leibensperger, Judge Hillman, and other state and federal trial judges – including Judge Ames, in this very case -- in reaching the same conclusion. Having established their entitlement to single damages under the FLSA at trial, Plaintiffs are entitled to have those single damages trebled for Plaintiff's failure to pay those amounts when due under the Wage Act.

Attorney's Fees

Plaintiffs have filed a petition for attorney's fees and costs. Defendants' primary response to that petition is to complain that "Plaintiffs and their attorneys caused this litigation to go as long as it has as they always demanded three times damages as their single damage," Defendants' Response to Plaintiffs' Request for Attorney Fees at 4, and then made their damages number a moving target. Defendants ignore the fact that Plaintiffs were in fact entitled to treble damages, as I rule above. As for the moving target, Defendants are not in a position to complain that "no Plaintiff was able to give a number of their damages at trial," *id.* at 3, given that Defendants maintained so few employment records that they arguably violated their legal requirements to maintain such records.

After several pages of argument that Plaintiffs "should not be rewarded for their own frivolous litigation," *id.* at 5, and that the attorney's fee provision in the Wage Act is a "giant legal loophole," *id.* at 3, Defendants spend one paragraph "looking at [Plaintiffs'] submissions"

in the petition for fees and costs. *Id.* at 5-6. In that paragraph, Defendants level three specific criticisms concerning attorney's fees: that two attorneys were used where only one was needed; that the "submissions are filled with unverifiable work," *id.* at 5; and that Attorney May billed for travel time to and from court. As for costs, there is only one criticism, that Plaintiffs seek almost $9,000 in fees for expert witnesses "when they were not even going to be called at trial." *Id.*

Defendants do not point to any particular entry in Plaintiffs' submission as an example of double-teaming an event where one attorney would have been sufficient, or of "unverifiable work," or of charges for travel time. This forces me to engage in a level of review of the fee petition that Defendants apparently chose not to do themselves. But that is my responsibility anyway, because the statute requires me to award only "reasonable" fees and costs.

A trial judge "typically 'is in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorney's services.'" *Killeen* v. *Westban Hotel Venture, LP*, 69 Mass. App. Ct. 784, 790 (2007), quoting *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 324 (1993). For that reason, the trial judge has considerable discretion in determining the size of a reasonable attorney's fee. *Berman* v. *Linnane*, 434 Mass. 301, 302-303 (2001); *DiMarzo* v. *American Mut. Ins. Co.*, 389 Mass. 85, 106 (1983).

All of the itemized legal bills are before me. I have reviewed them generally, keeping an eye out for instances that fall into the categories criticized by Defendants. However, I "'need not, and indeed should not, become [a] green-eyeshade accountant' in determining what amount of attorney's fees is reasonable in a particular case." *Parker* v. *EnerNOC, Inc.*, 2018 Mass. Super. LEXIS 97, *7-8 (Mass. Super. 2018) (Salinger, J.), quoting *Fox* v. *Vice*, 563 US 826, 838 (2011). Thus I am not required, or even expected, to review each entry on legal bills totaling

hundreds of thousands of dollars. *Twin Fires Inv., LLC* v. *Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 431 (2005).

In my review, I have applied the familiar lodestar analysis. I have considered "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979). A judge is not required to perform a factor-by-factor analysis, and no one factor is determinative. *Twin Fires*, 445 Mass. at 430. I conclude, on the basis of that general lodestar review, that the award I make below is fully justified.

This case involved some complex issues. In particular, as I noted above, there is no Massachusetts appellate authority on the use of the state Wage Act to enforce, by treble damages, an overtime violation of the federal Fair Labor Standards Act. Furthermore, the parties litigated the question of whether unpaid overtime damages constituted 1½ times the overtime hours worked or merely ½ times those hours (on the theory that Plaintiffs had already been paid straight time for those hours). This is a complex issue, over which Defendants fought long and hard. Plaintiffs ultimately prevailed.

The tasks performed by Plaintiffs' counsel in this case generally were appropriate. To the extent I understand what Defendants mean by "unverifiable work," I saw nothing in these bills to support that criticism. The time devoted to the tasks performed was, if anything, conservative. The need to employ interpreters in their dealings with their clients, two trial witnesses, and perhaps others, may have justifiably caused counsel to expend more hours than would otherwise be necessary. In addition, Defendants' failure to maintain, and therefore to

produce in discovery,[3] adequate employment records also complicated the case for Plaintiffs' counsel.

The jury awarded single damages of a total of more than $114,000, a considerable amount, particularly considering the relatively low wage rates that Defendants paid Plaintiffs. Many more dollars than that were involved in this case, however, because of the possibility, now realized, that Plaintiffs would collect treble damages and attorney's fees. That Plaintiffs' counsel obtained a very good result for Plaintiffs is not debatable. Furthermore, counsel obtained a real estate attachment in the amount of $300,000 near the outset of this case to secure the ultimate judgment in favor of Plaintiffs.

From my observation of counsel at trial, and from my review of affidavits submitted by prominent plaintiff-side employment attorneys in support of the fee petition, I conclude that the rates charged for the time of Plaintiffs' two attorneys – $400 per hour for Ms. May and $375 per hour for Mr. Levey – are appropriate.

The bills submitted by Plaintiffs show that counsel has decided not to seek reimbursement for about 30 hours of time. My review of the bills shows that those uncompensated hours were for making filings, sending emails, informing the court and Defendants of a change of address, and the like. Those deductions are appropriate, and perhaps even generous.

I have looked for occasions where both lawyers billed for what one lawyer might have done by herself. Those few instances I could find were perfectly appropriate. As one example,

[3] In one particularly telling moment at trial, Defendant Intha surprised even his own lawyers by testifying that he had some employment records in a desk drawer at work, which he had never shown his lawyers, much less produced in discovery to Plaintiffs. I ordered him and his counsel to produce those records to Plaintiffs that evening. Apparently deciding that they had not been prejudiced, Plaintiffs did not press the issue further.

Attorney Levey expended 1.3 hours on September 24, 2018 reviewing Attorney May's opening statement with her while she was preparing it. Obtaining a critique by a second lawyer of this important facet of the trial is a professionally responsible thing to do.

I did find that Attorney May, but not Attorney Levey, charged for travel to and from court (and to and from depositions, an item about which Defendants did not complain). I find no fault with this commonplace practice, but "when a party other than the one who hired the lawyer is required to pay the fee, conservative criteria are in order." *City Rentals, LLC* v. *BBC Co.*, 79 Mass. App. Ct. 559, 567 (2011), quoting *Price* v. *Cole*, 31 Mass. App. Ct. 1, 7 (1991). With no assistance from Defendants, I spotted about 15 hours of such travel charges, and I will therefore reduce the requested fee award by $6,000.

The only objection to costs raised by Defendants is to the expert witness fees of $8,800 (a voluntary reduction from the $9,750 actually incurred). Plaintiffs identified two experts, who worked at the same firm, but only one of them testified. The other expert was available in the courtroom at Defendants' request, however, in case Defendants wished to call him to cross-examine him, a course of action Defendants ultimately did not choose. Nonetheless, because only one expert testified, I will reduce the requested expert witness cost by 50% and award only $4,400.

In sum, then, I award $188,965 in reasonable attorney's fees and $11,404.18 in costs, for a total of $200,369.18.

Order for Judgment

FINAL JUDGMENT IS TO ENTER in favor of Plaintiff Rutchada Devaney, and against Defendants Zucchini Gold, LLC and Chalermpol Intha, jointly and severally, in the

amount of $82,391.04 (which is three times the single damages awarded by the jury of $27,463.68) plus prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus attorney's fees and costs of $66,789.72 (which is one-third of the reasonable attorney's fees and costs that I award above);

FINAL JUDGMENT IS TO ENTER in favor of Plaintiff Thewakul Rueangjan, and against Defendants Zucchini Gold, LLC and Chalermpol Intha, jointly and severally, in the amount of $140,305.95 (which is three times the single damages awarded by the jury of $46,768.65) plus prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus attorney's fees and costs of $66,789.72 (which is one-third of the reasonable attorney's fees and costs that I award above);

FINAL JUDGMENT IS TO ENTER in favor of Plaintiff Thanyathon Wungnak, and against Defendants Zucchini Gold, LLC and Chalermpol Intha, jointly and severally, in the amount of $120,797.04 (which is three times the single damages awarded by the jury of $40,265.68) plus prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus attorney's fees and costs of $66,789.72 (which is one-third of the reasonable attorney's fees and costs that I award above.)

Paul D. Wilson
Justice of the Superior Court

November 27, 2018

01/22V

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-2839

Notified 01.22.2020 (NJ)
TLG/F.T.
HJ/C.F.H.
BBB/E.R.L./M.C.M./C.L.

RUTCHADA DEVANEY and others[1]

vs.

ZUCCHINI GOLD, LLC and another[2]

ORDER ON: (1) DEFENDANT'S' POSTTRIAL MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO MASS. R. CIV. P 59(e) AND FOR REMITTITUR, and (2) PLAINTIFFS' CROSS-MOTION FOR SUPPLEMENTAL AWARD OF ATTORNEY'S FEES AND COSTS

On October 4, 2019, a jury returned a verdict in this case concerning overtime pay. The jury found that Defendant Zucchini Gold, LLC and its president and owner, Defendant Intha, had violated the federal Fair Labor Standards Act, 29 U.S.C. § 207, by failing to pay overtime to the three Plaintiffs for their work in the kitchen of the restaurant owned and operated by Defendants. The jury awarded damages of $27,463.68 to Plaintiff Devaney; $46,768.65 to Plaintiff Rueangjan; and $40,265.68 to Plaintiff Wungnak. On November 27, 2019, after posttrial briefing concerning treble damages and attorney's fees, I ordered the entry of judgment in favor of each Plaintiff in specific amounts, and judgment entered in those amounts on December 2, 2019. Defendants have now moved to alter or amend the judgment because of an error concerning the calculation of prejudgment interest, and for remittitur. Plaintiffs have cross-moved for a supplemental award of attorney's fees and costs.

[1] Thewakul Rueangjan and Thanyathon Wungnak

[2] Chalermpol Intha

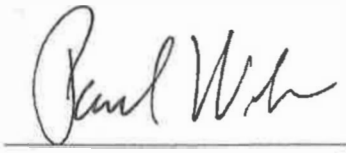
Defendants' motion is **ALLOWED** as to the amendment of the prejudgment interest calculation in the judgment. The parties agree that prejudgment interest should be calculated only on the single damages, not on three times those damages. See *George* v. *Nat'l Water Main Cleaning Co.*, 477 Mass. 371, 381 (2017) (clarifying that, where damages are automatically trebled, prejudgment interest should be assessed only on the single damages, not the treble damages). Therefore I **DIRECT** that the clerk recalculate the prejudgment statutory interest from September 21, 2015 on the amount of single damages awarded by the jury, namely the $27,463.68 awarded to Plaintiff Devaney, the $46,768.65 awarded to Plaintiff Rueangjan, and the $40,265.68 awarded to Plaintiff Wungnak.

Defendants' motion is **DENIED** as to the request for remittitur. As Defendants concede, see Defendants' Posttrial Motion at 2, I can disturb the jury verdict only if "the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice." *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 824 (1997). Defendants argue that the amounts that the jury awarded to the Plaintiffs were completely unsupported by the evidence and therefore the standard was met. I disagree, for the reasons cited in Plaintiffs' Partial Opposition.

Plaintiffs have cross-moved for a supplemental award of attorney's fees and costs, totaling $5119.03. Defendants inaccurately suggest that all of this expense was incurred in opposing the current motion. However, some of this request actually covers counsel's work in connection with the earlier post-trial briefing, performed after the cut-off date for the last request for attorney's fees. I have reviewed Attorney May's affidavit, and the attached billing detail, and conclude that these fees are reasonable. Therefore I **ALLOW** this cross-motion. As a consequence, I **DIRECT** that the clerk add an additional $5119.03 to the attorney's fees awarded in the earlier judgment.

Order for Judgment

The judgment entered on December 2, 2019 is to be amended, by the recalculation of prejudgment interest and the addition of attorney's fees, both as described above.



Paul D. Wilson
Justice of the Superior Court

January 16, 2020

51

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

TRIAL COURT
SUPER COURT DIV.

RUTCHADA DEVANEY, THEWAKUL RUEANGJAN, and THANYATHON WUNGNAK,

Plaintiffs,

v.

ZUCCHINI GOLD, LLC, d/b/a RICE BARN, AND CHALERMPOL INTHA,

Defendants.

C.A. No. 15-2839-F

[redacted] **AMENDED JUDGMENT ON JURY VERDICT**

(T.w.)

This action came on for trial before the Court and a jury, Paul D. Wilson, Justice presiding, the issues having been duly tried and the jury having rendered its verdict, it is hereby

ORDERED and ADJUDGED:

FINAL JUDGMENT IS TO ENTER in favor of the Plaintiff, RUTCHADA DEVANEY, and against Defendants, ZUCCHINI GOLD, LLC, and CHALERMPOL INTHA, jointly and severally, in the amount of (a) **$27,463.68**, as single damages, plus prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus (b) treble damages of **$54,927.36** and (c) attorney's fees and costs of **$68,496.06** (which is one-third of the reasonable attorneys' fees and costs awarded by this Court);

FINAL JUDGMENT IS TO ENTER in favor of the Plaintiff, THEWAKUL RUEANGJAN, and against Defendants, ZUCCHINI GOLD, LLC, and CHALERMPOL INTHA, jointly and severally, in the amount of (a) **$46,768.65**, as single damages, plus

JUDGMENT ENTERED ON DOCKET 5/31/20
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus (b) treble damages **$93,537.30** and (c) attorney's fees and costs of **$68,496.06** (which is one-third of the reasonable attorneys' fees and costs awarded by this Court); and

FINAL JUDGMENT IS TO ENTER in favor of the Plaintiff, THANYATHON WUNGNAK, and against Defendants, ZUCCHINI GOLD, LLC, and CHALERMPOL INTHA, jointly and severally, in the amount of (a) **$40,265.68**, as single damages, plus prejudgment statutory interest from September 21, 2015 (to be calculated by the clerk), plus (b) treble damages **$80,531.36** and (c) attorney's fees and costs of **$68,496.06** (which is one-third of the reasonable attorneys' fees and costs awarded by this Court).

Dated at Boston, Massachusetts this 22 day of January 2020:

BY: Timothy Walsh, Assistant Clerk

Entered: _____
Copies Mailed: _____

for violation of this section occurring before Apr. 15, 1986, see section 7 of Pub. L. 99–150, set out as a note under section 216 of this title.

INAPPLICABILITY TO NORTHERN MARIANA ISLANDS

Pursuant to section 503(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands with the United States of America, as set forth in Pub. L. 94–241, Mar. 24, 1976, 90 Stat. 263, set out as a note under section 1801 of Title 48, Territories and Insular Possessions, this section is inapplicable to the Northern Mariana Islands.

RULES, REGULATIONS, AND ORDERS PROMULGATED WITH REGARD TO 1966 AMENDMENTS

Secretary authorized to promulgate necessary rules, regulations, or orders on and after the date of the enactment of Pub. L. 89–601, Sept. 23, 1966, with regard to the amendments made by Pub. L. 89–601, see section 602 of Pub. L. 89–601, set out as a note under section 203 of this title.

CONGRESSIONAL FINDING AND DECLARATION OF POLICY

Pub. L. 88–38, § 2, June 10, 1963, 77 Stat. 56, provided that:

"(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

"(1) depresses wages and living standards for employees necessary for their health and efficiency;

"(2) prevents the maximum utilization of the available labor resources;

"(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

"(4) burdens commerce and the free flow of goods in commerce; and

"(5) constitutes an unfair method of competition.

"(b) It is hereby declared to be the policy of this Act [amending this section, and enacting provisions set out as notes under this section], through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries."

DEFINITION OF "ADMINISTRATOR"

The term "Administrator" as meaning the Administrator of the Wage and Hour Division, see section 204 of this title.

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

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—

(1) 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

(2) 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; or

(3) 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.

(c), (d) Repealed. Pub. L. 93–259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums[1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a),[2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole

[1] So in original. Probably should not be capitalized.

[2] So in original. The comma probably should be preceded by a closing parenthesis.

discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28

days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(*l*) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(*o*) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employ-

ment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher[3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

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 basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide—

[3] So in original. Probably should be followed by a period.

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

(June 25, 1938, ch. 676, §7, 52 Stat. 1063; Oct. 29, 1941, ch. 461, 55 Stat. 756; July 20, 1949, ch. 352, §1, 63 Stat. 446; Oct. 26, 1949, ch. 736, §7, 63 Stat. 912; Pub. L. 87–30, §6, May 5, 1961, 75 Stat. 69; Pub. L. 89–601, title II, §§204(c), (d), 212(b), title IV, §§401–403, Sept. 23, 1966, 80 Stat. 835–837, 841, 842; Pub. L. 93–259, §§6(c)(1), 7(b)(2), 9(a), 12(b), 19, 21(a), Apr. 8, 1974, 88 Stat. 60, 62, 64, 66, 68; Pub. L. 99–150, §§2(a), 3(a)–(c)(1), Nov. 13, 1985, 99 Stat. 787, 789; Pub. L. 101–157, §7, Nov. 17, 1989, 103 Stat. 944; Pub. L. 104–26, §2, Sept. 6, 1995, 109 Stat. 264; Pub. L. 106–202, §2(a), (b), May 18, 2000, 114 Stat. 308, 309; Pub. L. 111–148, title IV, §4207, Mar. 23, 2010, 124 Stat. 577.)

REFERENCES IN TEXT

The Fair Labor Standards Amendments of 1966, referred to in subsec. (a)(2), is Pub. L. 89–601, Sept. 23, 1966, 80 Stat. 830. For complete classification of this Act to the Code, see Short Title of 1966 Amendment note set out under section 201 of this title and Tables.

