FLSA Update – New Cases and Current Issues for Plaintiff and Defense

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1. Introduction

The past year or so has been an interesting one from the wage-hour perspective. The changed administration caused employers' advocates to feel optimism, as the suggestion of relaxed or rescinded regulatory action permeated the marketplace. It caused employees' advocates concern. While the new administration did in fact prove its willingness to take fairly novel action to counter the prior administration's rulemaking, especially with the executive, administrative, and professional exemptions, there were no earth-shattering pro-employer developments.

Plaintiffs' lawyers continued to file suit under the FLSA and its state law analogues. The Wage and Hour Division continued investigating employers and levying liquidated damages awards. Courts continued to grant conditional certification and deny decertification.

We did see some effort by the courts to provide some clarity around how parties should progress through discovery and preliminary stages of single plaintiff FLSA litigation. We also saw courts across the country maturing in the ways that they preside over wage and hour litigation -- as the cases have proliferated beyond California, Florida, and New York and as judges in other jurisdictions have become familiar with their rhythms and rules.

2. What's Going On in Washington, D.C.?

a. The Current State: WHD and DOL in D.C.

There are several key people to know: Secretary of Labor, Alex Acosta; Appointed to Wage and Hour Division Administrator, Cheryl Stanton; Solicitor of Labor, Katie O'Scannlain. Currently the Acting Administrator is Bryan Jarrett.

The WHD rescinded the Administrator's Interpretations regarding independent contractor status and joint employment. They reinstated a handful of opinion letters that prior administration had withdrawn and then re-opened the door to opinion letter requests. This, along with the DOL's Payroll Audit Independent Determination ("PAID") pilot initiative, signaled an eye towards self-assessments of FLSA compliance.

b. SCOTUS Wage and Hour Rulings 2017-2018

***Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018)**

On April 2, 2018, the Supreme Court decided *Encino Motorcars, LLC v. Navarro*, No. 16-1362, holding in a 5-4 decision that the Fair Labor Standards Act (FLSA) exempts service advisors at car dealerships from the Act's overtime-pay requirement. The District Court ruled that service advisors are exempt, but the Ninth Circuit reversed, holding that FLSA exemptions are to be narrowly construed, and that while a service advisor is a "salesman,"

Congress did not intend to exempt them because they are not primarily engaged in "servicing" automobiles, as they do not actually repair and maintain vehicles. Encino Motorcars, LLC (Encino) sold and serviced Mercedes-Benz automobiles. Hector Navarro was employed there as a service advisor, which involved him greeting customers and assessing their needs as they entered the business. Navarro, along with other similarly-situated plaintiffs, sued Encino for failing to pay overtime compensation when they worked more than forty hours a week. The Supreme Court reversed, holding that service advisors fall within the FLSA's exemption for "salesm[e]n … primarily engaged in … servicing automobiles." The Court concluded that "a service advisor is obviously a 'salesman'" and that "service advisors are also 'primarily engaged in … servicing automobiles.'" Although service advisors do not physically repair automobiles, the Court held that "the statutory language is not so constrained."

Epic Systems Corp v. Lewis

Epic Systems Corporation (Epic) is a Wisconsin-based healthcare data management software company. Epic has an arbitration agreement that requires its employees to resolve any employment-based disputes with Epic through individual arbitration and to waive their right to participate in or receive benefit from any class, collective, or representative proceedings. In February 2015, former Epic employee Jacob Lewis sued Epic in federal court individually and on behalf of similarly-situated employees and claimed that they had been denied overtime wages in violation of the Fair Labor Standards Act of 1938. Epic moved to dismiss the complaint and cited the waiver clause of its arbitration agreement. The district court denied Epic's motion and held that the waiver was unenforceable because it violated the right of employees to engage in "concerted activities" under Section Seven of the National Labor Relations Act (NLRA). The U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's decision and added that the waiver was also unenforceable under the savings clause of the Federal Arbitration Act (FAA). That clause provides that arbitration agreements are to be enforced unless there are legal or equitable grounds that would render a contract unenforceable. Finding the waiver of collective proceedings illegal under the NLRA, the appellate court held that the arbitration agreement was unenforceable under the FAA. *Epic Systems Corp.* was consolidated with two other cases, *Ernst & Young, LLP v. Morris* (9th Circuit) and *National Labor Relations Board v. Murphy Oil USA* (5th Circuit), and was the first case argued in the new term, but SCOTUS has yet to rule on the question of whether the National Labor Relations Act prohibits enforcement of an agreement requiring employees to resolve disputes with the employer through individual arbitration under the Federal Arbitration Act.

