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Labor and Employment Law on the Line

An Interview with

[Ellen Kearns](#), Editor-in-Chief

The Fair Labor Standards Act, Second Edition

[Federal Labor Standards Legislation Committee](#), [ABA Section of Labor and Employment Law](#)

The Monitor conducted the following interview with Ellen Kearns, Editor-in-Chief of the new second edition of ABA/BNA treatise [The Fair Labor Standards Act](#), to get her perspective on the developing field of federal wage and hour litigation based on her years of monitoring changes and participating in an ongoing dialogue with the Board of Editors members as they wrote the first edition and annual supplements. Ms. Kearns is an attorney representing employers with the firm of Constangy, Brooks & Smith, LLP in Boston, MA. The Board of Editors consists of a cross section of practitioners who provide a neutral presentation of the law based on a dialogue among its defense, plaintiff, and union bar members. Ms. Kearns' comments are from her own perspective and do not represent the views of other participants in the treatise or the American Bar Association.

Q: What trends have you seen in the past five years?

A: The emphasis today is on compensable work time issues—in particular whether preliminary and postliminary time is compensable and whether lunch period interruptions should be compensated. Another compensable time issue concerns personal digital assistants (PDAs). For example, if an employer gives a nonexempt employee a BlackBerry and expects the employee to respond to it during off-work time, then time spent in the response is likely to be compensable. The employer will argue that the interruptions during lunch and the response on the BlackBerry are all de minimis and therefore noncompensable. It may be de minimis, if it is a one-time occurrence of short duration and difficult to record, but it is more likely to be compensable when the interruptions during lunch are regular and when responding to BlackBerry requests occurs routinely during nonwork time. There is a recent case filed on the topic called *Allen v. City of Chicago*, No. 10-CV-03183 (N.D. Ill. 2010), in which police sergeants who were given BlackBerries and allegedly required to respond during off-duty hours are suing the City of Chicago for overtime violations. I believe the Mayor of Chicago characterized the case as “silliness” [Editor’s Note: according to National Public Radio, Mayor Richard Daly called it “silliness in the time of economic crisis.”], but if the sergeants can prove that they were regularly required to respond to Department inquiries during non-work time and did so, “the silliness” may cost the City of Chicago back pay. Finally, although the 2004 DOL amendments to the white-collar regulations somewhat stemmed the tide of misclassification cases in federal courts, I am still seeing many cases addressing the administrative exemption.

[*Editor’s Note:* See Chapter 8 of *The Fair Labor Standards Act, Second Edition*, for a discussion of compensable time issues.]



[Ellen Kearns](#), Editor-in-Chief
[The Fair Labor Standards Act, Second Edition](#)



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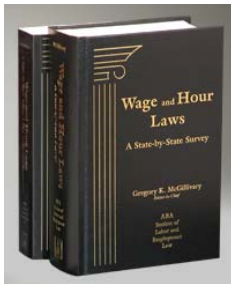
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Q: What changes in the Department of Labor (DOL) have you observed since President Obama took office?

A: For the first 15 months of the Obama administration, the DOL issued few if any regulations, advisories, or policies. Then, in March 2010, the DOL announced that it was no longer going to publish opinion letters on a per-employer basis; instead the DOL is going to respond to policy questions affecting employers as a whole by issuing Administrator Interpretations. That concerns many employers because even though the Fair Labor Standards Act (FLSA) is 70 years old and many questions regarding the application of that Act have been asked of and answered by the DOL, there are still new areas of concern that need to be addressed. It is very helpful in complying with the statute that the DOL provide relevant responses for the world of 2011. I always thought it was a wonderful service that the DOL provided to employers and employees alike regarding a variety of occupations and different pay systems. The fact that they will discontinue this service is a disappointment to both employers and employees. The DOL has explained that its decision is a resource issue and that it doesn't think it should use limited resources to provide an absolute defense for one specific employer's issue. But these opinion letters are helpful to all employers because they provide a roadmap regarding hot button issues.