The effective date of the Fair Labor Standards Amendments of 1966, referred to in subsec. (a)(2)(A), means the effective date of Pub. L. 89–601, which is Feb. 1, 1967 except as otherwise provided, see section 602 of Pub. L. 89–601, set out as an Effective Date of 1966 Amendment note under section 203 of this title.

Section 6(c)(3) of the Fair Labor Standards Amendments of 1974, referred to in subsec. (k)(1), is Pub. L. 93–259, §6(c)(3), Apr. 8, 1974, 88 Stat. 61, which is set out as a note under section 213 of this title.

AMENDMENTS

2010—Subsec. (r). Pub. L. 111–148 added subsec. (r).

2000—Subsec. (e)(8). Pub. L. 106–202, §2(a), added par. (8).

Subsec. (h). Pub. L. 106–202, §2(b), designated existing provisions as par. (2) and added par. (1).

1995—Subsec. (*o*)(6), (7). Pub. L. 104–26 added par. (6) and redesignated former par. (6) as (7).

1989—Subsec. (q). Pub. L. 101–157 added subsec. (q).

1985—Subsec. (*o*). Pub. L. 99–150, §2(a), added subsec. (*o*).

Subsec. (p). Pub. L. 99–150, §3(a)–(c)(1), added subsec. (p).

1974—Subsec. (c). Pub. L. 93–259, §19(a), (b), substituted "seven workweeks" for "ten workweeks", "ten workweeks" for "fourteen workweeks" and "forty-eight hours" for "fifty hours" effective May 1, 1974. Pub. L. 93–259, §19(c), substituted "five workweeks" for "seven workweeks" and "seven workweeks" for "ten workweeks" effective Jan. 1, 1975. Pub. L. 93–259, §19(d), substituted "three workweeks" for "five workweeks" and "five workweeks" for "seven workweeks" effective Jan. 1, 1976. Pub. L. 93–259, §19(e), repealed subsec. (c) effective Dec. 31, 1976.

Subsec. (d). Pub. L. 93–259, §19(a), (b), substituted "seven workweeks" for "ten workweeks", "ten workweeks" for "fourteen workweeks" and "forty-eight hours" for "fifty hours" effective May 1, 1974. Pub. L. 93–259, §19(c), substituted "five workweeks" for "seven workweeks" and "seven workweeks" for "ten workweeks" effective Jan. 1, 1975. Pub. L. 93–259, §19(d), substituted "three workweeks" for "five workweeks" and "five workweeks" for "seven workweeks" effective Jan. 1, 1976. Pub. L. 93–259, §19(e), repealed subsec. (d) effective Dec. 31, 1976.

Subsec. (j). Pub. L. 93–259, §12(b), extended provision excepting from being considered a subsec. (a) violation agreements or undertakings between employers and employees respecting consecutive work period and overtime compensation to agreements between employers engaged in operation of an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises and employees respecting consecutive work period and overtime compensation.

Subsec. (k). Pub. L. 93–259, §6(c)(1)(D), effective Jan. 1, 1978, substituted in par. (1) "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975" for "exceed 216 hours" and inserted in par. (2) "(or if lower, the number of hours referred to in clause (B) of paragraph (1))".

Pub. L. 93–259, §6(c)(1)(C), substituted "216 hours" for "232 hours", wherever appearing, effective Jan. 1, 1977.

Pub. L. 93–259, §6(c)(1)(B), substituted "232 hours" for "240 hours", wherever appearing, effective Jan. 1, 1976.

Pub. L. 93–259, §6(c)(1)(A), added subsec. (k), effective Jan. 1, 1975.

Subsec. (*l*). Pub. L. 93–259, §7(b)(2), added subsec. (*l*).

Subsec. (m). Pub. L. 93–259, §9(a), added subsec. (m).

Subsec. (n). Pub. L. 93–259, §21(a), added subsec. (n).

1966—Subsec. (a). Pub. L. 89–601, §401, retained provision for 40-hour workweek and compensation for employment in excess of 40 hours at not less than one and one-half times the regular rate of pay and substituted provisions setting out a phased timetable for the workweek in the case of employees covered by the overtime provisions for the first time under the Fair Labor Standards Amendments of 1966 beginning at 44 hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966, 42 hours during the second year from such date, and 40 hours after the expiration of the second year from such date, for provisions giving a phased timetable for workweeks in the case of employees first covered under the provisions of the Fair Labor Standards Amendments of 1961.

Subsec. (b)(3). Pub. L. 89–601, §212(b), substituted provisions granting an overtime exemption for petroleum distribution employees if they receive compensation for the hours of employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the applicable minimum wage rate and if the enterprises do an annual gross sales volume of less than $1,000,000, if more than 75 per centum of such enterprise's annual dollar volume of sales is made within the state in which the enterprise is located, and not more than 25 per centum of the annual dollar volume is to customers who are engaged in the bulk distribution of such products for resale for provisions covering employees for a period of not more than 14 workweeks in the aggregate in any calendar year in an industry found to be of a seasonal nature.

Subsec. (c). Pub. L. 89–601, §204(c), substituted provisions for an overtime exemption of 10 weeks in any calendar year or 14 weeks in the case of an employer not

qualifying for the exemption in subsec. (d) of this section, limited to 10 hours a day and 50 hours a week, applicable to employees employed in seasonal industries which are not engaged in agricultural processing, for provisions granting a year-round unlimited exemption applicable to employees of employers engaged in first processing of milk into dairy products, cotton compressing and ginning, cottonseed processing, and the processing of certain farm products into sugar, and granting a 14-week unlimited exemption applicable to employees of employers engaged in first processing of perishable or seasonal fresh fruits or vegetables first processing within the area of production of any agricultural commodity during a seasonal operation, or the handling or slaughtering of livestock and poultry.

Subsec. (d). Pub. L. 89–601, §204(c), added subsec. (d). Former subsec. (d) redesignated (e).

Subsecs. (e), (f). Pub. L. 89–601, §204(d)(1), redesignated former subsecs. (d) and (e) as (e) and (f) respectively. Former subsec. (f) redesignated (g).

Subsecs. (g), (h). Pub. L. 89–601, §204(d)(1), (2), redesignated former subsecs. (f) and (g) as subsecs. (g) and (h) respectively, and in subsecs. (g) and (h) as so redesignated, substituted reference to "subsection (e)" for reference to "subsection (d)." Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 89–601, §§204(d)(1), 402, redesignated former subsec. (h) as (i) and inserted provision that, in determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

Subsec. (j). Pub. L. 89–601, §403, added subsec. (j).

1961—Subsec. (a). Pub. L. 87–30, §6(a), designated existing provisions as par. (1), inserted "in any workweek", and added par. (2).

Subsec. (b)(2). Pub. L. 87–30, §6(b), substituted "in excess of the maximum workweek applicable to such employee under subsection (a)" for "in excess of forty hours in the workweek".

Subsec. (d)(5), (7). Pub. L. 87–30, §6(c), (d), substituted "in excess of the maximum workweek applicable to such employee under subsection (a)" for "forty in a workweek" in par. (5) and "the maximum workweek applicable to such employee under subsection (a)" for "forty hours" in par. (7).

Subsec. (e). Pub. L. 87–30, §6(e), substituted "the maximum workweek applicable to such employee under subsection (a)", "subsection (a) or (b) of section 206 of this title (whichever may be applicable" and "such maximum" for "forty hours", "section 206(a) of this title" and "forty in any", respectively.

Subsec. (f). Pub. L. 87–30, §6(f), substituted "the maximum workweek applicable to such employee under subsection" for "forty hours" in two places.

Subsec. (h). Pub. L. 87–30, §6(g), added subsec. (h).

1949—Subsec. (a). Act Oct. 26, 1949, continued requirement that employment in excess of 40 hours in a workweek be compensated at rate not less than 1½ times regular rate except as to employees specifically exempted.

Subsec. (b)(1). Act Oct. 26, 1949, increased employment period limitation from one thousand hours to one thousand and forty hours in semi-annual agreements.

Subsec. (b)(2). Act Oct. 26, 1949, increased employment period limitation from two thousand and eighty hours to two thousand two hundred and forty hours in annual agreements, fixed minimum and maximum guaranteed employment periods, and provided for overtime rate for hours worked in excess of the guaranty.

Subsec. (c). Act Oct. 26, 1949, added buttermilk to commodities listed for first processing.

Subsec. (d). Act Oct. 26, 1949, struck out former subsec. (d) and inserted a new subsec. (d) defining regular rate with certain specified types of payments excepted.

Subsec. (e) added by act July 20, 1949, and amended by act Oct. 26, 1949, which determined compensation to be paid for irregular hours of work.

Subsecs. (f) and (g). Act Oct. 26, 1949, added subsecs. (f) and (g).

1941—Subsec. (b)(2) amended by act Oct. 29, 1941.

EFFECTIVE DATE OF 2000 AMENDMENT

Pub. L. 106–202, §2(c), May 18, 2000, 114 Stat. 309, provided that: "The amendments made by this section [amending this section] shall take effect on the date that is 90 days after the date of enactment of this Act [May 18, 2000]."

EFFECTIVE DATE OF 1995 AMENDMENT

Pub. L. 104–26, §3, Sept. 6, 1995, 109 Stat. 265, provided that: "The amendments made by section 2 [amending this section] shall apply after the date of the enactment of this Act [Sept. 6, 1995] and with respect to actions brought in a court after the date of the enactment of this Act."

EFFECTIVE DATE OF 1985 AMENDMENT

Amendment by Pub. L. 99–150 effective Apr. 15, 1986, see section 6 of Pub. L. 99–150, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Pub. L. 93–259, §6(c)(1)(A)–(D), Apr. 8, 1974, 88 Stat. 60, provided that the amendments made by that section are effective Jan. 1, 1975, 1976, 1977, and 1978, respectively.

Amendment by sections 7(b)(2), 9(a), 12(b), 19(a), (b), and 21(a) of Pub. L. 93–259 effective May 1, 1974, see section 29(a) of Pub. L. 93–259, set out as a note under section 202 of this title.

Pub. L. 93–259, §19(c)–(e), Apr. 8, 1974, 88 Stat. 66, provided that the amendments and repeals made by subsecs. (c), (d), and (e) of section 19 are effective Jan. 1, 1975, Jan. 1, 1976, and Dec. 31, 1976, respectively.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–601 effective Feb. 1, 1967, except as otherwise provided, see section 602 of Pub. L. 89–601, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Amendment by Pub. L. 87–30 effective upon expiration of one hundred and twenty days after May 5, 1961, except as otherwise provided, see section 14 of Pub. L. 87–30, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see section 16(a) of act Oct. 26, 1949, set out as a note under section 202 of this title.

REGULATIONS

Pub. L. 106–202, §2(e), May 18, 2000, 114 Stat. 309, provided that: "The Secretary of Labor may promulgate such regulations as may be necessary to carry out the amendments made by this Act [amending this section]."

TRANSFER OF FUNCTIONS

Functions of all other officers of Department of Labor and functions of all agencies and employees of that Department, with exception of functions vested by Administrative Procedure Act (now covered by sections 551 et seq. and 701 et seq. of Title 5, Government Organization and Employees) in hearing examiners employed by Department, transferred to Secretary of Labor, with power vested in him to authorize their performance or performance of any of his functions by any of those officers, agencies, and employees, by Reorg. Plan No. 6 of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5.

APPLICABILITY; LIABILITY OF EMPLOYERS

Pub. L. 110–244, title III, §306, June 6, 2008, 122 Stat. 1620, provided that:

"(a) APPLICABILITY FOLLOWING THIS ACT.—Beginning on the date of enactment of this Act [June 6, 2008], section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply to a covered employee notwithstanding section 13(b)(1) of that Act (29 U.S.C. 213(b)(1)).

"(b) LIABILITY LIMITATION FOLLOWING SAFETEA-LU.—

"(1) LIMITATION ON LIABILITY.—An employer shall not be liable for a violation of section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) with respect to a covered employee if—

"(A) the violation occurred in the 1-year period beginning on August 10, 2005; and

"(B) as of the date of the violation, the employer did not have actual knowledge that the employer was subject to the requirements of such section with respect to the covered employee.

"(2) ACTIONS TO RECOVER AMOUNTS PREVIOUSLY PAID.—Nothing in paragraph (1) shall be construed to establish a cause of action for an employer to recover amounts paid before the date of enactment of this Act [June 6, 2008] in settlement of, in compromise of, or pursuant to a judgment rendered regarding a claim or potential claim based on an alleged or proven violation of section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) occurring in the 1-year period referred to in paragraph (1)(A) with respect to a covered employee.

"(c) COVERED EMPLOYEE DEFINED.—In this section, the term 'covered employee' means an individual—

"(1) who is employed by a motor carrier or motor private carrier (as such terms are defined by section 13102 of title 49, United States Code, as amended by section 305);

"(2) whose work, in whole or in part, is defined—

"(A) as that of a driver, driver's helper, loader, or mechanic; and

"(B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles—

"(i) designed or used to transport more than 8 passengers (including the driver) for compensation;

"(ii) designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or

"(iii) used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of title 49, United States Code, and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103 of title 49, United States Code; and

"(3) who performs duties on motor vehicles weighing 10,000 pounds or less."

LIABILITY OF EMPLOYERS

Pub. L. 106–202, §2(d), May 18, 2000, 114 Stat. 309, provided that: "No employer shall be liable under the Fair Labor Standards Act of 1938 [29 U.S.C. 201 et seq.] for any failure to include in an employee's regular rate (as defined for purposes of such Act) any income or value derived from employer-provided grants or rights obtained pursuant to any stock option, stock appreciation right, or employee stock purchase program if—

"(1) the grants or rights were obtained before the effective date described in subsection (c) [set out as an Effective Date of 2000 Amendment note above];

"(2) the grants or rights were obtained within the 12-month period beginning on the effective date described in subsection (c), so long as such program was in existence on the date of enactment of this Act [May 18, 2000] and will require shareholder approval to modify such program to comply with section 7(e)(8) of the Fair Labor Standards Act of 1938 [29 U.S.C. 207(e)(8)] (as added by the amendments made by subsection (a)); or

"(3) such program is provided under a collective bargaining agreement that is in effect on the effective date described in subsection (c)."

COMPENSATORY TIME; COLLECTIVE BARGAINING AGREEMENTS IN EFFECT ON APRIL 15, 1986

Pub. L. 99–150, §2(b), Nov. 13, 1985, 99 Stat. 788, provided that: "A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(*o*) of the Fair Labor Standards Act of 1938 (as added by subsection (a)) [29 U.S.C. 207(*o*)]."

DEFERMENT OF MONETARY OVERTIME COMPENSATION

Pub. L. 99–150, §2(c)(2), Nov. 13, 1985, 99 Stat. 789, provided that a State, political subdivision of a State, or interstate governmental agency could defer until Aug. 1, 1986, the payment of monetary overtime compensation under this section for hours worked after Apr. 14, 1986.

EFFECT OF AMENDMENTS BY PUBLIC LAW 99–150 ON PUBLIC AGENCY LIABILITY RESPECTING ANY EMPLOYEE COVERED UNDER SPECIAL ENFORCEMENT POLICY

Amendment by Pub. L. 99–150 not to affect liability of certain public agencies under section 216 of this title for violation of this section occurring before Apr. 15, 1986, see section 7 of Pub. L. 99–150, set out as a note under section 216 of this title.

RULES, REGULATIONS, AND ORDERS PROMULGATED WITH REGARD TO 1966 AMENDMENTS

Secretary authorized to promulgate necessary rules, regulations, or orders on and after the date of the enactment of Pub. L. 89–601, Sept. 23, 1966, with regard to the amendments made by Pub. L. 89–601, see section 602 of Pub. L. 89–601, set out as a note under section 203 of this title.

STUDY BY SECRETARY OF LABOR OF EXCESSIVE OVERTIME

Pub. L. 89–601, title VI, §603, Sept. 23, 1966, 80 Stat. 844, directed Secretary of Labor to make a complete study of practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impeded the creation of new job opportunities in American industry and instructed him to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations.

EX. ORD. NO. 9607. FORTY-EIGHT HOUR WARTIME WORKWEEK

Ex. Ord. No. 9607, Aug. 30, 1945, 10 F.R. 11191, provided: By virtue of the authority vested in me by the Constitution and statutes as President of the United States it is ordered that Executive Order 9301 of February 9, 1943 [8 F.R. 1825] (formerly set out as note under this section), establishing a minimum wartime workweek of forty-eight hours, be, and it is hereby, revoked.

HARRY S. TRUMAN.

DEFINITION OF "ADMINISTRATOR"

The term "Administrator" as meaning the Administrator of the Wage and Hour Division, see section 204 of this title.

§ 208. Repealed. Pub. L. 110–28, title VIII, § 8103(c)(1)(A), May 25, 2007, 121 Stat. 189

Section, acts June 25, 1938, ch. 676, §8, 52 Stat. 1064; Oct. 26, 1949, ch. 736, §8, 63 Stat. 915; Aug. 12, 1955, ch. 867, §§4, 5(b)–(e), 69 Stat. 711, 712; Pub. L. 85–750, Aug. 25, 1958, 72 Stat. 844; Pub. L. 87–30, §7, May 5, 1961, 75 Stat. 70; Pub. L. 93–259, §5(c)(1), (d), Apr. 8, 1974, 88 Stat. 58; Pub. L. 95–151, §2(d)(3), Nov. 1, 1977, 91 Stat. 1246; Pub. L. 101–157, §4(c), Nov. 17, 1989, 103 Stat. 940; Pub. L. 101–583, §1, Nov. 15, 1990, 104 Stat. 2871, related to wage orders in American Samoa.

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

(June 25, 1938, ch. 676, § 15, 52 Stat. 1068; Oct. 26, 1949, ch. 736, § 13, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263.)