3. FLSA National Trends

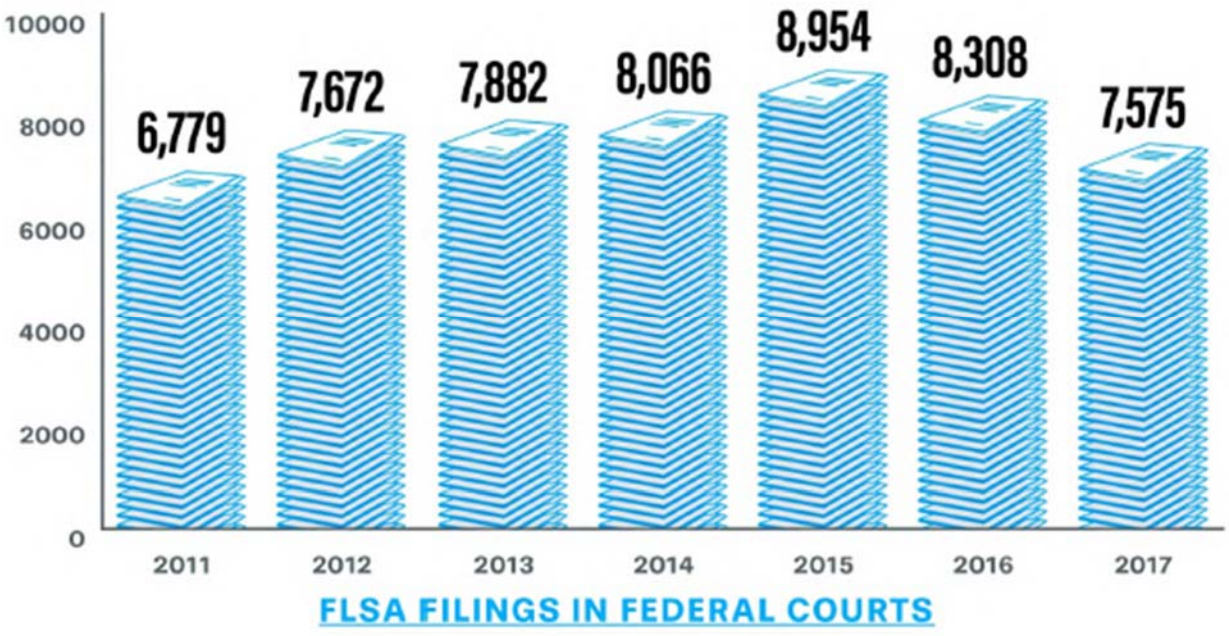
a. Statistics

While there has been a marginal reduction year-over-year in the number of FLSA cases filed in federal court, there are still meaningful cases that continue to be filed across the country. Further, generally, courts have become more sophisticated in their management of FLSA cases. For example, there are new discovery protocols made available for courts overseeing non-collective action FLSA cases.

Hot topics in wage and hour litigation continue to revolve around the following issues:

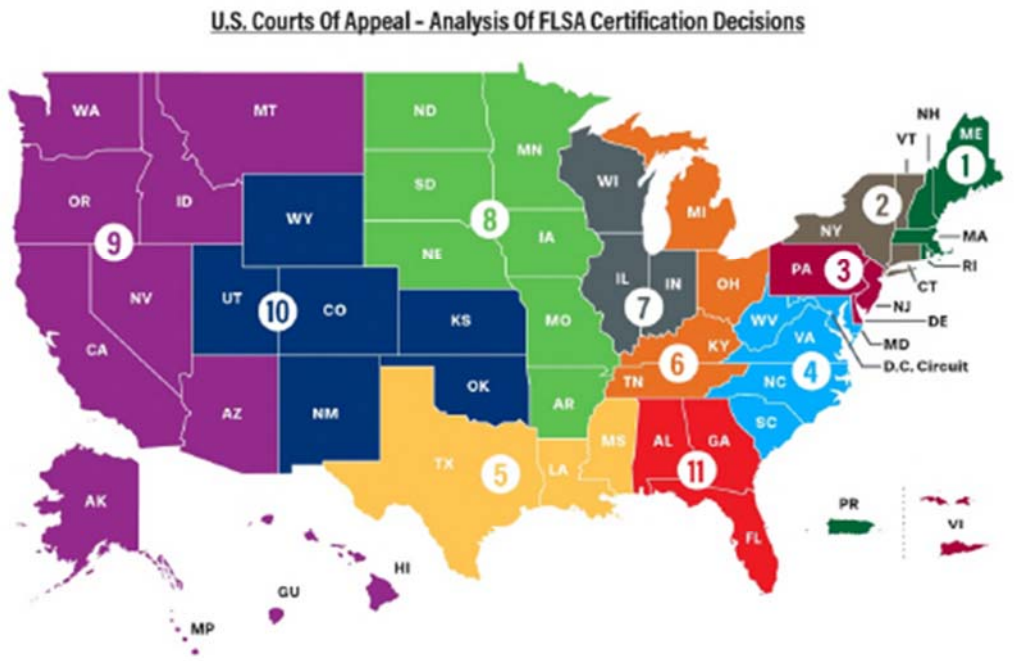
- Independent Contractors
- Joint Employment
- Gig/Shared Economy
- Restaurant Worker/Tip Pooling Issues
- "Sales" -- inside and outside
- Transportation/ Logistics
- Home healthcare workers
- Assistant Manager/Managers

Slight Reduction in Year-Over-Year FLSA Filings in Federal Court



b. Class and Collective Action National Trends

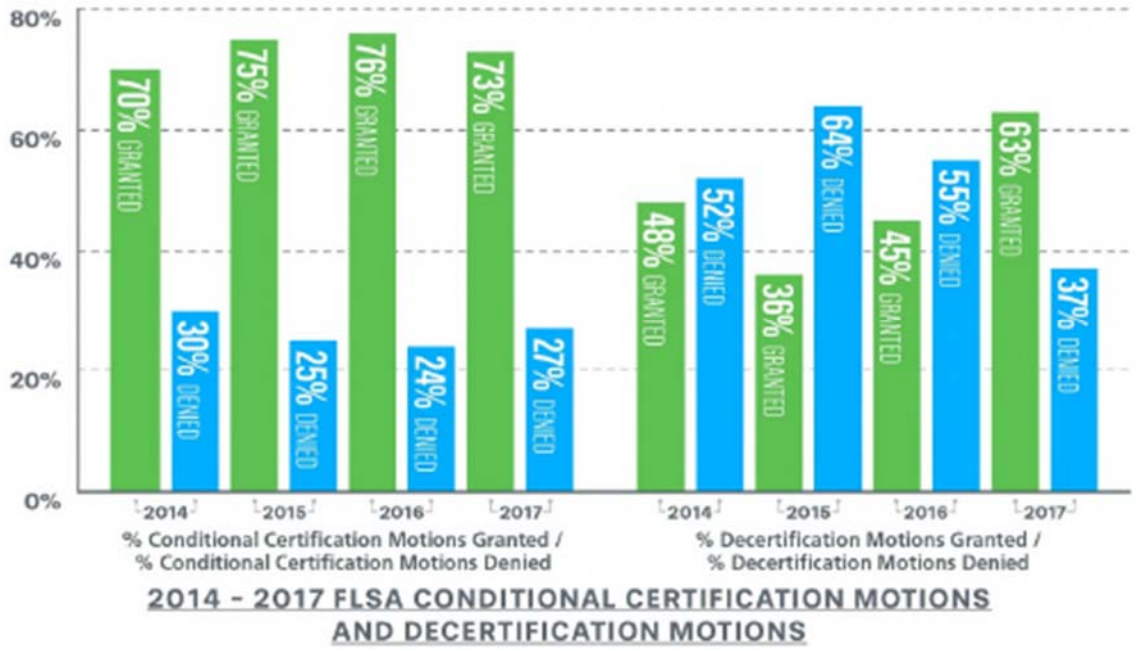
Analysis of FLSA Certification Decisions