In late 2010, the Obama administration's DOL issued a regulatory agenda that has concerned the whole employer community. The regulations [to be drafted] may require an employer to perform a classification analysis of any person who has been designated as an independent contractor. According to the Department, employers will have to tell each individual classified as an independent contractor that if he or she doesn't agree with the independent contractor status, that individual can call the DOL or the Treasury Department. I think that is an onerous burden and may interfere with the attorney-client privilege.

[*Editor's Note.* See Chapter 3 of *The Fair Labor Standards Act, Second Edition*, for a discussion of coverage issues.]

Q: In what areas are courts most confused about how to handle litigation under the FLSA?

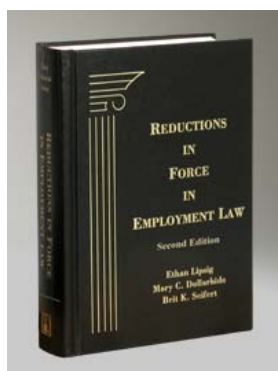
A: *The problems with litigating hybrid class actions.*—If a plaintiff files a hybrid class action because he or she wants to take advantage of the remedies of the FLSA and also wants to take advantage of certain state law remedies, court responses to such hybrid actions have been mixed. In federal court, plaintiffs claim there is supplemental jurisdiction for the state law causes of action, but defendants argue that trying the federal and state causes of action in the same proceeding is “inherently incompatible” due to the opt-in and opt-out procedures. The problem is, defendants argue, that a notice goes out to the worker regarding his FLSA cause of action, and the worker is told, “If you want to participate in this cause of action, you have to opt in.” So let's say there are 1,000 eligible persons in the class and 250 opt in—a 25-percent opt-in rate. Then the question becomes, Who is part of the state law cause of action? Does the class include the initial 1,000 or does it only include the 250? If the court says “you go back to the 1,000,” then the 1,000 putative class members get a second letter telling them that they are now in the state cause of action unless they opt out. Because of these procedural issues, some courts have not taken jurisdiction over state causes of action in a hybrid cases.

[*Editor's Note.* See Chapter 20 of *The Fair Labor Standards Act, Second Edition*, for a discussion of issues surrounding hybrid class actions.]

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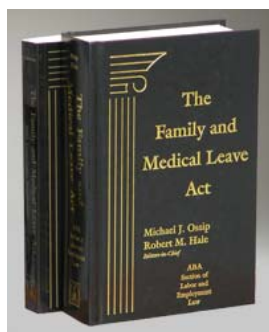
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Whether the fluctuating workweek can be used in compensating employees who should not have been classified as exempt.—The fluctuating workweek method for calculating overtime compensation applies to salaried nonexempt employees. Oftentimes, in settling an FLSA case based on misclassification of an employee as exempt, the employer will agree that the employees were misclassified as exempt, but will want to pay them back pay based on the fluctuating workweek method of computing overtime. Computing overtime using the fluctuating workweek makes a significant difference to employers. Let's say, for example, the employee makes \$1,000 per week and he or she works 50 hours, then under the fluctuating workweek method of computing overtime, the hourly rate is 1,000 divided by 50 because the employee's salary was for all hours worked. One thousand dollars divided by 50 is \$20, and the employer argues that the employee has already been paid straight time for the hours between 40 and 50, so you just take half the \$20, which is \$10, and multiply it times ten. That means, using the fluctuating workweek method of calculating overtime, you owe \$100 for the extra ten hours. The plaintiff bar says no, you cannot use the fluctuating workweek to calculate overtime due. Instead, the employer must take the \$1,000 and divide it by 40 hours to get \$25 an hour. Then the employer must multiply that rate times time-and-a-half for the 10 extra hours. [\$25 x 1.5 x 10] That results in a payment to the employee of \$375 for the ten extra hours. Only a few courts have addressed whether an employer may use the fluctuating workweek method of calculating overtime in settling a misclassification case. In the state of Florida, there has been at least one court that has granted summary judgment to the employer who applied the fluctuating workweek of calculating overtime due in settling the case. In other words, the employer agreed the employees were misclassified, and in trying to decide what to pay them, the court said you can use the fluctuating workweek.

[*Editor's Note:* See Chapter 10 of *The Fair Labor Standards Act, Second Edition*, for a discussion of the fluctuating workweek method for calculating overtime.]