AMENDMENTS

1949—Subsec. (a)(1). Act Oct. 26, 1949, § 13(a), inserted provision protecting purchaser in good faith in sale of goods produced in violation of this chapter.

Subsec. (a)(5). Act Oct. 26, 1949, § 13(b), inserted "or any regulation or order made or continued in effect under the provisions of section 211(d) of this title" after "211(c) of this title".

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see section 16(a) of act Oct. 26, 1949, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

LIABILITY OF PUBLIC AGENCY FOR DISCRIMINATION AGAINST EMPLOYEE FOR ASSERTION OF COVERAGE

Pub. L. 99-150, § 8, Nov. 13, 1985, 99 Stat. 791, provided that: "A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 [29 U.S.C. 207] shall be held to have violated section 15(a)(3) of such Act [29 U.S.C. 215(a)(3)]. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act."

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liq-

uidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [29 U.S.C. 255(a)], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C. 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3)[1] of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

(1)(A) Any person who violates the provisions of sections[2] 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term ''serious injury'' means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation. Any person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and col-

[1] See References in Text note below.

[2] So in original. Probably should be ''section''.

lecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

(June 25, 1938, ch. 676, §16, 52 Stat. 1069; May 14, 1947, ch. 52, §5(a), 61 Stat. 87; Oct. 26, 1949, ch. 736, §14, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§1, 2, 15 F.R. 3174, 64 Stat. 1263; Aug. 8, 1956, ch. 1035, §4, 70 Stat. 1118; Pub. L. 85–231, §1(2), Aug. 30, 1957, 71 Stat. 514; Pub. L. 87–30, §12(a), May 5, 1961, 75 Stat. 74; Pub. L. 89–601, title VI, §601(a), Sept. 23, 1966, 80 Stat. 844; Pub. L. 93–259, §§ 6(d)(1), 25(c), 26, Apr. 8, 1974, 88 Stat. 61, 72, 73; Pub. L. 95–151, §10, Nov. 1, 1977, 91 Stat. 1252; Pub. L. 101–157, §9, Nov. 17, 1989, 103 Stat. 945; Pub. L. 101–508, title III, §3103, Nov. 5, 1990, 104 Stat. 1388–29; Pub. L. 104–174, §2, Aug. 6, 1996, 110 Stat. 1554; Pub. L. 110–233, title III, §302(a), May 21, 2008, 122 Stat. 920; Pub. L. 115–141, div. S, title XII, §1201(b), Mar. 23, 2018, 132 Stat. 1148.)

REFERENCES IN TEXT

The Portal-to-Portal Act of 1947, referred to in subsec. (d), is act May 14, 1947, ch. 52, 61 Stat. 84, as amended, which is classified principally to chapter 9 (§251 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 251 of this title and Tables.

The effective date of this amendment of subsection (d), referred to in subsec. (d), occurred upon the expiration of 90 days after Aug. 30, 1957. See section 2 of Pub. L. 85–231, set out as an Effective Date of 1957 Amendment note under section 213 of this title.

Section 206(a)(3) of this title, referred to in subsec. (d)(3), was repealed and section 206(a)(4) of this title was redesignated section 206(a)(3) by Pub. L. 110–28, title VIII, §8103(c)(1)(B), May 25, 2007, 121 Stat. 189.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of section 16 of act June 25, 1938, as amended by section 6(d)(1) of Pub. L. 93–259, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

AMENDMENTS

2018—Subsec. (b). Pub. L. 115–141, §1201(b)(1), inserted "Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages." after second sentence and struck out "either of" after "liability prescribed in".

Subsec. (c). Pub. L. 115–141, §1201(b)(2), inserted at end "The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages."

Subsec. (e)(2). Pub. L. 115–141, §1201(b)(3), inserted at end "Any person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b)."

2008—Subsec. (e). Pub. L. 110-233 amended subsec. (e) generally. Prior to amendment, subsec. (e) related to civil penalties for child labor violations.

1996—Subsec. (e). Pub. L. 104–174 in first sentence substituted "of section 212 of this title or section 213(c)(5) of this title" for "of section 212 of this title" and "under section 212 of this title or section 213(c)(5) of this title" for "under that section".

1990—Subsec. (e). Pub. L. 101–508 struck out "or any person who repeatedly or willfully violates section 206 or 207 of this title" after "issued under that section," in first sentence, substituted "not to exceed $10,000 for each employee who was the subject of such a violation" for "not to exceed $1,000 for each such violation" in first sentence, inserted after first sentence "Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation.", substituted "any penalty under this subsection" for "such penalty" wherever appearing except after "appropriateness of", substituted "Except for civil penalties collected for violations of section 212 of this title, sums" for "Sums" in last sentence, and inserted at end "Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury."

1989—Subsec. (e). Pub. L. 101–157 inserted "or any person who repeatedly or willfully violates section 206 or 207 of this title" in introductory provisions and inserted "or a repeated or willful violation of section 215(a)(2) of this title" in par. (3).

1977—Subsec. (b). Pub. L. 95–151, §10(a), (b), inserted provisions relating to violations of section 215(a)(3) of this title by employers, "(1)" after "section 217 of this title in which", and cl. (2), and substituted "An action to recover the liability prescribed in either of the preceding sentences" for "Action to recover such liability".

Subsec. (c). Pub. L. 95–151, §10(c), inserted "to recover the liability specified in the first sentence of such subsection" after "an action by or on behalf of any employee".

1974—Subsec. (b). Pub. L. 93–259, §6(d)(1), substituted in second sentence "maintained against any employer (including a public agency) in any Federal or State court" for "maintained in any court".

Subsec. (c). Pub. L. 93–259, §26, in revising first three sentences, reenacted first sentence, substituting "Secretary" for "Secretary of Labor"; included in second sentence provision for an action by the Secretary for liquidated damaged and deleted requirement of a written request by an employee claiming unpaid minimum wages or unpaid overtime compensation with the Secretary of Labor prior to an action by the Secretary and proviso prohibiting any action in any case involving an issue of law not settled finally by the courts and depriving courts of jurisdiction of any action or proceeding involving the issue of law not settled finally; and substituted third sentence "The right provided by subsection (b) to bring by or on behalf of any employee and of any employees to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary." for "The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid wages or unpaid overtime compensation and an additional equal amount as liquidated damages."

Subsec. (e). Pub. L. 93–259, §25(c), added subsec. (e).

1966—Subsec. (c). Pub. L. 89–601 substituted "statutes of limitations" for "two-year statute of limitations".

1961—Subsec. (b). Pub. L. 87–30 provided for termination of right of action upon commencement of injunction proceedings by the Secretary of Labor.

1957—Subsec. (d). Pub. L. 85–231 added cls. (1) and (2) and designated existing provisions as cl. (3).

1956—Subsec. (d). Act Aug. 8, 1956, added subsec. (d).

1949—Subsec. (c). Act Oct. 26, 1949, added subsec. (c).

1947—Subsec. (b). Act May 14, 1947, struck out provisions relating to the designation by employee or employees of an agent or representative to maintain an action under this section for and on behalf of all employees similarly situated and inserted provisions relating to the requirement that no employee shall be a party plaintiff unless he gives his consent in writing and such consent is filed with the court.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–233, title III, §302(b), May 21, 2008, 122 Stat. 922, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the enactment of this Act [May 21, 2008]."

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–151 effective Jan. 1, 1978, see section 15(a) of Pub. L. 95–151, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–259 effective May 1, 1974, see section 29(a) of Pub. L. 93–259, set out as a note under section 202 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–601 effective Feb. 1, 1967, except as otherwise provided, see section 602 of Pub. L. 89–601, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Amendment by Pub. L. 87–30 effective upon expiration of one hundred and twenty days after May 5, 1961, except as otherwise provided, see section 14 of Pub. L. 87–30, set out as a note under section 203 of this title.

EFFECTIVE DATE OF 1957 AMENDMENT

Amendment by Pub. L. 85–231 effective upon expiration of ninety days from Aug. 30, 1957, see section 2 of Pub. L. 85–231, set out as a note under section 213 of this title.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see section 16(a) of act Oct. 26, 1949, set out as a note under section 202 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

Act May 14, 1947, ch. 52, §5(b), 61 Stat. 87, provided that: "The amendment made by subsection (a) of this section [amending this section] shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended [this chapter], on or after the date of the enactment of this Act [May 14, 1947]."

TRANSFER OF FUNCTIONS

Functions relating to enforcement and administration of equal pay provisions vested by subsecs. (b) and (c) of this section in Secretary of Labor transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §1, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

For transfer of functions of other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5.

LIABILITY OF STATE, POLITICAL SUBDIVISION, OR INTERSTATE GOVERNMENTAL AGENCY FOR VIOLATIONS BEFORE APRIL 15, 1986, RESPECTING ANY EMPLOYEE NOT COVERED UNDER SPECIAL ENFORCEMENT POLICY

Pub. L. 99–150, §2(c)(1), Nov. 13, 1985, 99 Stat. 788, provided that: "No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 [29 U.S.C. 216] for a violation of section 6 [29 U.S.C. 206] (in the case of a territory or possession of the United States), 7 [29 U.S.C. 207], or 11(c) [29 U.S.C. 211(c)] (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act [this chapter] under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations."

EFFECT OF AMENDMENTS BY PUBLIC LAW 99–150 ON PUBLIC AGENCY LIABILITY RESPECTING ANY EMPLOYEE COVERED UNDER SPECIAL ENFORCEMENT POLICY

Pub. L. 99–150, §7, Nov. 13, 1985, 99 Stat. 791, provided that: "The amendments made by this Act [see Short Title of 1985 Amendment note set out under section 201 of this title] shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 [29 U.S.C. 216] for a violation of section 6, 7, or 11 of such Act [29 U.S.C. 206, 207, 211] occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act [this chapter] under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations."

RULES, REGULATIONS, AND ORDERS PROMULGATED WITH REGARD TO 1966 AMENDMENTS

Secretary authorized to promulgate necessary rules, regulations, or orders on and after the date of the enactment of Pub. L. 89–601, Sept. 23, 1966, with regard to the amendments made by Pub. L. 89–601, see section 602 of Pub. L. 89–601, set out as a note under section 203 of this title.

CONSTRUCTION OF 1949 AMENDMENTS WITH PORTAL-TO-PORTAL ACT OF 1947

Act Oct. 26, 1949, ch. 736, §16(b), 63 Stat. 920, provided that: "Except as provided in section 3(*o*) [29 U.S.C. 203(*o*)] and in the last sentence of section 16(c) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 216(c)], no amendment made by this Act [amending sections 202, 208, 211 to 217 of this title] shall be construed as amending, modifying, or repealing any provisions of the Portal-to-Portal Act of 1947."

RETROACTIVE EFFECT OF 1949 AMENDMENTS; LIMITATION OF ACTIONS

Act Oct. 26, 1949, ch. 736, §16(d), 63 Stat. 920, provided that actions based upon acts or omissions occurring prior to the effective date of act Oct. 26, 1949, which was to be effective ninety days after Oct. 26, 1949, were not prevented by the amendments made to sections 202 to 208, and 211 to 217 of this title by such act, so long as such actions were instituted within two years from such effective date.

§ 216a. Repealed. Oct. 26, 1949, ch. 736, § 16(f), 63 Stat. 920

Section, act July 20, 1949, ch. 352, §2, 63 Stat. 446, related to liability for overtime work performed prior to July 20, 1949. See section 216b of this title.

lized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act[1]—the Secretary of Labor.

(May 14, 1947, ch. 52, §10, 61 Stat. 89.)

REFERENCES IN TEXT

The Fair Labor Standards Act of 1938, as amended, referred to in text, is act June 25, 1938, ch. 676, 52 Stat. 1060, which is classified generally to chapter 8 (§201 et seq.) of this title. For complete classification of this Act to the Code, see section 201 of this title and Tables.

The Walsh-Healey and Bacon-Davis Acts, referred to in text, are defined for purposes of this chapter in section 262 of this title.

TRANSFER OF FUNCTIONS

Functions relating to enforcement and administration of equal pay provisions vested by subsec. (b)(1) of this section in Administrator of Wage and Hour Division of Department of Labor transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §1, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

For transfer of functions of other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6, of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], 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 the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

(May 14, 1947, ch. 52, §11, 61 Stat. 89; Pub. L. 93-259, §6(d)(2)(B), Apr. 8, 1974, 88 Stat. 62.)

REFERENCES IN TEXT

The Fair Labor Standards Act of 1938, as amended, referred to in text, is act June 25, 1938, ch. 676, 52 Stat. 1060, as amended, which is classified generally to chapter 8 (§201 et seq.) of this title. For complete classification of this Act to the Code, see section 201 of this title and Tables.

AMENDMENTS

1974—Pub. L. 93-259 substituted "section 216 of this title" for "section 216(b) of this title".

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93-259 effective May 1, 1974, see section 29(a) of Pub. L. 93-259, set out as a note under section 202 of this title.

§ 261. Applicability of "area of production" regulations

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer—

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

(May 14, 1947, ch. 52, §12, 61 Stat. 89.)

REFERENCES IN TEXT

The Fair Labor Standards Act of 1938, as amended, referred to in text, is act June 25, 1938, ch. 676, 52 Stat. 1060, as amended, which is classified generally to chapter 8 (§201 et seq.) of this title. For complete classification of this Act to the Code, see section 201 of this title and Tables.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6, of 1950, §§1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

§ 262. Definitions

(a) When the terms "employer", "employee", and "wage" are used in this chapter in relation to the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], they shall have the same meaning as when used in such Act of 1938.

(b) When the term "employer" is used in this chapter in relation to the Walsh-Healey Act or Bacon-Davis Act[1] it shall mean the contractor or subcontractor covered by such Act.

(c) When the term "employee" is used in this chapter in relation to the Walsh-Healey Act or the Bacon-Davis Act[1] it shall mean any individual employed by the contractor or subcontractor covered by such Act in the performance of his contract or subcontract.

(d) The term "Wash-Healey Act"[2] means the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), as amended;[1] and the term "Bacon-Davis Act" means the Act entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics employed by contractors and subcontractors on public buildings", approved August 30, 1935 (49 Stat. 1011), as amended.[1]

(e) As used in section 255 of this title the term "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

[1] See References in Text note below.

[2] So in original. Probably should be "Walsh-Healey Act".

"statutory exclusions.") As stated by the Supreme Court in the Youngerman-Reynolds case cited above: "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

§ 778.109 The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588.

(b) *Hourly rate and bonus.* If the employee receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50).

[76 FR 18857, Apr. 5, 2011]

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For overtime work the pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, *see* § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, for 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).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty is the regular rate in that week. In the example just given, if the employee was guaranteed $11 an hour for productive working time, the employee would be paid $506 (46 hours at $11) for the 46 hours of productive work (instead of the $491 earned at piece rates). In a week in which no waiting time was involved, the employee would be owed an additional $5.50 (half time) for each of the 6 overtime hours worked, to bring the total compensation up to $539 (46 hours at $11 plus 6 hours at $5.50 or 40 hours at $11 plus 6 hours at $16.50). If the employee is paid at a different rate for waiting time, the regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

[76 FR 18857, Apr. 5, 2011]

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

§ 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. 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.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. 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. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. 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 thus found to be $9 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

[46 FR 7310, Jan. 23, 1981, as amended at 76 FR 18857, Apr. 5, 2011]

§ 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from

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Chapter 149 LABOR AND INDUSTRIES

Section 148 PAYMENT OF WAGES; COMMISSIONS; EXEMPTION BY CONTRACT; PERSONS DEEMED EMPLOYERS; PROVISION FOR CASHING CHECK OR DRAFT; VIOLATION OF STATUTE

Section 148. Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions

shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any

wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a particular pay period. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.

Compensation paid to public and non-public school teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year; provided, however, that payment of such compensation may be deferred to the extent that equal payments may be established for a 12 month period including amounts payable in July and August subsequent to the end of the school year.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.

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Chapter 149 LABOR AND INDUSTRIES

Section 150 COMPLAINT FOR VIOLATION OF CERTAIN SECTIONS; DEFENSES; PAYMENT AFTER COMPLAINT; ASSIGNMENTS; LOAN OF WAGES TO EMPLOYER; CIVIL ACTION

Section 150. The attorney general may make complaint or seek indictment against any person for a violation of section 148. On the trial no defence for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid. The defendant shall not set up as a defence a payment of wages after the bringing of the complaint. An assignment of future wages payable weekly under section one hundred and forty-eight shall not be valid if made to the person from whom such wages are to become due or to any person on his behalf, or if made or procured to be made to another person for the purpose of relieving the employer from the obligation to pay weekly. A loan made by an employee to his employer of wages which are payable weekly under section one hundred and forty-eight, whether made directly to the employer or to another person or persons on

his behalf, shall not be valid as a defense on the trial of a complaint for failure to pay such wages weekly, unless such loan shall have been made with the approval of the attorney general.

An employee claiming to be aggrieved by a violation of sections 33E, 52E, 148, 148A, 148B, 148C, 150C, 152, 152A, 159C or 190 or section 19 of chapter 151 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; provided, however, that the 3 year limitation period shall be tolled from the date that the employee or a similarly situated employee files a complaint with the attorney general alleging a violation of any of these sections until the date that the attorney general issues a letter authorizing a private right of action or the date that an enforcement action by the attorney general becomes final. An employee so 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.

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Chapter 151 MINIMUM FAIR WAGES

Section 1A OVERTIME PAY; EXCLUDED EMPLOYMENTS

Section 1A. Except as otherwise provided in this section, no employer in the commonwealth shall employ any of his employees in an occupation, as defined in section two, for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed. Sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production, shall be excluded in computing the regular rate and the overtime rate of compensation under the provisions of this section. In any work week in which an employee of a retail business is employed on a Sunday or certain holidays at a rate of one and one-half times the regular rate of compensation at which he is employed as provided in chapter 136, the hours so worked on Sunday or certain holidays shall be excluded from the calculation of overtime pay as required by this section, unless a collectively bargained labor agreement provides otherwise. Except as otherwise provided in the second sentence, nothing in this section shall be

construed to otherwise limit an employee's right to receive one and one-half times the regular rate of compensation for an employee on Sundays or certain holidays or to limit the voluntary nature of work on Sundays or certain holidays, as provided for in said chapter 136.

This section shall not be applicable to any employee who is employed:—

(1) as a janitor or caretaker of residential property, who when furnished with living quarters is paid a wage of not less than thirty dollars per week.

(2) as a golf caddy, newsboy or child actor or performer.

(3) as a bona fide executive, or administrative or professional person or qualified trainee for such position earning more than eighty dollars per week.

(4) as an outside salesman or outside buyer.

(5) as a learner, apprentice or handicapped person under a special license as provided in section nine.

(6) as a fisherman or as a person employed in the catching or taking of any kind of fish, shellfish or other aquatic forms of animal and vegetable life.

(7) as a switchboard operator in a public telephone exchange.

(8) as a driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section two hundred and four of the motor carrier act of nineteen hundred and thirty-five, or as employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act or subject to title II of the Railway Labor Act.

(9) in a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of one hundred and twenty days in any year, and determined by the commissioner to be seasonal in nature.

(10) as a seaman.

(11) by an employer licensed and regulated pursuant to chapter one hundred and fifty-nine A.

(12) in a hotel, motel, motor court or like establishment.

(13) in a gasoline station.

(14) in a restaurant.

(15) as a garageman, which term shall not include a parking lot attendant.

(16) in a hospital, sanitorium, convalescent or nursing home, infirmary, rest home or charitable home for the aged.

(17) in a non-profit school or college.

(18) in a summer camp operated by a non-profit charitable corporation.

(19) as a laborer engaged in agriculture and farming on a farm.

(20) in an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of one hundred and fifty days in any one year.

Case No: 8:17-cv-2254-T-36CPT
UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

Thomas v. Waste Pro USA, Inc.

Decided Sep 30, 2019

Case No: 8:17-cv-2254-T-36CPT

09-30-2019

ALFRED W. THOMAS, Plaintiff, v. WASTE PRO USA, INC. and WASTE PRO OF FLORIDA, INC., Defendants.

Charlene Edwards Honeywell United States District Judge

ORDER

This matter comes before the Court on Defendant Waste Pro USA, Inc.'s Motion for Summary Judgment and Incorporated Memorandum of Law (Doc. 185), Plaintiff's response thereto (Doc. 206), Defendant Waste Pro USA Inc.'s reply (Doc. 215), Waste Pro of Florida, Inc.'s Motion for Summary Judgment and Incorporated Memorandum of Law (Doc. 187), Plaintiff's response thereto (Doc. 207), Defendant Waste Pro of Florida, Inc.'s reply (Doc. 218), Plaintiff's Amended Motion for Partial Summary Judgment and Incorporated Supporting Memorandum of Law (Doc. 197), Defendant Waste Pro USA, Inc.'s response thereto (Doc. 210), Defendant Waste Pro of Florida, Inc.'s response thereto (Doc. 211), and Plaintiff's reply (Doc. 221). Defendants both move for summary judgment and Plaintiff moves for partial summary judgment as to liability. Doc. 185, Doc. 187, Doc. 197.

The Court, having considered the motions, being duly advised in the premises and for reasons described herein, will deny Defendant Waste Pro USA, Inc.'s Motion for Summary Judgment (Doc. 185), will grant in part and deny in part Waste Pro of Florida, Inc.'s Motion for Summary Judgment (Doc. 187) and deny Plaintiff's Amended Motion for Partial Summary Judgment (Doc. 197). *2 **I. BACKGROUND AND FACTS** [1]

[1] The Court has determined the facts, which are undisputed unless otherwise noted, based on the parties' submissions, including depositions, interrogatory responses, declarations, and exhibits (Doc. 185-187; Doc. 197; Doc. 206-207, 209-211, Doc. 215-216, Doc. 218-219, Doc. 221), as well as the parties' Stipulation of Agreed Material Facts Regarding Defendants Waste Pro USA's Motion for Summary Judgment (Doc. 205), Amended Stipulation of Agreed Material Facts Regarding Defendant Waste Pro of Florida's Motion for Summary Judgment (Doc. 208), and Stipulation of Agreed Material Facts Regarding Plaintiff's Amended Motion for Partial Summary Judgment (Doc. 213).

This is a collective action filed pursuant to § 216(b) of the FLSA by Plaintiff Alfred W. Thomas ("Thomas" or "Plaintiff") pertaining to the pay of certain "Helpers" employed by Defendants Waste Pro USA, Inc. ("Waste Pro USA" or "WP USA"), and Waste Pro of Florida, Inc. ("Waste Pro of Florida" or "WP Florida") (collectively, "Defendants"), which alleges willful violations of the FLSA. Doc. 111 ¶¶ 1, 64, 72. Waste Pro USA is the parent company to various subsidiaries who provide professional solid waste collection and disposal and recycling services in nine states pursuant to various commercial, municipal, subscription or military contracts. *Id.* ¶ 23, Doc.

130 ¶ 23, Doc. 197-28 at 2; Doc. 213 ¶ 4. One of those subsidiaries is Waste Pro of Florida. Doc. 111 ¶ 23, Doc. 131 ¶ 23; Doc. 213 ¶ 4.

The Second Amended Complaint raises two causes of action: (1) violation of the FLSA by Defendants, jointly and severally, by failing to pay Plaintiff and other Helpers time and a half overtime premium pay when they worked more than forty hours per week, and (2) violation of the FLSA by Waste Pro USA by failing to pay Plaintiff and other Helpers time and a half overtime premium pay when they work more than
3 forty hours per week. Doc. 111 ¶¶ 58-73. *3

A. Undisputed Facts

1. Company Structure

WP USA was founded by John J. Jennings, who is the Chairman of the Board and Chief Executive Officer ("CEO") of WP USA. Doc. 197-27 at 7:8-9; Doc. 197-30 at 2. Jennings is also the CEO of WP Florida. Doc. 206-1 at 3211-14. WP USA operates in nine states, including Florida, Georgia, North Carolina, South Carolina, Alabama, Mississippi, Louisiana, Arkansas, and Tennessee. Doc. 197-30 at 2. WP USA is "one of the largest, full-service, vertically integrated waste management companies." *Id.* at 3.

Regional Vice Presidents act as the CEOs of their area, but report to Jennings. Doc. 206-1 at 32:8-14. There are ten Regional Vice Presidents. Doc. 197-30. The CEO of WP USA hires Regional Vice Presidents and the decision to fire a Regional Vice President is made by Jennings or the Board of Directors of WP USA. Doc. 213 ¶¶ 8-9. Jennings meets with the Regional Vice Presidents roughly three times per year to discuss the status of the regions. *Id.* ¶ 13. Once every week, the Regional Vice Presidents conduct a conference call to discuss the needs and success of their regions. *Id.* ¶ 16.

Each subsidiary has its own Human Resources Manager. Doc. 205 ¶ 17. Some subsidiaries, including WP Florida, has a Human Resources Manager for each region. *Id.* ¶ 18.

WP Florida consists of five regions: southeast, central, north, southwest, and coastal. Doc. 205 ¶ 1. Each region is made up of divisions. *Id.* ¶ 3. Each region within WP Florida is managed by a Regional Vice President, and each division is managed by a Division Manager, who reports to the Regional Vice President. *Id.* ¶¶ 2, 4. Depending on the size of the division, there is also an Operations Manager or Site Manager who reports to the Division Manager and who oversees
4 *4 Route Supervisors or Route Managers. *Id.* ¶¶ 5, 6. Helpers report to Route Supervisors or Route Managers. *Id.* ¶ 7.

Division Managers have the authority to determine schedules for Helpers and staff the routes. *Id.* ¶ 8. The number of hours worked by a Helper each day depends on his or her assigned route. *Id.* ¶ 11. Additionally, Division Managers have the authority to train and evaluate Helpers, although WP USA provides guidelines related to training. *Id.* ¶¶ 8, 16. Because Helpers are laborers, most training occurs on the job, although Helpers receive limited classroom training. *Id.* ¶¶ 13-14.

The rate of pay for Helpers varies among divisions and regions. *Id.* ¶ 9. Some divisions start all Helpers at the same pay rate, whereas others set Helpers' rates based on experience. *Id.* ¶ 10. WP USA maintains employees' 401(k)s and health insurance plans. *Id.* ¶ 19.

WP USA and WP Florida are indisputably related to a certain extent. Defendants urge in this proceeding that WP USA provides guidance and administrative support to its subsidiaries, including WP of Florida. *See generally* Doc. 210. Banasiak testified during his deposition with respect to various forms of support provided by WP USA, including human resources support as needed with respect to specific questions or issues (Doc. 206-1 at 58:19-59:12), provision of a timekeeping system, ADP (*Id.* at 62:11-63:5), and

provision of an intranet site that hosts forms and data that can be used by the subsidiaries (*Id.* at 63:7-15).

WP USA also has a corporate safety department, accounting department, maintenance department, and sales department. *Id.* at 66:7-16, 69:14-16. The WP USA safety department provides information related to changes in safety information, such as changes in Department of Transportation regulations, via posting documents with such information on the intranet. *Id.* at 70:19-22, 71:1-8. The maintenance department is responsible for changes in equipment and *5 service for equipment. *Id.* at 72:15-16. For example, maintenance would advise of changes in how often oil should be changed for trucks. *Id.* at 72:15-23. The WP USA maintenance department has a record of the vehicles that are purchased by the regions. *Id.* at 73:25-74:9. The WP USA accounting department evaluates financial results and performance. *Id.* at 76:16-17. The financial results handled by the WP USA accounting department are generated by each region by a regional controller. *Id.* at 77:3-5. The WP USA sales department is a support mechanism for the field and does not generate any sales. *Id.* at 79:3-6.

Plaintiff argues that WP USA and its subsidiaries are a single enterprise and WP USA is a joint employer of the Helpers. *See generally* Doc. 197. Plaintiff relies on evidence that WP USA advertises itself as a waste removal company, like its subsidiaries (Doc. 197-30), and Jennings is on the Board of Directors of WP USA, is CEO of each subsidiary, and delegates management to the Regional Vice Presidents, some of whom oversee operations across several different subsidiaries (Doc. 197-24, Doc. 197-27 at 7:7-9, 17:14-18, Doc. 197-28 at 2). Additionally, payroll for the subsidiaries is handled locally, but managed by WP USA. Doc. 197-35. Moreover, the subsidiaries may use documents with the WP USA logo on them and, even if they have the power to change various documents, such as an employee handbook, Defendants present no evidence that any region actually made any changes. Doc. 197-41, Doc. 206-1 at 17-19, Doc. 206-14, Doc. 206-15, Doc. 206-16, Doc. 206-17. Plaintiff also relies on evidence that employees applied for Helper positions through the WP USA webpage, receive documents purportedly from WP USA, and understand themselves to be WP USA employees. Doc. 206-14 ¶¶ 5-8; Doc. 206-15 ¶¶ 1-7, Doc. 206-16 ¶¶ 1-6, Doc. 206-17 ¶¶ 1-5. *6

2. Pay Methods

Helpers are employees who load garbage, recycling, or other solid waste into a rear-load truck. Doc. 197-2; Doc. 206-1 at 30:22-31:1. Helpers in WP Florida are paid a day rate, although the starting pay differs by division and is set by the division manager. Doc. 206-1 at 181:21-183:9-14. Most Helpers employed by WP USA subsidiaries are paid via the day rate method, although some are paid on an hourly basis. Doc. 197-4. A day rate is intended to compensate an employee for his or her work that day, regardless of the number of hours worked. Doc. 197-1 at 8, Doc. 197-10 at 61:9-17. More specifically, divisions have routes to collect solid waste, and Helpers have a daily task of picking up a route, and receive a day rate for picking up that daily task. Doc. 206-1 at 91:12-19. Additionally, Helpers also receive non-discretionary bonuses if they assist on other routes or meet the criteria for performance bonuses. *Id.* at 95:24-96:2, Doc. 197-18; Doc. 213 ¶¶ 2-3.

With respect to half-day rates, these were paid by various WP USA subsidiaries, including WP Florida, until 2017. Doc. 206-1 at 124:1-125:25. The half day rate was not paid anywhere in WP Florida after August 24, 2017. Doc. 186-1 ¶ 14.

Overtime for day rate workers in WP Florida is calculated by multiplying each hour worked over 40 hours by one-half of the workers' regular rate, which is calculated by dividing the total compensation by the total hours worked. Doc.

197-1 at 9. The workers' total compensation for the week includes their day rate, their half day rate, and non-discretionary bonuses. Doc. 187 at 3.

B. Disputed Facts as to Pay Method

Regional Vice President for the West Coast of Florida, Keith Banasiak, testified during his deposition that the half day rate is "compensation for something less than what the daily task would
7 *7 be." Doc. 206-1 at 124:1-6. When asked whether it was triggered by hours, Banasiak stated that he would describe the half day rate as a task. *Id.* at 126:5-11. He further explained that "if an employee . . . has a set task to do, but" the helper is also asked to do something that was not "his normal daily task," such as coming in on a weekend to clean the yard, he would be paid the half day rate. *Id.* at 126:11-17.

However, Plaintiff argues that Defendants have a common practice of paying the half day rate if Helpers work 4.0 hours or less in a day. Doc. 197 at 11. To support this assertion, Plaintiff cites to an e-mail from Judi Craigo, the Director of Benefits for WP USA (Doc. 197-29), to Tia Epps, a regional human resources representative for Georgia, North Carolina, and South Carolina, in response to Epps' question of "after how many hours a person has worked do we pa[y] them the FULL Day Rate?" Doc. 197-13. Craigo's response states "Less than 4 hours = ½ Day[;] 4 hours or more = 1 Full Day." *Id.* Plaintiff also relies on an e-mail exchange between Craigo, Shannon Early, who is the Director of Human Resources for WP USA, and Trish Reid, who is a human resources manager for the "Southern Region of WastePro USA." Doc. 197-14. The exchange concerns how to explain the overtime rate for a day rate employee. *Id.* In the exchange, Reid states that she is hesitant to use a supplied spreadsheet because employees did "not understand it" and it shows that a specific employee was being paid a low overtime rate. *Id.* at 2. Reid suggests explaining the overtime rate by stating, in relevant part, that day rate employees "are not paid time and a half like hourly employees are because [day rate employees] earn a day rate for the day. As long as [day rate employees] work at least 4.00 hours they get their whole day rate." *Id.*

C. *Andreu*

Plaintiff contends that this case is similar to a prior case against WP Florida, *Andreu v. Waste Pro of Florida, et al.*, No. 17-60926-CIV-WPD (S.D.
8 Fla.). That case involved a lawsuit *8 by a driver employed by WP Florida who alleged that WP Florida's day rate compensation practice violated the FLSA and entitled him to unpaid overtime compensation. Doc. 197-5. There, the court denied a motion for summary judgment filed by WP Florida, that is similar to WP Florida's Motion for Summary Judgment in this case. Doc. 207-1, Doc. 207-2. The case proceeded to a jury trial and the jury returned a verdict in favor of the *Andreu* plaintiff. Doc. 197-8.

D. Previous Reviews of WP Florida Pay Methods

WP Florida relies on prior reviews of its pay method by the Department of Labor ("DOL"). More specifically, the DOL conducted an audit of WP Florida's compliance with the FLSA's overtime provisions for the period between August 6, 2011 through August 5, 2013. Doc. 187-1 at 11-23. The DOL Audit indicates that "employees were paid on a daily fee basis, however the firm accurately paid for their overtime hours." *Id.* at 18. The Audit explains that "employees received the same rate for each day of work," and, therefore, received half their regular rate for hours worked over 40 per week. *Id.* Additionally, the auditor does not conclude that this was altered by the payment of bonuses. *Id.* at 20. The auditor explains that "[b]onuses were divided by all hours worked during the same week in which the bonus was allocated in order to obtain the additional amount originally not included in the regular rate. Once the new rate was

obtained, it was then divided by ½ and then multiplied by all the hours worked over 40 during the same workweek." *Id.*

The DOL conducted another investigation of WP Florida for the period of March 15, 2014, to March 14, 2016. *Id.* at 25-30. The report indicates that "[m]ost drivers and helpers [were] paid a day rate." *Id.* at 25. The investigation was conducted because an employee complained that he or she was not paid proper overtime because he received only half time for his or her daily rate. *Id.* at 27. With respect to the half day rate, the investigator concludes that this "was still a flat rate *9 without regard to the number of hours worked and did not result in an overtime violation." *Id.* at 27-28. The investigation concluded that "the drivers and helpers . . . were paid a daily rate intended to cover all hours worked," and were paid half time for hours worked in excess of 40 per week, there was no FLSA violation. *Id.* at 28.

E. The Motions for Summary Judgment

Plaintiff filed a Motion for Summary Judgment requesting judgment with respect to three issues: (1) that Defendants' day rate overtime pay violates the FLSA; (2) that WP USA employs Plaintiff and Helpers; and (3) that WP of Florida is collaterally estopped from asserting its good faith affirmative defense in this case. Doc. 197 at 23-24.

WP USA moved for summary judgment on the basis that it does not employ Plaintiff or any Opt-In Plaintiff. Doc. 185. WP USA argues that the record evidence shows that it does not control Plaintiff's or other Helpers' conditions of employment. *Id.*

WP Florida moved for summary judgment and argues that its compensation methodology is consistent with the FLSA, 29 C.F.R. § 778.112 is not the only permissible method for compensating day rate employees, and occasional instances in which Helpers were paid the half day rate did not invalidate WP Florida's compensation methodology. Doc. 187 at 8-15. WP Florida also argues that summary judgment is appropriate for Helpers who are not adversely affected by any common policy or plan of WP Florida. *Id.* at 15-17.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 *10 (1986). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. *Celotex*, 477 U.S. at 323; *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). That burden can be discharged if the moving party can show the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. *Id.* at 324. Issues of fact are "genuine only if a reasonable jury, considering the evidence present, could find for the nonmoving party," and a fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue of material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. *Celotex*, 477 U.S. at 323. However, a party cannot defeat summary judgment by relying upon conclusory allegations. *See Hill v. Oil Dri Corp. of Ga.*, 198 F. App'x 852, 858 (11th Cir. 2006).