The joint employment situation.—Courts aren't sure which test to apply. For years, the test to determine whether a putative employer was a "joint employer" concerned whether the putative employer hired and fired the workers, directed their work, kept personnel records of them, and gave them their paychecks. If answers to those questions were "no", then a putative employer was not a joint employer. But in a case called *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003), the Second Circuit said, although those are important factors, maybe we should look at other factors in evaluating the joint employer relationship. It looked at whether the putative employer had the work done on its premises, whether the work was an integral part of the production, who controlled the employees, and whether the employer was trying to get out from under its obligations by subcontracting pieces of its business.

In these cases, the employees in question work for a subcontractor who is marginally financed and when that subcontractor is told he or she has to pay minimum wage and overtime, the subcontractor takes off. So the question becomes: Who has to pay the unpaid minimum wage and overtime? Plaintiffs use this joint employment theory to get the manufacturer or producer to pay the unpaid wages. For example, this can happen in the construction industry where a roofer or a framer does not pay his workers minimum wage or overtime. When he is sued for violations of the wage hour statutes, the subcontractor disappears so plaintiffs go after the developer or the general contractor on a joint employment theory. *Zheng* changed the landscape of joint employment. Many courts do not know how to deal with these cases because the real employer is gone, so they look for someone to pay the unpaid wages.

[*Editor's Note:* See Chapter 3 of *The Fair Labor Standards Act, Second Edition*, for a discussion of joint employment issues.]

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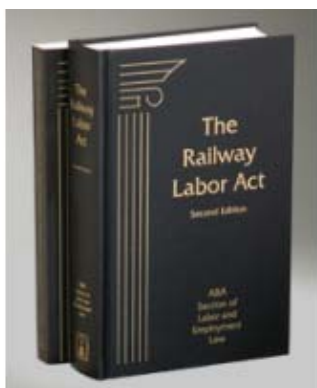


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Q: What are the most avoidable problems you see employers experiencing? Are there any "gotcha's" that are particularly difficult for employers to avoid even after exercising due diligence?

A: Automatic deductions for meal periods.—In these cases, the employer tells his or her employees that they will be paid for seven and a half hours, but they have to be on the premises for eight. The employer says, “Go down to the cafeteria, spend a half hour down there and then come back up,” deducting a half hour for lunch from the total time the worker is on the premises. But sometimes the employee may be stopped by a patient, a customer, or a supervisor and doesn’t get the full half hour; the employee might get only a 15 or 20 minute break. Should the employee be paid for this lost lunch time? Generally speaking, yes, unless the employer can mount a successful de minimis defense. But, for the most part, if the employee loses part of his or her lunch hour on a regular basis, then the lost time will have to be paid for. To protect against this kind of claim, I recommend that employers come up with some way to determine the start and the end time of “breaks.” Perhaps the employer could introduce some sort of card swipe system or clock-in/clock-out system for nonexempt employees. Employers need to assess whether their automatic deduction systems have holes in them, and, if so, employers must be prepared to fix the holes.

[*Editor’s Note:* See Chapter 8 of *The Fair Labor Standards Act, Second Edition*, for a discussion of automatic meal deduction issues.]

The administrative/production dichotomy.—Under the administrative exemption, employees are exempt if they perform work related to management policies or general business operations of the employer and regularly exercise discretion and independent judgment in their work.

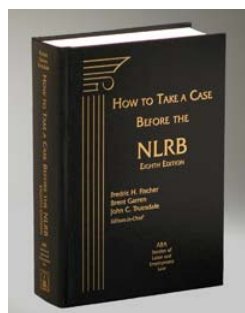
During the past 20 years, a hotly contested matter concerned the meaning of the words “directly related to management policies and general operations of the employer.” Employers argued that “management policies and general operations” must be interpreted broadly, and that it would apply to any employee who exercises minimal discretion in his or her work. Plaintiffs argued the language is much narrower than that.

In one of the first cases to address this issue, *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), the court considered whether county probation officers were exempt under the administrative exemption. The court concluded that although probation officers provide recommendations to the courts, these recommendations do not involve advice on the proper way to conduct the business of the court, but merely provide information that the court uses in the course of its daily production activities. Thus, the duties did not qualify probation officers as exempt administrative employees, because they were “producing the work” of the probation department.