The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed. *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005). The Court must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. *Id.* The Eleventh Circuit has explained that "[c]ross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984) (quoting *Bricklayers Int'l*
11 *Union*, *11 *Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017 (5th Cir. 1975)). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *Id.* at 1555-56.

III. DISCUSSION

The FLSA states that, except as otherwise provided,

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce . . . or is employed in an enterprise engaged in commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Time and a half overtime pay is the presumed amount to which workers are entitled as overtime pay. *Falken v. Glynn Cty., Ga.*, 197 F.3d 1341, 1345 (11th Cir. 1999).

A. Plaintiff's Evidence

Defendants argue that the Court should not consider the evidence Plaintiff submits in support of his Motion for Summary Judgment because it is not authenticated and is not self-authenticating. Doc. 210 at 2-4; Doc. 211 at 1-4. Defendants, apparently, did not realize that a 2010 amendment to the Rule 56(c) allows parties to submit evidence that can be presented in an admissible form at trial, and requires the opposing party to object to the evidence on the basis that it "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

Federal Rule of Civil Procedure 56(c)(1) directs that a party must support its assertion that a fact cannot be genuinely disputed by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." This may be objected to by the other party on the basis that "a fact *cannot* be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).
12 *12 The practice commentary to Rule 56 explains that "parties who want the court to consider documentary evidence must be sure to include it in the record and to make sure that it is properly authenticated (usually by affidavit) and otherwise admissible." Fed. R. Civ. P. 56, Rules and Commentary (citing *Woods v. City of Chi.*, 234 F.3d 979, 988 (7th Cir. 2000)). The commentary further explains that the party submitting documents that are not self-authenticating may "meet the authentication requirement by attaching the documents to an affidavit of a witness who can authenticate them," Federal Rule of Civil Procedure 56, Rules and Commentary (citations omitted), or "through deposition testimony," *id.*

Prior to 2010, a party was required to authenticate documents for them to be considered in support of summary judgment. However, Rule 56 was amended in 2010 so that authentication is no longer required until an objection is raised that the

evidence *cannot* be submitted in an admissible form. *Abbott v. Elwood Staffing Servs., Inc.*, 44 F. Supp. 3d 1125, 1134 (N.D. Ala. 2014) (quoting *Foreword Magazine, Inc. v. OverDrive, Inc.*, No. 1:10-cv-1144, 2011 WL 5169384, at *2 (Oct. 31, 2011)). The advisory committee explained the amendment, stating that such an "objection functions much as an objection at trial, adjusted for the pretrial setting," and that "[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56, Advisory Comm. Notes.

Here, Defendants do not raise a sufficient objection to the documentary evidence submitted by Plaintiff to support his Motion for Summary Judgment because they do not argue, as Rule 56 requires an objection to do, that the evidence
13 "cannot be presented in a form that would be *13 admissible evidence." Fed. R. Civ. P. 56(c)(2). Accordingly, the Court will consider the documents provided by Plaintiff to support his Motion for Summary Judgment.[2]

[2] Plaintiff responds that his evidence will be admissible at trial because Defendants produced the documents and emails and created the website whose pages Plaintiff relies on. Doc. 22, p. 7-8.

B. Single Enterprise

To establish that two entities are a single enterprise, a plaintiff must demonstrate: (1) related activities; (2) unified operation or common control; and (3) a common business purpose. *Donovan v. Easton Land & Dev. Co.*, 723 F.2d 1549, 1551 (11th Cir. 1984). Because the FLSA is to be construed liberally, *Dunlop v. Ashy*, 555 F.2d 1228, 1234 (5th Cir. 1977), the Court must construe the definition of "enterprise" liberally, *Williams v. Johnny Kynard Logging, Inc.*, No. 2:11-CV-2138-VEH, 2013 WL 2107658, at *6 (N.D. Ala. May 10, 2013). Whether two entities constitute an enterprise is a question of law for the court to decide. *Cabral v. Lakes Café Sports Bar & Grill, Inc.*, No. 09-21128-CIV, 2010 WL 1372457, at *3 (S.D. Fla. Mar. 31, 2010) (citing *Tafalla v. All Fla. Dialysis Serv., Inc.*, No. 07-80396, 2009 WL 151159, at *9 (S.D. Fla. Jan. 21, 2009)).

However, establishing that two entities are a single enterprise does not establish that both are potentially liable. *Patel v. Wargo*, 803 F.2d 632, 636 (11th Cir. 1986). Instead, whether entities are a single enterprise is relevant to determining coverage under the FLSA. *Id.* at 635. To establish liability for two entities, the plaintiff must show that there is a joint employer relationship. *Id.* ("There is no suggestion in the language of the [FLSA] that an employer is responsible to other employers' employees, unless of course there is a joint employer relationship.").

Here, WP USA does not contest whether it is a covered employer under the FLSA. Doc. 210 at 6. Because whether WP Florida and WP USA are a
14 single enterprise is not determinative *14 of liability, the issue on which Plaintiff seeks summary judgment, the Court need not address whether Defendants are a single enterprise. *Id.*

C. Joint Employer

"The overtime wage provisions of the FLSA apply only to workers who are 'employees' within the meaning of the Act." *Tafalla v. All Fla. Dialysis Servs., Inc.*, No. 07-80396-CIV, 2009 WL 151159, at *5 (S.D. Fla. Jan. 21, 2009) (quoting 29 U.S.C. § 206(a)(1)). An employee is defined by the FLSA as an "individual employed by an employer." 29 U.S.C. § 203(e)(1). An employer includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d).

"A joint employer relationship can be found where 'one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.' "

E.E.O.C. v. Papin Enters., 6:07-cv-1548-Orl-17GJK, 2009 WL 961108, at *8 (M.D. Fla. Apr. 7, 2009) (quoting *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1360 (11th Cir. 1994)). In determining whether entities are joint employers, a court "focus[es] on the entities' relationships to a given employee or class of employees." *Peppers v. Cobb Cty., Ga.*, 835 F.3d 1289, 1300 (11th Cir. 2016) (quoting *Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312, 1324 (10th Cir. 2004)). "A determination of joint employment status under the FLSA is a question of law." *Tafalla*, 2009 WL 151159, at *5 (citing *Antenor v. D&S Farms*, 88 F.3d 925, 929 (11th Cir. 1996).

In *Patel v. Wargo*, 803 F.2d at 634, the Eleventh Circuit has explained that whether defendants are "employers within the meaning of [the FLSA] is a legal determination," but that "the individual findings of fact which led to that legal determination [are] examined under the clearly erroneous standard." The Eleventh Circuit
15 recognized that prior law "wavered" as to *15
whether joint employment status was a legal or factual issue. *Id.* at 634 n.1. The Court stated, however, that "[t]he weight of authority in other circuits support [its] characterization of the question as one of law, with the subsidiary findings being issues of fact." *Id.* The Eleventh Circuit later explained that in reviewing a summary judgment motion in favor of the defendant on the issue of joint employment the Court "must determine whether there are genuine issues of material fact and, if not, whether the [defendants] were entitled to judgment on the question of joint employment as a matter of law." *Antenor v. D&S Farms*, 88 F. 3d 925, 929 (11th Cir. 1996).

Where issues of fact exist within the employment inquiry, this Court has taken different approaches. For example, in *Schumann v. Collier Anesthesia, P.A.*, No. 2:12-cv-347-FtM-29CM, 2017 WL 1207263, at *2-3 (M.D. Fla. Apr. 3, 2017), the Court denied a motion for summary judgment as to joint employer status because of issues of fact on the matter and concluded that in such circumstances "employment status becomes a mixed issue of law and fact to be resolved by a jury, assuming one has been properly demanded . . . ." *Id.* By contrast, in *Vondriska v. Cugno*, No. 8:07-cv-1322-T-24TGW, 2010 WL 3245426, at *2 (M.D. Fla. Aug. 17, 2010), the Court, on remand, denied the parties' motions for summary judgment because issues of material fact existed as to the issue of whether the defendant employed the plaintiff, and conducted a bifurcated bench trial on the issue. There, the Court stated that " [c]ontrolling Eleventh Circuit precedent mandates that the issue of whether the defendant is an employer is a question of law, 'with the subsidiary findings being issues of fact.' " *Id.* The Court concluded that those issues of fact would be resolved by a "miniature bench trial." *Id.*

In determining whether a joint employment relationship exists, a court looks to the "economic reality" of the relationship between the plaintiff and the alleged employer "to determine whether the surrounding circumstances show that the
16 plaintiff is economically dependent on the *16
putative employer." *Id.* (citing *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961)). The following factors have been identified by the Eleventh Circuit as relevant to the determination of whether an employee is economically dependent on, and employed by, another entity: (1) the nature and degree of control of the alleged joint employer over the employee; (2) the degree of supervision over work, either direct or indirect; (3) the right to hire, fire, or modify the employment conditions; (4) the power to determine the workers' pay or method of payment; (5) the preparation of payroll and payment of wages; (6) the ownership of facilities where the work occurred; (7) the performance of a job integral to the business, and (8) the relative investment in the equipment and facilities. *Id.* (citing *Antenor v. D&S Farms*, 88 F.3d 925, 929

(11th Cir. 1996)). These factors are weighted collectively and qualitatively. *Id.* (citing *Antenor*, 88 F.3d at 929).

1. Nature and Degree of Control

"For purposes of analyzing the nature and degree of a purported joint employer's control over an alleged employee, courts have held that '[c]ontrol arises . . . when the [purported joint employer] goes beyond general instructions . . . and begins to assign specific tasks, to assign workers, or to take an overly active role in the oversight of the work.' " *Molina v. Hentech, LLC*, No. 6:13-cv-1111-Orl-22KRS, 2015 WL 1242790, at *3 (M.D. Fla. Mar. 18, 2015) (quoting *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178 (11th Cir. 2012)). "A purported employer takes an overly active role in the oversight of work 'when it decides such things as (1) for whom and how many employees to hire; (2) how to design the employees' management structure; (3) when work begins each day; (4) when the laborers shall start and stop their work throughout the day; and (5) whether a laborer should be disciplined or retained.' " *Id.* (quoting *Layton*, 686 F.3d at 1178). To demonstrate such control, the plaintiff must "reference[] specific instances where the control allegedly occurred." *Id.* (citing *Layton*, 686 F.3d at 1178). *17

In support of this factor, Plaintiff cites to a document describing WP USA's payroll process, sent from Sharon Tolopka, WP USA's Director of Payroll and Human Relations Systems, to its Chief Accounting Officer, Judith Craigo, which states that WP USA employs 2800 people. Doc. 197-33 at 77:1-4; Doc. 197-35 at 3. The document indicates that all divisions are on the same pay period, pay employees on the same date, and that WP USA requires direct deposit. *Id.*

The document also states that Department Managers and Division Managers have access to the timekeeping system to make necessary adjustments and that each employee is required to approve his or her own time. *Id.* Additionally, individual divisions' payroll administrators or office managers have access to the systems and complete day-to-day activities. *Id.* With respect to time sheets, after they are signed by employees, Department Managers approve the time sheets and add any discretionary bonuses. *Id.* at 4. The HR administrator makes any required changes with department manager's approval. *Id.* Once labor hours are approved, the HR administrator for the division notifies corporate payroll. *Id.* Once all division approvals are received, the Corporate Payroll Department checks for missing documents, runs and reviews a detailed report. *Id.* Corporate HR reviews the amounts for reasonableness, makes any necessary changes, and payroll is generated once approved by Corporate Payroll. *Id.* The gross amount of payroll is withdrawn from WP USA's account. *Id.* at 5.

However, the payroll process document indicates that, although applicants apply online through WP USA's webpage, "[e]ach division is responsible for its own hiring." *Id.* at 3. More specifically, the division or department manager approves new hires after an interview, drug test, and background check. *Id.* With respect to termination, the document states that a form is completed by the department manager and submitted to the payroll administrator. *Id.* at 7. The HR administrator or office administrator enters the termination date and changes the employee's *18 status to terminated. *Id.* WP USA recommends an exit conference or checklist be completed or signed by both the employee and the employer. *Id.*

This is the only evidence Plaintiff cites in his Motion for Summary Judgment regarding this factor, and Plaintiff contends that it left "no doubt that WP USA *controls all aspects* of Plaintiff's and Opt-In Plaintiffs' employment." Doc. 197 at 39 (emphasis in original). This evidence, however, does not demonstrate that WP USA takes an active role in Plaintiff's or other Helpers' work, such as how many employees to hire, when work begins each day, when work stops each day, or whether workers should be disciplined or retained. *Molina*, 2015 WL 1242790 at*3 (quoting *Layton*, 686 F.3d

at 1178). Indeed, the document demonstrates the opposite regarding decisions on whether to hire and fire workers.

Plaintiff relies on additional evidence in his Response to WP USA's Motion for Summary Judgment.[3] He cites to the WP USA Employee Handbook as evidence that all employees are offered the same benefits and sick day structure, and that WP USA maintains a centralized accrual system for vacation requests. Doc. 206-13 at 29, 60-61. Additionally, Plaintiff notes that, pursuant to the payroll document, Corporate HR reviews a report of new hires each pay period. Doc. 197-35 at 3. However, the document does not state that the hiring process is overseen or approved by Corporate HR.

[3] Plaintiff relies on evidence that WP USA creates the job description for the Helper position. Doc. 206 at 7-8. However, in the citation provided by Plaintiff, the deponent testified that he does not know who created the document referred to in his deposition. Doc. 206-1 at 154:8-9.

Further, Plaintiff executed a declaration in which he states that he is employed by both Defendants and that it has been clear during his employment that he works for WP USA, which hired him and set up his interview. Doc. 206-14 ¶¶1-3. He states that he was sent to a WP USA location, where he was hired, and he was provided numerous
19 documents that bore the WP USA *19 name, including training materials of WP USA. *Id.* ¶¶ 4-5, 8. He also states the he received a WP USA employee identification number, the garbage trucks display the WP USA logo, and the timekeeping system he uses and any payroll issues are handled by WP USA. *Id.* ¶¶ 6-7, 9, 12. Plaintiff indicates that he is advised of policy changes by WP USA newsletters and other documents. *Id.* ¶ 13. Plaintiff further states that he was disciplined on two occasions for missing a day and insubordination and received a progressive disciplinary form from WP USA when that happened. *Id.* ¶ 14. Plaintiff's understanding is that WP USA has the power to fire him. *Id.* ¶ 15.

Other helpers executed substantially similar declarations, although they contain different facts regarding discipline or termination. Docs. 206-15, 206-16, 206-17. For example, Israel Baptiste states that he contacted WP USA when he was fired, which advised it would investigate the circumstances surrounding his termination.[4] Doc. 206-15. Marco Coates states that he was suspended for leaving one day for personal reasons and received a progressive disciplinary form from WP USA. Doc. 206-16.

[4] Opt-In Plaintiff Israel Jean Baptiste has been terminated from this litigation as his claims against Defendants are time-barred.

WP USA relies on various declarations in support of its Motion for Summary Judgment, which Plaintiff argues do not weigh against this factor because, although the declarations indicate that the various regions have the power to hire, fire, train, and create policies for the Helpers within their divisions or regions, the declarations and other evidence do not demonstrate that the subsidiaries actually deviated from WP USA's policies. WP USA relies on declarations by the Regional Vice President of WP Louisiana (Doc. 185-1), a Divisional Vice President of WP Georgia (Doc. 185-2), a Divisional Vice President of WP North Carolina (Doc. 185-3), and Divisional Vice President for WP Alabama. (Doc. 185-4). Randall
20 J. Waterland, the Regional *20 Vice President for WP Louisiana states that he acts as the CEO for his region, with full authority to make all decisions, including staffing, training, compensation, and purchasing and maintaining equipment. Doc. 185-1 ¶ 1. WP Louisiana has multiple divisions, and the division managers decide whether to hire and fire Helpers, and also determine their pay. *Id.* ¶¶ 4-5, 9. The divisions make decisions regarding routes and, based on the route needs, how many days Helpers work, the

hours worked, and the routes worked. *Id.* ¶ 8. Additionally, performance evaluations and criteria are determined by the division managers. *Id.* ¶ 11. Waterland indicates that WP USA's only role is to provide guidance and ensure that payroll records are timely submitted. *Id.* ¶¶ 10, 12. The declarations by the divisional vice presidents include similar statements regarding their autonomy within their divisions. *See generally* Docs. 185-2, 185-3, 185-4.

Notwithstanding the declarations, Plaintiff contends that the various divisions follow the so-called recommended policies without altering them. Doc. 206 at 8-10. Generally, Plaintiff argues that the declarations are immaterial because WP USA does not show that any of the regions or divisions actually vary from the WP USA handbook or guidelines. For example, Plaintiff argues all subsidiaries use central corporate documents as the foundation of their training without material variations. To support this, Plaintiff cites to Banasiak's deposition testimony that the starting point of the regions' training documents comes from WP USA's intranet. Doc. 206-1 at 147:2-7. With respect to differences, Banasiak testified that the actual training would be different because it was done by different people who might show different examples, or train in a different order, or have items in the classroom that others did not have. *Id.* at 146:15-19.

Plaintiff also contends that the WP USA Employee Handbook provides the guidelines for all aspects of Helpers' employment, including rules, compensation, benefits, timekeeping, and attendance policies. The Handbook includes a progressive disciplinary policy that Plaintiff
21 asserts *21 Banasiak admitted is consistent with a form used by WP Florida without modification. Doc. 206-1 at 134:12-135:9. In fact, Banasiak testified that although the form originated from the WP USA intranet, he believed that the one currently used in his region was different. *Id.* at 135:2-9. Nonetheless, Plaintiff also asserts that WP USA controls termination because it provides the termination process in the handbook and payroll document. Doc. 206 at 10. This evidence, however, does not indicate that WP USA is involved in the actual termination decision, or controls that decision. *Layton*, 686 F.3d at 1178 (stating that control arose when the purported employer actively took a roll in oversight, including by deciding whether the employee should be disciplined). Instead, it is simply general policy information.

Additionally, Plaintiff maintains that WP USA controls evaluations, raises, and termination. Doc. 206 at 10. Plaintiff relies on the payroll document, which states that employee evaluations should occur on the employee's anniversary date or a designated common review date. Doc. 197-35 at 5. The document does not indicate that WP USA performs the evaluations. Similarly, Plaintiff's reliance on the statement in the document that an employee's raise must be entered into the ADP Vantage program and submitted for electronic approval is not demonstrative of this factor because nothing indicates that WP USA exercised oversight of this decision. Instead, the payroll document states that raises are recommended by division managers and approved by a Regional Vice President. *Id.* Thus, they are controlled by the subsidiary and not WP USA.

In *Braden v. County of Washington*, No. 08-574, 2010 WL 1664895, at *7 (W.D. Penn. Apr. 23, 2010), the Pennsylvania district court rejected a plaintiff's argument, analogous to the argument made here, regarding an alleged employer's joint employment where the plaintiff relied primarily on the defendant's "involvement in payroll and benefits administration, the [d]efendant's presence during the hiring process, the fact that
22 [d]efendant's HR provided support to court- *22 related[5] employees, that [the plaintiff's undisputed employer] followed or adopted certain . . . policies [of the alleged joint employer], and . . . that [the alleged joint employer] recommended that [the p]laintiff be suspended, written up, and fired." (internal footnote omitted). The plaintiff in that

case relied on these factors to demonstrate that the alleged joint employer had "control over the employee's daily activities and working conditions . . . ." *Id.* at *6. The district court concluded that there was no evidence that the alleged joint employer had direct or indirect control over the plaintiff's work schedule or working conditions, that the evidence demonstrated that the alleged joint employer approved, rather than determined, the rate and method of the plaintiff's compensation, and the evidence did not show that the alleged joint employer had the power to determine, or take action to hire or fire her. *Id.* at *7. Additionally, the alleged joint employer did not give the plaintiff work assignments. *Id.* The *Braden* court was not persuaded by the plaintiff being told and believing that she was an employee of the alleged joint employer because "[j]oint employer status . . . does not turn on the perceptions of the employee" and the human resources support was more "akin to an administrative function" rather than "an exercise of the requisite control." *Id.*

[5] The plaintiff worked for the Domestic Relations Section ("DRS") of a county court. *Braden*, 2010 WL 1664895, at *1.

Although the instant case differs slightly from *Braden* because there is evidence that Plaintiff's supervisors report to Jennings, who was also involved in WP USA, that consideration falls more properly under the next factor. As in *Braden*, although WP USA is involved in general policies and oversight of payroll, no evidence shows that WP USA takes an active role in Helpers' schedules, specific route assignments, or training. Accordingly, no genuine issue of material fact exists as to this factor. Instead, the evidence indicates that WP USA does not take an active
23 role *23 in oversight of Helpers' work. *See also Spears v. Choctaw County Commission*, No. 07-0275-CG-M, 2009 WL 2365188 (S.D. Ala. July 30, 2009) (County Commission was not a joint employer where sheriff decided who to hire and fire, who to assign specific tasks to, assigned schedules, and resolved issues regarding discipline.).

Here, even if WP USA had broad authority regarding policies and budget, the undisputed evidence shows that supervisory and control matters were left to individual regions and divisions. The undisputed evidence pertaining to this factor suggests that WP USA is not a joint employer.

2. Degree of Supervision over Work

"Supervision can be present regardless of whether orders are communicated directly to the alleged employee or indirectly through the contractor." *Layton*, 686 F.3d at 1178-79 (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994)). "[I]nfrequent assertions of minimal oversight do not constitute the requisite degree of supervision." *Id.* (citing *Martinez-Mendoza v. Champion Intern. Corp.*, 340 F.3d 1200, 1211 (11th Cir. 2003)).

With respect to this factor, Plaintiff asserts in his Motion for Summary Judgment, and in his Response to WP USA's Motion for Summary Judgment, that WP USA has significant supervision over the work performed at its subsidiaries and in its regions. Specifically, Jennings, the chairman of the board of WP USA, communicates with the Regional Vice Presidents regularly regarding business matters, frequently visits subsidiaries to check on the status of the regions and monitor work, and creates the policies, procedures, and work rules for Helpers across all regions. Doc. 197 at 39.

With respect to meetings between Regional Vice Presidents and Jennings, the evidence Plaintiff cites shows that Mills, a Regional Vice President, met with Jennings when he was hired (Doc. 197-26 at 18:12-17), Jennings meets with Regional
24 Vice Presidents approximately three *24 times per year (Doc. 197-27 at 23:1-4), and the director of HR visits the divisions on a quarterly basis to

review accidents and workers' compensation claims with the division managers (Doc. 197-10 at 31:8-32:9). Also, the director of HR created a handbook that can be used by the subsidiaries if they chose to use it. *Id.* at 93:3-94:25.

Additionally, Plaintiff relies on his and other Helpers' declarations which indicate that WP USA maintains the timekeeping system and provides monthly newsletters, bulletins, and policy changes or corporate mandates. Doc. 206-14 ¶¶ 7, 14; Doc. 206-15 ¶¶ 6, 12; Doc. 206-16 ¶ 6; Doc. 206-15 ¶¶ 6, 12.

None of this evidence demonstrates that WP USA supervises Plaintiff's or Helpers' work. Instead, it demonstrates that WP USA is involved in some capacity in overseeing management and reviewing safety and claims against the subsidiaries. Whether an entity is a joint employer "is determined by focusing on the entities' relationships to a given employee or class of employees. The joint employer relationship, in other words, is employee-specific." *Peppers*, 835 F.3d at 1300. Plaintiff fails to tie his evidence regarding supervision to himself or Helpers as a class. Accordingly, the undisputed evidence related to this factor suggests that WP USA is not a joint employer.

3. Right to Hire, Fire, or Modify Employment Conditions

Plaintiff argues that WP USA's Chief Executive Officer and/or Board of Directors hire and fire the Regional Vice Presidents who oversee WP USAs regions. Doc. 197 at 39. With respect to this assertion, because the inquiry is specific to the employee in question, or class of employees, this assertion is not relevant. *Peppers*, 835 F.3d at 1300.

Plaintiff also relies on a statement in the employee handbook that "[n]o supervisor or member of management, except John Jennings (President & 25 CEO), has the authority to bind the *25 company to any employment contract for any specified period of time with any employee, either verbally or in writing." Doc. 197-41 at 14. Additionally, Plaintiff generally relies on the handbook, which Plaintiff argues sets uniform workplace rules and policies that Helpers are required to follow and which advises that the violation of the policies and procedures would subject employees to disciplinary action, including termination. Doc. 197 at 40. However, evidence demonstrates that the regions were free to accept the handbook if they chose to, and change it if they chose to. Doc. 197-10 at 94:23-25; Doc. 206-1 at 119:3-13.

Plaintiff also submits his and other Helpers' declarations stating that they were hired by WP USA and that it is their understanding that if anyone at WP USA is unhappy with their work, WP USA has the power to fire or discipline them. Docs. 206-14, 206-15, 206-16, 206-17. On the other hand, WP USA submitted declarations providing that division managers control decisions regarding hiring and firing. Doc. 185-1, 185-2, 185-3, 185-4. Plaintiff's and Opt-In Plaintiffs' declarations conflict with the declarations submitted by WP USA regarding whether WP USA had the authority to hire, fire or discipline Helpers. Thus, a genuine dispute of fact exists with regard to this factor.

4. Power to Determine Workers' Pay or Method of Payment

Plaintiff relies on evidence that WP USA recommended use of the day rate and explained how it works. Doc. 197-42; Doc. 206-1 at 107:9-19. Nonetheless, the evidence Plaintiff submits also shows that some Helpers are paid on an hourly basis, and not through the day rate, supporting Defendants' assertion that WP USA does not mandate pay method. Doc. 197-4. Plaintiff also relies on evidence that all subsidiaries used the half day rate. Doc. 197-13; Doc. 197-14; Doc. 206-1 at 125:14-21. Additionally, Plaintiff cites to evidence that WP USA employees, including Jennings, are actively involved in bonus decisions and pay adjustments

26 for employees. *26 Nonetheless, even that evidence demonstrates that, although Jennings was aware of such decisions, the decisions are made by the regional vice president. Doc. 206-21.

Evidence also demonstrates that with respect to specific pay rates and methods, division managers make such decisions. Doc. 123-6 ¶ 12; Doc. 206-1 at 181:2-23. Decisions regarding whether to pay safety bonuses are made by region and division. Doc. 185-5 at 8.

The evidence demonstrates that although WP USA makes recommendations and provides explanations—essentially, support—regarding how to pay Plaintiff and Helpers, no evidence shows that WP USA makes specific, individual decisions, or mandates a specific amount of pay or method of payment. Accordingly, the undisputed evidence related to this factor suggests that WP USA is not a joint employer.

5. Preparation of Payroll and Payment of Wages

This factor weighs in favor of a finding that WP USA jointly employs Plaintiff and other Helpers. Although WP USA argues, and the evidence is undisputed that, individual subsidiaries prepare the payroll and pay wages, substantial other evidence shows that the process is managed by WP USA. Doc. 197-35 at 3. Additionally, WP USA maintains the health insurance and 401(k) plans of all employees. 206:108:18-20. The gross amount of the withdrawal is taken from WP USA's operating account. *Id.* at 5. However, the subsidiaries employ human resources employees who handle payroll at a more local level. *Id.* at 4; *see also* Doc. 185-1 ¶ 12. Accordingly, undisputed evidence demonstrates that WP USA is involved in preparation of payroll and payment of wages and this factor suggests that WP USA is a joint employer.

6. Ownership of Facilities

With respect to this factor, Plaintiff argues that WP USA owns 100% of its subsidiaries and is the only shareholder. Doc. 197-25; Doc. 197-27 at 27 15:1-9. Additionally, Plaintiff relies on *27 evidence that Jennings publicized that he secured a $715 million recapitalization and $500 million senior note offering, for which he used WP USA subsidiaries' assets as collateral. Doc. 197-27 at 49:24-52:9. Plaintiff further argues that this factor weighs in favor of joint employment because Jennings directs the subsidiaries as part of a full service, vertically integrated waste management company. *Id.* at 7:7-9; Doc. 206-7. In addition, WP USA maintains vehicle records. Doc. 206-1 at 73:23-74:4.

Defendant's declarations provide that the facilities used by the various subsidiaries are owned or leased by the subsidiaries. Doc. 185-1 ¶ 13, Doc. 185-2 ¶ 13, Doc. 185-3 ¶ 12, Doc. 185-4 ¶ 13. The subsidiaries likewise own the trucks used by Helpers. Doc. 206-1 at 128:23-129:3.

The evidence Defendants submit is more reflective of ownership of facilities and equipment used by Plaintiff and Helpers to perform their jobs. Plaintiff does not provide any evidence that the facilities and equipment are actually owned by WP USA, only that WP USA owns the subsidiaries, and therefore is the ultimate owner of these assets. Plaintiff cites to no law indicating that the Court should ignore corporate structures in determining ownership. Accordingly, the undisputed evidence related to this factor weighs in favor of a conclusion that WP USA is not an employer of Plaintiff or Helpers.

7. Performance of Job Integral to Business

"A task or activity is considered 'integral' to an employer's business when that employer 'would be virtually certain to assure that the function is performed, and would obtain the services of whatever workers are needed for this function." *Martinez-Mendoza*, 340 F.3d at 1213.

Plaintiff contends that WP USA is in the trash removal business and Plaintiff and other Helpers are integral to that business because they are
28 responsible for assisting in picking up *28 garbage, yard waste, and recycling. Doc. 197-2; Doc. 206-1 at 30:23-31:1. Regarding evidence of WP USA being in the trash removal business, Plaintiff cites to evidence that WP USA advertises itself as such on its webpage. Doc. 197-24.

WP USA argues that this factor is not relevant, citing to *Hankerson v. Fort Lauderdale Scrop, Inc.*, No. 15-60785-CIV, 2016 WL 7508242, at *3 (S.D. Fla. Sept. 8, 2016). The court in *Hankerson* cites to no authority for its position that this factor is relevant only when one employer contracted with another entity. As pointed out by Plaintiff, other courts in the Eleventh Circuit have analyzed this factor. Accordingly, the Court will consider this factor in weighing all factors.

A review of the record shows that during his deposition, Banasiak testified that it would not be fair to say that WP USA is "a company that handle[s] waste and recycling for residential and business companies," because it does not have any trucks or resources, such as employees, for the collection of waste. Doc. 206-1 at 18:25-19:14. This conflicts with the evidence presented by Plaintiff that WP USA holds itself out as a waste removal company. Doc. 206-7. Accordingly, disputed facts exist with respect to this factor.

8. Investment in Equipment and Facilities

"This factor informs [the court's] inquiry because workers are more likely to be economically dependent on the person who supplies the equipment or facilities." *Garcia-Celestino v. Consol. Citrus Ltd. P'ship*, No. 2:10 C 542-MEA-DNF, 2015 WL 3440351, at *23 (M.D. Fla. May 28, 2015) (internal quotation omitted), *aff'd in part, rev'd in part on other grounds*, 842 F.3d 1276 (11th Cir. 2016).

Plaintiff cites to evidence that WP USA provides the capital to purchase equipment. Doc. 197-27 at 50:21-25; Doc. 197-28 at 2. Defendant cites to
29 evidence that the facilities and trucks *29 are owned or leased by the subsidiaries. Doc. 185-1 ¶ 13, Doc. 185-2 ¶ 13, Doc. 185-3 ¶ 12, Doc. 185-4 ¶ 13; Doc. 206-1 at 128:23-129:3.

Here, the undisputed evidence shows that the subsidiaries supply the equipment or facilities, but that the investment into the equipment or facilities may be made by WP USA. Accordingly, this factor suggests that WP USA is a joint employer of Plaintiff or Helpers.

9. Assessment of the Factors

Of the eight factors, the undisputed evidence with respect to the first, second, fourth, and sixth (the nature and degree of control, the degree of supervision, the power to determine pay, and ownership of the facilities), weigh in favor of a finding that WP USA is not a joint employer. The fifth and eighth factors (preparation of payroll and payment of wages, and investment in equipment and facilities), weigh in favor of a finding that WP USA is a joint employer. The remaining two factors (the right to hire, fire or modify employment conditions, and performance of a job integral to the business), have disputed facts and cannot assist the Court for purposes of summary judgment.

No one factor in this analysis is dispositive. *Martinez-Mendoza*, 340 F.3d at 1209. Instead, "[i]n entertaining and assessing the evidence relevant to the inquiry called for by a given factor, the question the district court must ask itself is whether such evidence, considered as a whole, supports (or fails to support) the [plaintiff's] claim that he is economically dependent on the putative employer . . . ." *Id.* Ultimately, "[t]he facts the court finds at the end of each inquiry become pieces of circumstantial evidence which, together, yield inferentially one of two ultimate facts: joint employment exists or it does not." *Id.* The burden

of proof falls on the plaintiff to establish joint employment by a preponderance of the evidence. *Id.* *30

Based on the above, the Court cannot determine at this stage whether WP USA is a joint employer of Plaintiff or other Helpers. Resolution of the remaining factors, for which the evidence is conflicting, is critical to the Court's determination. If WP USA does have the right to hire, fire, or determine the conditions of Plaintiff's employment, this would weigh heavily in favor of a conclusion that WP USA is a joint employer. On the record before the Court, neither Defendant WP USA nor Plaintiff are entitled to judgment, as a matter of law, on the question of joint employment. Accordingly, WP USA's Motion for Summary Judgment (Doc. 185) is denied. Likewise, Plaintiff's Motion for Summary Judgment on the issue of joint employment (Doc. 197) is denied.

D. Day Rate, Half Day Rate, and Bonuses Under the FLSA

The Code of Federal Regulations describes a "regular rate" under the FLSA as "a rate per hour." 29 C.F.R. § 778.109. Section 778.109 explains that the FLSA "does not require employers to compensate employees on an hourly rate basis," and employees' "earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek . . . ." *Id.* To determine an employee's regular hourly rate of pay, his or her "total remuneration for employment . . . in any workweek" is divided "by the total number of hours actually worked by him in that workweek for which such compensation was paid." *Id.* Sections of the Code of Federal Regulations "give some examples of the proper method of determining the regular rate of pay in particular instances." *Id.*

One section 778.112, which relates to "day rates and job rates," provides as follows:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he
>
> *31
>
> receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Unlike other sections, which permit an employee to be paid the hourly rate for overtime hours *and* an additional half of the hourly rate for the hours in excess of forty during the week, day rate employees under section 778.112 receive only half of their hourly rate for hours worked in excess of forty during the workweek.[6]

> [6] The United States Court of Appeals for the Fifth Circuit previously found this to be a permissible interpretation by the Secretary of Labor of the FLSA's prescription that employees receive one and one-half of their regular rate of compensation for hours worked in excess of forty per week "because each employee is receiving 100% of his regular rate for each hour worked, plus and additional one-half of that regular rate for each hour in excess of 40 in a week . . . ." *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 268 (5th Cir. 2000). Plaintiff does not challenge the Secretary of Labor's interpretation in section 778.112, but argues that section 778.112 does not apply.