Another example occurs in cases involving the job of “investigator.” If a retail establishment hires an investigator to investigate theft in its stores, it is likely that the investigator will meet the duties requirement of the administrative exemption. However, as we can see from the case of *Reich v. State of New York*, 3 F.3d 581 (2d Cir. 1993), even when investigators enjoy broad discretion in the conduct of their investigations, including decisions as to whether to make an arrest, they were considered nonexempt employees because their employer [the State of New York] was in the law enforcement business “ [a]nd, it remains undisputed that the primary function of the Investigators within that business is to conduct—or “produce”—its criminal investigations.” The court noted that investigators do not administer the affairs of that bureau. Accordingly, the investigators did not fall within the administrative exemption to the FLSA.

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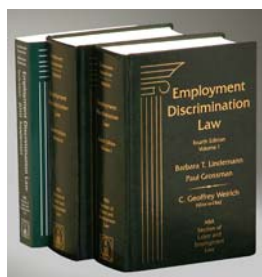
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During the eight years of the Bush administration, the DOL did not push the administrative/production dichotomy exemption at all, but focused on whether the individual had discretion in the work he or she performed. But, on March 24, 2010, the DOL began to reemphasize the administrative/production dichotomy. It found that mortgage loan officers did not meet the administrative exemption's requirements because "mortgage loan officers are primarily responsible for the sale of mortgage loans, and therefore, they fall on the 'production' side of the 'production vs. staff' dichotomy. As production workers, loan officers do not qualify for the exemption."

For employers, the watch word is this: Even though you have an employee with a lot of responsibilities, a lot of discretion, if they are producing the work of the agency or of the company, they are not going to be considered exempt under Obama administration's DOL.

[*Editor's Note:* See Chapter 4 of *The Fair Labor Standards Act, Second Edition*, for a discussion of administrative exemption issues.]

The de minimis concept.—The third area that I think is problematic in determining compliance with the FLSA is the concept called de minimis. The de minimis argument was made for the first time in 1946 in a Supreme Court case called *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946). In *Mt. Clemens Pottery*, workers had to swipe in, walk eight minutes to get to their workstation, and engage in preparatory activities such as putting on aprons, sharpening tools, and turning on machinery. Employees wanted to be paid not only for the walking time to and from their workstation, but for the time spent in preparatory activities. The Supreme Court suggested that a de minimis approach could determine how much of this time should be compensated. It noted that "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." The Court found that the evidence clearly showed that workers spent a "substantial measure" of their time engaged in prep work, and that the compensability of this time could be gauged under a de minimis rule. The case was remanded to the district court, to determine how much time (on average) was spent walking and how much time doing preparatory activities, and to fashion an award based only the amount of time engaged in preparatory activity. The district court determined that seven–eight minutes of time was spent in preparatory activity.

For about the next 10 or 15 years, courts were generally finding that if an activity took an employee 10 minutes or less, such time was de minimis, and thus noncompensable. But in 1998, the de minimis rule changed sharply. In *Reich v. Monfort Inc.*, 144 F.3d 1329 (10th Cir. 1998), employees in a beef processing plant had to put on protective clothing and gloves, sharpen their knives, and put on a hair net and boots. The district court found that the preliminary and postliminary activities constituted 10 minutes of compensable time each day, and rejected defendant's argument that it should be excluded under the de minimis doctrine. The Tenth Circuit found that it was "a close case" but agreed with the district court's conclusion that the work was not de minimis and hence was compensable. In reaching its conclusion, the court focused on three factors: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether "the claimants performed the work on a regular basis." With respect to the first factor the court found in favor of the employer saying that it would be administratively difficult to record the actual time each worker engaged in these activities. With respect to the next two factors, the appellate court found in favor of the employee. It noted that the size of the aggregate claim was very large considering the total number of employees and the two or three year period that might be applicable. Finally, with respect to the regularity factor the court noted that the preliminary and postliminary work took about ten minutes each day the employee worked and thus this factor weighed in favor of plaintiff.

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