WP Florida[7] argues that section 778.11 2is just an example or illustration of how to calculate the regular rate and that it does not provide stringent parameters for the only instances when overtime may be paid at half the regular rate. Doc. 211 at

10. WP Florida contends that even if it did not pay Plaintiff strictly in accordance with section 778.112, because it used a day rate, Plaintiff was entitled only to half of his regular rate as a day rate worker. Doc. 187 at 9. WP Florida relies on *Allen v. Board of Public Education for Bibb County*, 495 F.3d 1306 (11th Cir. 2007), in support of this argument.

[7] WP USA's Motion for Summary Judgment relates only to the issue of joint employment. Doc. 185. However, it filed a notice that in the event that the Court denied its Motion for Summary Judgment, it joined in all grounds for summary judgment raised by WP Florida. Doc. 189. Accordingly, all references regarding WP Florida in the remainder of the Order also apply to WP USA.

In *Allen*, bus drivers, bus monitors, paraprofessionals, secretaries, and custodians filed an action alleging violation of the FLSA based on an alleged failure to pay the appropriate regular
32 *32 rate. *Id.* at 1309. With respect to bus drivers, they were paid different hourly rates depending on the type of route being driven—for example, drivers were paid various "regular route" rates depending on years of service, $6 per hour for field trips, and $7 per hour for all other routes. *Id.* at 1310. The overtime rate was calculated based on a weighted rate of pay, calculated by dividing the straight-time compensation by the number of hours worked. *Id.* at 1310-11.

29 C.F.R. § 778.115 provides guidance for "employees working at two or more rates." That section states, in pertinent part, that "[w]here an employee in a single workweek works at *two or more different types of work* for which different nonovertime rates of pay . . . have been established, his regular rate for that week is the weighted average of such rates." 29 C.F.R. § 778.115 (emphasis added). The bus drivers in *Allen* contended that use of a blended rate was permitted only if the employee was engaged in two or more different types of work and, because their jobs involved only one type of work, a weighted rate could not be employed. 495 F.3d at 1312-13.

The Eleventh Circuit rejected the plaintiffs' argument, stating that "when viewed in the proper context, it is apparent that section 778.115 contains no" mandate that employees working at two or more rates perform different types of work. *Id.* at 1312. In reaching this conclusion, the Eleventh Circuit read section 778.115 in conjunction with section 778.109's statement that the following sections were examples of how to determine the regular rate of pay. *Id.* at 1313. In reading sections 778.109 and 778.115 together, the Court stated that it became apparent that section 778.115 was "one of the examples mentioned in [section 778.109] as a way that the regular rate may be calculated in certain cases." *Id.* Accordingly, although section 778.115 "exemplifie[d] one way that a regular rate [could] be determined, it [did] not mandate that different rates of pay [were] only permitted when different
33 types of work [were] performed." *Id.* *33

Here, WP Florida argues that, despite paying half-day rates and various non-discretionary bonuses, it complied with the FLSA because section 778.112, pursuant to *Allen*, is not a mandate. Doc. 187 at 11. Instead, it is an example of how to calculate the regular rate under the circumstances when a day or job rate employee receives no other form of compensation, which does not address—or preclude—situations where the employee receives a day or job rate plus other forms of compensation. *Id.* WP Florida contends that its method of including all day rates, half day rates, and weekly non-discretionary bonuses in the remuneration, divided by the hours worked, to obtain the regular rate is a permissible method of calculating the regular rate. *Id.* at 13.

Plaintiff argues that *Allen* is not applicable because the employer paid its employees overtime compensation of one and one half times the employees' regular rate of pay, whereas here,

Plaintiff and other Helpers were paid only half time. Doc. 207 at 9-10. Additionally, Plaintiff argues that *Allen* interprets section 778.115, not section 778.112. *Id.* at 10.

Plaintiff's distinctions regarding *Allen* are not substantive. Specifically, the Eleventh Circuit in *Allen* explained that all sections that followed section 778.109 were examples, not only section 778.112. Additionally, half time is authorized by section 778.112, and Plaintiff does not challenge the fact that paying half time is permissible under that section. The decision in *Allen* is instructive as to the appropriate interpretation of section 778.112.

In addition to *Allen*, WP Florida relies on a 1967 DOL Opinion Letter that addresses employees paid a day rate plus an additional $2.00 per hour for extra tips. Doc. 187-1 at 5. The employer asked the DOL to clarify how it should determine these employees' regular rate of pay. *Id.* The DOL Administrator explained that the applicable section stated

> that if an employee is paid a flat sum for a day's work without regard to the number of hours worked in the day, and if he receives no other form of compensation for his services, his regular rate [of pay] is determined by totaling all the sums received at such day rates in the workweek and dividing by the total hours actually worked.

34 *34 *Id.* Such an employee was "then entitled to extra half-time pay at this rate for all hours worked in excess of the applicable maximum workweek." *Id.* The Administrator further explained that in workweeks where an employee made extra tips, "the hours worked and the wages received must be added to the total hours worked and the total earnings received." *Id.* Then, "[t]he total wages at both day rates and hourly rates [were] added together and divided by the total hours worked to determine the regular rate for that week," and additional half-time was required to be paid on the new regular rate. *Id.* Based on this, WP Florida contends that it complied with the DOL's formula for calculating the regular rate and overtime for day rate employees who received other methods of compensation. Doc. 187 at 9.

Plaintiff argues that WP Florida's reliance on the DOL's interpretation is not proper because DOL interpretations lack the force of law. Indeed, the Supreme Court has explained that " [i]nterpretation[s by an agency] such as those in opinion letters . . . do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Instead, such interpretations are entitled only to respect to the extent that they are persuasive. *Id.* If the agency's interpretation contained in an opinion letter is not persuasive, it is not entitled to such respect. *Id.* Here, the DOL's opinion letter is persuasive and entitled to respect.

In his own Motion for Summary Judgment, and in his Response to WP Florida's Motion for Summary Judgment, Plaintiff argues that the use of additional methods of payment violates section 778.112, making it inapplicable. Doc. 207 at 6. Because, according to Plaintiff, section 778.112 is inapplicable, WP Florida is required to pay time and a half for overtime hours worked, not half time. Plaintiff cites to various cases which state that payment of other forms of compensation takes the compensation method outside of the purview of section 778.112. For example, in *Turner v. BFI Waste Services, LLC*, 268 F. Supp. 3d 831, 831

35 (D.S.C. 2017), a *35 residential waste disposal driver was paid a day rate, as well as "on an hourly basis for a variety of required tasks, including: (1) 'help pay' for time spent collecting trash on another employee's route, and (2) 'downtime' for when his truck was inoperable, when he was attending a safety meeting, or when he was training another driver." The plaintiff's employer added the hourly rates to the day rate to obtain the plaintiff's total wages for the week, then divided this by the total number of hours worked during the week to determine the plaintiff's regular rate of pay. *Id.* The employer paid half this amount

for overtime hours worked. *Id.* Thus, the plaintiff in *Turner* was paid similarly to how Plaintiff was paid in this case.

The *Turner* plaintiff filed an action alleging FLSA overtime provision violations. *Id.* The plaintiff alleged that the defendant miscalculated his regular rate of pay, resulting in an illegally low overtime rate. *Id.* The plaintiff also alleged that his employer deducted a thirty-minute meal break each shift, even though he worked through the meal period, which resulted in a failure to pay all overtime hours worked. *Id.*

The district court in *Turner* concluded that the employer's hybrid day and hour rate, under which the plaintiff was not paid a day rate if he worked fewer than eight hours and was paid additional amounts on an hourly basis for various tasks, precluded the employer's argument that the plaintiff was paid a day rate. *Id.* at 838 (stating that it was "clear that [the plaintiff] was not a day rate employee as the DOL and courts have interpreted the term to mean"). The court found this pay method to be more analogous to a fluctuating workweek payment method. *Id.*

Additionally, the court noted that "[a] review of the payroll records demonstrates that the practical consequence of [the employer's] hybrid compensation scheme is that [the plaintiff] worked a larger number of hours for a lower rate of pay." *Id.* at 839. More specifically, the employer's method of calculating overtime "led to [the
36 plaintiff] working larger number of hours *36 for an increasingly low rate of pay." *Id.* "While this is not a per se violation of the FLSA, it raises questions about the validity of the hybrid compensation scheme itself . . . ." *Id.* However, ultimately, the issue on summary judgment was whether the parties had a clear and mutual understanding on whether the day rate was intended to compensate for forty hours per week, or all hours worked, as well as what type of work the day rate was intended to cover. *Id.*

Turner is distinguishable. Most importantly, Plaintiff does not argue here that he received an hourly rate instead of a day rate if he worked fewer than eight hours. Nor does Plaintiff argue that he was paid an hourly rate for tasks such as attending meetings. Instead, the methods of payment included the day rate, the half day rate, and bonuses, and Plaintiff argues that the day rate does not apply because whether he and other Helpers received a full day rate or a half day rate depended on the number of hours worked.

Plaintiff also relies on *Rodriguez v. Carey International, Inc.*, No. 03-22442- CIV-UNGARO-BENAGES, 2004 WL 5582173, at *7 (S.D. Fla. Sept. 15, 2004) , which does not entirely support his position. In *Rodriguez*, the plaintiffs[8] were limousine drivers who were paid 60% of the trip fee charged to customers plus the mandatory 20% gratuity charged to customers. *Id.* at *1. The defendants contended that the day/job rate delineated by section 778.112 applied, whereas the plaintiffs contended it did not because they received other forms of compensation. *Id.* The court explained that section 778.112 did "not provide definitional contours," and case law did not exist to explain the clause. *Id.* However, the court stated that "the most logical and likely reasoning is that the regulation does not apply . . . if the employee is given some other form of compensation separate and apart from the job rate," such as where "an employee also receives an
37 *37 hourly rate, salary, or commission . . . ." *Id.* The problem with including various different compensation methods, the court explained, was that it could "be totally impossible to convert any such time for which an employee was paid or should have been paid into a uniform regular hourly rate." *Id.*

[8] Other types of drivers who were paid differently were also involved in *Rodriguez*, but to simplify the review of the case, only these limousine drivers are discussed. This narrowing does not affect the analysis of the case. --------

Nonetheless, the court went on to say that this did "not mean that there cannot be more than one component in computing the job rate. There is no policy reason for such a prohibition, and there is no regulation or other authoritative declaration that prohibits adding different items to calculate the entirety of the job rate." *Id.* The court explained that as long as all components were "calculated as part of the job rate, there is no inconsistency that might result as it would from having a job rate and a separate hourly rate, salary, or commission engrafted onto the job rate." *Id.*

The court in *Rodriguez* determined that certain activities performed by the plaintiffs—such as training sessions or driving between jobs—did not properly fall under a per job rate that could be compensated under section 778.112. *Id.* at *8. Instead of concluding, however, that section 778.112 did not apply at all, the *Rodriguez* court simply concluded that these non-job-rate activities should be compensated in accordance with the standard formula that provided for time and a half of overtime hours. *Id.* For the job-rate activities, the plaintiffs were entitled only to half time for overtime hours. *Id.*

Rodriguez supports the proposition that a day rate can incorporate various types of compensation—in that case, the day rate was calculated by adding the fare plus the mandatory tip. WP Florida calculated the regular rate—not the day rate itself—by adding together fixed compensation rates. However, here, non-discretionary safety and help bonuses could easily be engrafted onto the day rate to achieve a regular hourly rate. This form of
38 compensation is unlike *38 the activities involved in *Rodriguez* that depended on the amount of time spent on a task. The Court will address below the issue of whether Plaintiff's compensation of a day rate or half day rate depended on the number of hours worked. Accordingly, *Rodriguez* is not persuasive.

Other cases are more supportive of Plaintiff's position. In *Serrano v. Republic Services, Inc.*, 227 F. Supp. 3d 768 (S.D. Tex. 2017), the plaintiffs were paid through a combination of methodologies: a job/day rate, piece rate, and hourly rates. *Id.* at 770. The plaintiffs argued that this pay scheme was unlawful because section 778.112 did not allow other forms of compensation to be blended with the job or day rate. *Id.* The court concluded that section 778.112 "applies when a pay structure such as a day rate, alone, compensates the employee for all hours worked." *Id.* at 771. In other words, that section would "not apply when the flat rate is only part of the monetary compensation." *Id.* The court stated that section 778.112 "by its own terms, does not apply when the employer pays the employee monetary compensation pursuant to a combination of rates." *Id.* at 772. Because the plaintiffs in *Serrano* "receiv[ed] a combination of methods of monetary compensation as part of their wages in addition to any flat sums," the court found that section 778.112 did not apply. *Id.*

Similarly, in *Rodriguez v. Republic Services, Inc.*, No. SA-13-CV-20-XR, 2013 WL 5656129, at *1 (W.D. Tex. Oct. 15, 2013), the court found that a combination of pay rates fell outside of section 778.112. There, the plaintiffs were paid a day rate for five days, but were also required to occasionally work for a sixth day at an hourly rate based on the employee's regular rate of pay for a trailing thirteen-week average. The plaintiffs were also paid "incentive payments" of $10 for each day worked. *Id.* The defendants argued that section 778.112 applied, and the plaintiffs contended that because they received three different forms of compensation for the same service, section 778.112 did not apply. *Id.* In response, the defendants argued, as WP Florida
39 does *39 here, that "sections 778.111 through 778.122 [were] mere examples of the proper method for determining the regular rate of pay," citing to the Eleventh Circuit's decision in *Allen*. *Id.* at *2. The district court was "troubled by

Defendants' argument and the Eleventh Circuit's decision in *Allen*." *Id.* Specifically, the district court cited to the FLSA's prescription that employers pay employees not less than one and one-half times the employee's regular rate, and explained that the defendants' argument "flip[ped] the general rule onto its head allowing for any number of payroll methods to be employed in order to pay overtime at only the half-rate, rather than one and one-half times." *Id.* The court concluded that it would be required to re-write section 778.112 and delete the phrase "and if he receives no other compensation for his services" to apply it to the facts of the case. *Id.* Thus, the district court rejected the proposition that section 778.112 was a mere example that need not be strictly followed to pay a day rate.

This Court has also briefly addressed this issue. In *Bunday v. Suncoast Beverage Sales, LLP*, No. 2:08-CV-00769-JLQ, 2009 WL 10670167, at *6-7 (M.D. Fla. Sept. 18, 2009), the Court addressed whether section 778.112 applied to a beer sales representative who was paid a day rate, received a $5.00 bonus for completing his paperwork every day, and received a commission of $0.11 per case of beer delivered. In *Bunday*, the "[p]laintiff argue[d] that since his pay was different every day, based on whether he filled out his paperwork and how many cases he delivered, his pay, taken in the aggregate, [could not] be considered a flat rate." *Id.* at *6. The Court, relying on *Powell v. Carey International, Inc.*, 514 F. Supp. 2d 1302 (S.D. Fla. 2007), concluded that the *Bunday* plaintiff was paid a day rate because day rate payment methods could be variable as long as the employee's compensation was not anchored to or correlated with the number of hours he or she worked. *Id.* at *6-7. The Court explained that the plaintiff's compensation was "an analog to a job rate, since he was paid to complete a defined route
40 of visits *40 each day, regardless of the length of time it took him to complete such rounds." *Id.* at *7. That other factors of his pay were variable did not alter that he was paid a job rate. *Id.*

Additionally, the Court further stated that " [d]espite the presence of a degree of murkiness due to the hybrid nature of [the plaintiff's] compensation, logic does not support [the p]laintiff's contention" that he was an hourly employee because "[h]e received $80 daily, regardless of the hours he worked." *Id.* Thus, " [p]aperwork incentives and commission notwithstanding, [the plaintiff's pay wa]s an archetypal example of a flat sum pay scheme" because "his hours could vary by large amounts and [he] would still receive the same base pay for having completed a defined set of tasks each day." *Id. Bunday* is analogous to the facts of this case, in which Plaintiff and Helpers were paid a day rate for completing their routes, but received additional compensation for other, non-routine, tasks.

Here, the Court concludes that section 778.112 need not be followed exactly with respect to paying employees a day rate. Instead, consistent with the Eleventh Circuit's decision in *Allen*, it is only an example of how to calculate the regular rate when a worker is paid a day rate. 495 F.3d at 1313. Thus, the fact that Plaintiff and Helpers received other compensation in the form of bonuses or for additional tasks does not mean they were not paid a day rate. Moreover, the payment of half day rates for tasks outside of Helpers' usual tasks does not take Plaintiff or other Helpers outside the scope of day rate employees. As the Court explained in *Bunday*, the primary payment to Plaintiff and Helpers was through a day rate, and that amount could vary based on additional tasks. Accordingly, payment of overtime to Plaintiff or Helpers at a half rate, instead of a time and a half rate, is permissible.

Plaintiff also submits evidence to demonstrate that whether he and Helpers received a day rate was tied to whether they worked four or more hours.
41 Doc. 197-14. Doc. 197-15. This conflicts *41 with Banasiak's testimony that Plaintiff and Helpers received a day rate for completing their task of finishing their route, and were paid a half day rate for individual tasks that were outside of their

normal route. Doc. 206-1 at 90:10, 91:16-19, 126:5-17. Thus, although the practice of paying workers a day rate for daily tasks, a half day rate for additional tasks, and bonuses, and paying overtime at a rate of half that amount instead of one and a half times that amount, is compliant with the FLSA, it is not clear that this was WP Florida's practice. To the extent that WP Florida would pay Plaintiff or Helpers only the half day rate if their daily task took less than four hours, instead of the full day rate for their daily task, the Court finds that this is not consistent with paying a day rate, or compliant with the FLSA. Because the evidence is conflicting with respect to whether payment of the day rate for a daily task was tied to the number of hours worked, the Court cannot grant summary judgment as to whether Defendants violated the FLSA.

E. Individuals Not Affected by Half-Day Rate Policy

WP Florida argues that the proposed collective includes all Helpers who worked at locations where there was a policy or practice of paying either a half-day rate or non-discretionary bonus, even if those Helpers were not affected by that policy, and that Opt-In Plaintiffs who were never paid a half-day rate or non-discretionary bonus suffered no injury and cannot state a claim for relief. Doc. 187 at 15-16.

In *Auer v. Robbins*, 519 U.S. 452, 455 (1997), the Supreme Court evaluated alleged FLSA violations regarding whether employees met the salary-basis test, which requires salary basis employees to regularly receive on a regular basis a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work. Salary basis employees are exempt employees to whom the minimum wage and maximum hour requirements do not apply. 29
42 U.S.C. § 213. The employees in *Auer* alleged *42
that they were not exempt because their salary could be reduced for various disciplinary infractions related to the quality or quantity of work performed. 519 U.S. at 455. During the litigation, the issue arose as to whether employees could not meet the test for exempt status if they were actually subjected to deductions, or whether it applied when there was a theoretical possibility of deductions. *Id.* at 459. The Secretary of Labor interpreted the "test to deny exempt status when employees [were] covered by a policy that permit[ted] disciplinary or other deductions in pay 'as a practical matter.' " *Id.* at 461. The Secretary concluded the standard was met if there was "either an actual practice of making such deductions or an employment policy that create[d] a 'significant likelihood' of such deductions." *Id.* The Supreme Court explained that this policy rejected a bright line policy of requiring actual deductions, but did require "a clear and particularized policy . . . [that] 'effectively communicate[d]' that deductions [would] be made in specific circumstances." *Id.* The Supreme Court found that the Secretary's policy was not clearly erroneous. *Id.*

Plaintiff here argues that the decision in *Auer* demonstrates that the case should include Opt-In Plaintiffs who were "subject to" any unlawful day rate pay practice. Doc. 207 at 12. However, Plaintiff does not explain how the Secretary's policy regarding an exempt/non-exempt status applies to a determination of who may claim a violation of the FLSA for failure to pay overtime to non-exempt employees. Similarly, Plaintiff does not cite to any interpretation by the Secretary to which this Court would defer in the event that it was not clearly erroneous. *Auer* is not applicable here.

Plaintiff also relies on *Speer v. Cerner Corp.*, No. 14-0204-CV-W-FJG, 2016 WL 5395268, 2016 U.S. Dist. LEXIS 131230, at *32 (W.D. Mo. Sept. 26, 2016), in which the defendant argued that the named plaintiffs did "not have standing to bring claims predicated on pay types that they did not receive." The plaintiffs in *Speer* argued that the
43 defendant "invit[ed] *43 the Court to commit legal

error by conflating Article III standing with the requirements for class certification under Rule 23 and conditional certification of collective action under the FLSA." *Id.* at *33. The court agreed because the plaintiffs alleged the injury-in-fact of improper compensation for overtime worked, which was traceable to the actions of the defendant, which caused the plaintiffs' harm. *Id.* The court stated that "[j]ust because plaintiffs have pled class claims that may include those of individuals who received other types of compensation not received by the named plaintiffs does not mean that the named plaintiffs do not have standing for suit." *Id.* The court also stated that the plaintiffs pled that they were victims of a common policy or plan that applied to a broad group of individuals to which the plaintiffs belonged. *Id.* at *33-34.

Plaintiff, here, relies on *Speer* to argue that WP Florida's request for summary judgment as to Opt-In Plaintiffs not paid a half-day rate or bonuses conflated Article III's standing requirements with requirements for collective claims under the FLSA. Doc. 207 at 12-13. Plaintiff's reliance on *Speer* is misplaced. The court in *Speer* addressed whether the named plaintiffs had standing regarding pay types not received by them, not whether the class could include parties who were not affected by a common policy or plan that allegedly violated the FLSA. WP Florida's argument is that Helpers who were never paid a half day rate or discretionary bonus are not victims of any FLSA violation and, therefore, have no injury in fact.

WP Florida likewise does not provide cases on point, but cites to cases that were at the conditional certification stage and discussed inclusion of employees who were adversely affected by policies that violated the FLSA. *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1240 (S.D. Ala. 2008); *Pares v. Kendall Lakes Auto., LLC*, No. 13-20317-CIV-MORENO, 2013 U.S. Dist. LEXIS 90499, at *4 (S.D. Fla. June 27, 2013) (stating that the named plaintiffs were required to make substantial and detailed allegations of FLSA violations of which the 44 named plaintiffs and *44 putative class were victims). These cases do not address standing or the existence of an injury, nor do they discuss what it means to be adversely affected by a policy or practice that violated the FLSA.

Other cases have denied summary judgment as to individual class members who have not suffered damages. *Khadera v. ABM Indus. Inc.*, No. C08-0417 RSM, 2012 WL 581580, at *4 (W.D. Wash. Feb. 22, 2012). Instead, courts have treated this as a matter to be resolved when allocating damages. *Id.* (citing *French v. Essentially Yours Indus.*, Case No. 1:07-CV-817, 2008 U.S. Dist. LEXIS 54550, 2008 WL 2788511 (W.D. Mich. July 16, 2008) (certifying Rule 23 class even though "some members may have different damages or none at all"); *In re Patriot Am. Hospitality Inc. Secs. Litig.*, MDL No C-00-1300 VRW, 2005 U.S. Dist. LEXIS 40993, *13, 2005 WL 3801594 (N.D. Cal Nov. 30, 2005) (approving class settlement where certain class members sustained no damages, but where plaintiff's expert was sufficiently able to account for those class members in allocating damages); *cf. Sibley v. Sprint Nextel Corp.*, 315 F.R.D. 642, 664 (D. Kan. 2016) (denying a motion for decertification on the basis that some class members suffered no damages, and stating that such members simply would not receive compensation).

Accordingly, the Court denies WP Florida's Motion for Summary Judgment to the extent that it seeks to eliminate Opt-In Plaintiffs on a piecemeal basis based on damages at this stage.

F. Collateral Estoppel

In its Answer, WP of Florida raises as an affirmative defense that it acted in good faith and had reasonable grounds to believe its acts or omissions did not violate the FLSA. Doc. 131 at 7. Plaintiff argues in his Motion for Summary Judgment that Defendant WP of Florida is collaterally estopped from asserting the

affirmative defense of good faith because it previously litigated this affirmative defense in *Andreu*. Doc. 197 at 42-47. WP of Florida
45 responds that collateral estoppel *45 is inappropriate because *Andreu* involved different facts and issues, including the alleged failure to pay promised bonuses and involuntary work to receive bonuses. Doc. 211 at 14-16. Additionally, WP of Florida contends that it anticipates submitting witnesses and evidence not relevant to the *Andreu* trial specific to the regions at issue in this case. *Id.*

The "good faith defense is an objective test that bars actions for violations of the FLSA if the employer establishes 'that the act or omission complained of was (1) taken in good faith and (2) was in conformity with and (3) in reliance on a written interpretation by a designated agency.' " *Newby v. Great Am. Dream Inc.*, No. 1:13-cv-3297-TWT-GGB, 2014 U.S. Dist. LEXIS 158829 (N.D. Ga. Oct. 14, 2014), *Report and Recommendation adopted by*, *Berry v. Great Am. Dream, Inc.*, No. 1:13-CV-3297-TWT, 2014 U.S. Dist. LEXIS 158501 (N.D. Ga. Nov. 6, 2014) (quoting *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926 (11th Cir. 1987)). "[T]he written administrative interpretation 'must provide a clear answer to the particular situation.' " *Ballehr v. Ctrs., Inc.*, No. 5:08-cv-261-Oc-10GRJ, 2009 WL 10670050, at *6 (M.D. Fla. Nov. 10, 2009) (quoting *Cole*, 824 F.2d at 928). "The agency designated to provide interpretations of the FLSA is the Administrator of the Wage and Hour Division of the Department of Labor." *Cusumano v. Maquipan Int'l, Inc.*, 390 F. Supp. 2d 1216, 1221 (M.D. Fla. 2005) (quoting *Cole*, 824 F.2d at 926).

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Schulman v. S. Shuttle Servs. Inc.*, No. 08-80219-CIV, 2009 WL 331550, at *2 (S.D. Fla. Feb. 10, 2009) (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979)). Offensive collateral estoppel is used "when 'the plaintiff seeks to foreclose the defendant from litigating an issue the defendant
46 *46 has previously litigated unsuccessfully in an action with another party.' " *Id.* (quoting *Parklane*, 439 U.S. at 326 n.4). "To claim the benefit of collateral estoppel the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998). With respect to whether an issue is identical, the party opposing the application of collateral estoppel "need only point to one material differentiating fact that would alter the legal inquiry." *F.T.C. Nat'l Urology Grp., Inc.*, 785 F.3d 477, 482 (11th Cir. 2015) (quoting *CSX Transp., Inc. v. Bhd of Maint. of Ways Emps.*, 327 F.3d 1308, 1317 (11th Cir. 2003)).

The Supreme Court has cautioned that fairness to both parties must be considered when applying offensive collateral estoppel. *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666 (11th Cir. 1984) (citing *Parklane*, 439 U.S. at 331). "Of primary importance is whether the opposing party had an adequate incentive to litigate vigorously in the previous proceedings and whether he received a full and fair hearing in that proceeding." *Id.* "Once . . . the litigant has had a full and fair opportunity to litigate his claim, the trial court has broad discretion in deciding whether offensive collateral estoppel is appropriate." *Id.* (citing *Parklane*, 439 U.S. at 331). Additionally, "[t]he general rule is that in cases where a plaintiff could easily have joined in the earlier action or where

the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Newby*, 2014 U.S. Dist. LEXIS 158829, at *17.

47 *47

WP of Florida contends that *Andreu* differs because it involved an alleged failure to pay promised bonuses and a resulting miscalculation of the regular rate, which is not alleged here. Doc. 211 at 15. According to WP of Florida, much of the evidence in *Andreu* related to whether the plaintiff received all of the bonuses promised to him and, if not, how much that affected his regular rate. *Id.* at 16. Based on this and other evidence, the jury in *Andreu* concluded that WP of Florida did not meet its burden of showing that its actions were taken in good faith and in conformity with and reliance on a written administrative interpretation by the DOL. Doc. 197-8 at 2.

Plaintiff replies that the material issues in this case are identical to those in *Andreu*, which focused on WP of Florida's failure to pay overtime at time-and-a-half and failure to adhere to the requirements for paying a day rate. Doc. 221 at 8. Plaintiff contends that the argument in *Andreu* that WP of Florida failed to pay bonuses two or three times was inconsequential to the verdict. *Id.*

This Court took judicial notice of documents filed in *Andreu* to the extent necessary to recognize that such filings were made, or recognize judicial acts and the subject matter of the litigation. Doc. 306. A review of the documents in *Andreu* shows that the subject matter of the litigation included a dispute as to whether WP of Florida failed to pay promised compensation, which is not at issue in this case. Doc. 197-20 at 63:8-18. Plaintiff does not provide support for his statement that this issue was inconsequential to the result in *Andreu*.

The additional argument in *Andreu* is sufficient to make the issue in that case different from the issue in this case, so as to render offensive collateral estoppel inapplicable. The Court cannot determine that the additional issue of WP of Florida's purported failure to pay for extra shifts did not affect the jury's decision in *Andreu*. For this reason, the Court finds that application of offensive collateral estoppel would be unfair in this case. Accordingly, it is

48 *48

ORDERED:

1. Defendant Waste Pro USA, Inc.'s Motion for Summary Judgment (Doc. 185) is **DENIED.** Genuine issues of material fact exist as to whether Waste Pro USA is a joint employer of Plaintiff and Helpers.

2. Defendant Waste Pro of Florida, Inc.'s Motion for Summary Judgment (Doc. 187) is **GRANTED-in-part and DENIED-in-part.** Defendant WP Florida's practice of paying bonuses and including them in the regular rate, for which Defendant paid half time as overtime, did not violate the FLSA. Thus, Defendant WP Florida's Motion for Summary Judgment is **GRANTED** with respect to its practice of including payment of bonuses in calculating day workers' regular rate. Additionally, the Court finds that Defendant WP Florida's practice of paying a day rate, half day rate based on tasks, and bonuses does not violate the FLSA as a matter of law to the extent that payment of a day rate and half day rate was not tied to the number of hours worked. This conclusion also applies with respect to Defendant WP USA. However, because a genuine issue of material fact exists as to whether a half day rate was paid for daily tasks if the employee worked fewer than four hours, Defendant WP Florida's Motion for Summary Judgment is **DENIED** with respect to whether payment of a half day rate complied with the FLSA.

3. Plaintiff's Amended Motion for Partial Summary Judgment (Doc. 197) is **DENIED.**

DONE AND ORDERED in Tampa, Florida on September 30, 2019.

/s/

Charlene Edwards Honeywell

United States District Judge Copies to:
Counsel of Record and Unrepresented Parties, if any

Defense Counsel Objection

I state for the record my objections to the rulings made by this Court yesterday relative to the …Jury Instructions to be applied to a violation of the FLSA. In two holdings this Court has allowed this trial to continue, whereas as of last night, we're getting the supplemental expert disclosure, there was not one number disclosed to the defendants relative to the claim damages of the plaintiff. There was a suggestion that because the defendant did not object to the use of the expert disclosure the Court originally made, that the expert should then be able to amend his opinion in the middle of trial, even though that amendment was never disclosed prior to trial. By ruling as it has, the Court has allowed basically expert disclosures the new theory of damages on the 5th day of trial.

For the record, the only reason nothing was moved to --excluded prior to trial was that the plaintiffs were not using the report that was disclosed and later determined that they weren't calling the expert at all. This was confirmed during the first day of trial. The end of the fourth day there were two holdings or rulings, rather, that cannot be reconciled. The first

ruling was that the regular rate was to be determined in this case pursuant to 29CFR778.109. In that regulation, in essence, it was determined that the regular rate was going to be calculated by taking the amount of weekly compensation actually paid and dividing that by the number of hours a week actually worked per week. And that would give us the regular rate. Therefore, by that calculation, the hourly or regular rate is considered --it's considering all the money actually paid and dividing that by the hours actually proven to be worked; therefore, implicit in this calculation is the truth that they were paid for all hours worked.

The Court then also held that the calculation for damages as per 29CFR778.12 is inapplicable to the case [at bar]. However, it seems as though the Court's eventual instructions will make the affirmative direction to the jury that damages are equal to one-and-a-half times the regular rate no matter how much these plaintiffs were actually paid. It is feared that this would be the instruction even though the plaintiffs already admitted to receiving money for all hours worked. Respectfully, this is exactly what the role of

the jury is, to determine what the damages are. It's uncontested that the directions to the jury should state that 29USC207 dictates that an employee should receive for all hours worked over 40 a rate "not less than one-and-one-half times the regular rate at which he is employed."

That should be the extent of any direction thereby giving the jury the power to find consistent with the plaintiffs' own testimony on the subject that the plaintiffs were paid for all hours worked.

The plaintiff and defense for that matter can argue however they want. But according to the plaintiffs they were paid already. This is also consistent with the application of 29CFR778.109. They got the time and the time-and-a-half that Section 207 requires. There's no justification legally or factually to state what a jury must multiply and regulate by. To exclude Section 112 does not render the jury powerless to find the plaintiffs were paid for all hours worked, and the power to then determine what, if anything, is owed for the situation to be compliant with Section 207. If they find the plaintiffs were not paid anything for hours worked over 40, then they multiply by one-and-one-half

times. But if they find that they were paid, then it would only be a half.

The point is that the exact function of the jury -- that is the exact function of the jury and they should be left with that function. The defendants are left powerless as the plaintiffs were given a fresh drawn board to have an expert on the fifth day of trial -- a damages trial change his earlier disclose expert opinions. His testimony was not disclosed, and the defendants were left without an expert of their own to combat the brand-new opinion of plaintiffs' expert. Such result is wholly against any notion of a fair trial advocacy highly prejudicial to the defendants and almost guarantees the effectuation of an unfair trial.

Therefore, your Honor, I appreciate your indulgence, but the defendant objects

(Tr.V.2 139-143)

Certification of Counsel

I, Christopher Hemsey, do hereby certify that this brief complies with the rules of court that pertain to filing of briefs, including, but not limited to Mass. R.A.P. 16(a)(13); Mass. R.A.P. 16(e); Mass. R.A.P. 18; Mass. R.A.P. 20 and Mass. R.A.P. 21.

To create the brief, counsel used Microsoft Word and its Courier New font with a size 12 font not exceeding 10.5 characters per inch. Counsel determined the page length for purposes of Mass. R.A.P. 20(a)(2)(A) to be 46 pages from the Statement of Issues (Page 6) to the Conclusion (Page 52) and was 9655 words, including headings.

Certificate of Service

Pursuant to Mass. R.A.P. 13, I, Christopher Hemsey do hereby certify under the pains and penalties of perjury that this brief, entitled "Appellants' Brief" as well as all four volumes of the Exhibits Appendix and three volumes of the Transcript Appendix relative the Appeals Court Case entitled Zucchini Gold, LLC d/b/a Rice Barn and Chalermpol Intha v. Rutchada

Devaney, Thewakul Rueangjan and Thanyathon Wungnak, Case No. 2021-P-0301 was served on the attorney of record for the appellee electronically through the Massachusetts Court System e-file system. I served the paperwork on behalf of the appellants, Zucchini Gold, LLC d/b/a Rice Barn and Chalermpol Intha. Upon information and belief, service will be made on:

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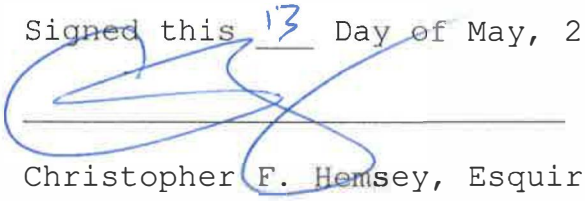
Signed this 13 Day of May, 2021



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