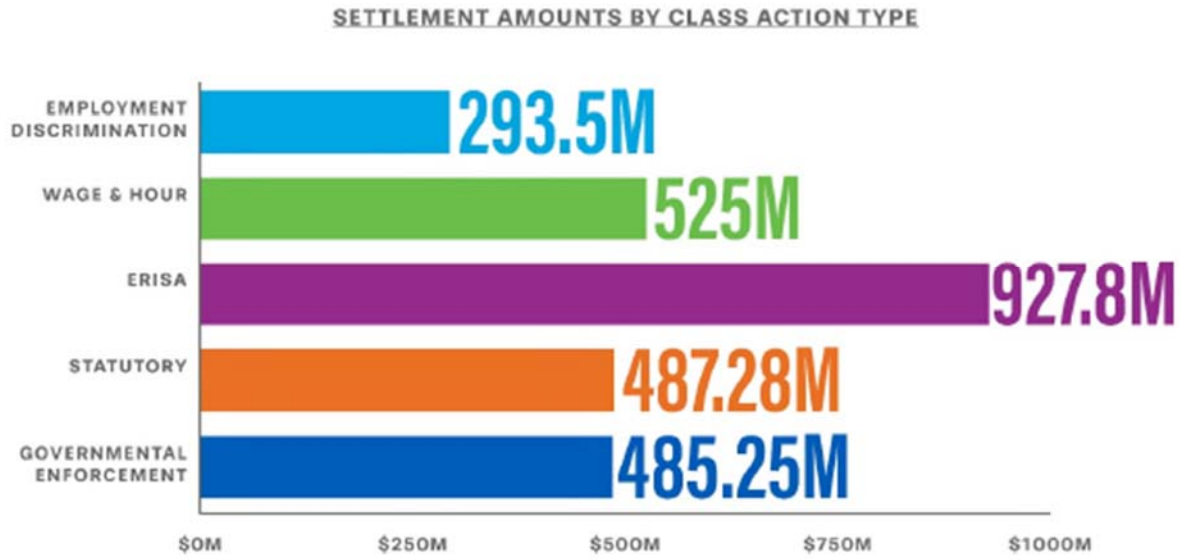
	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	2	2	0	0	0

Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied
15 Decertification Motions Granted / 9 Decertification Motions Denied

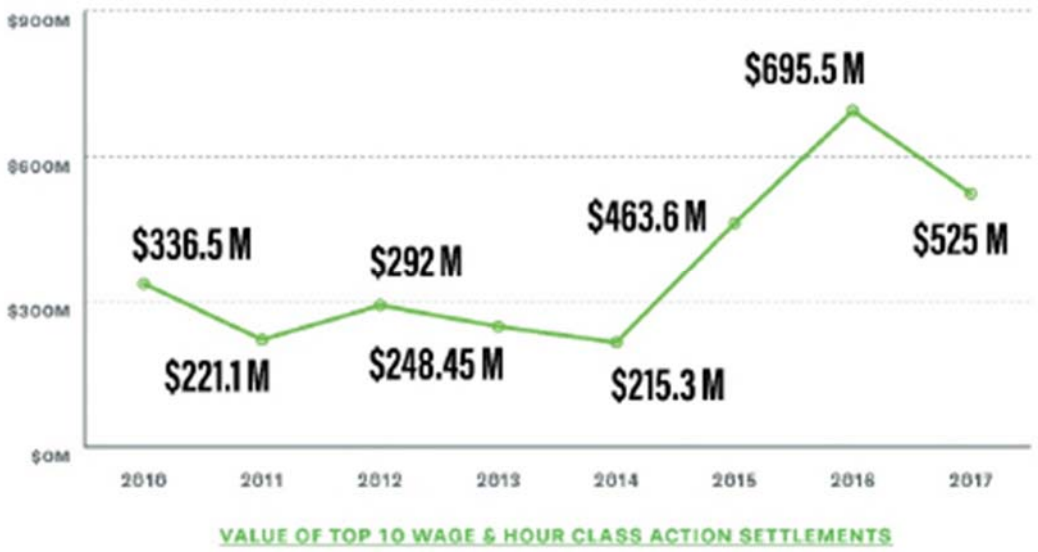
2014-2017 FLSA Conditional Certification and Decertification Motions



2017 Settlement Amounts By Class Action Type



Cumulative Value of Top 10 Wage and Hour Class Action Settlements



4. Common Litigation Issues

a. Misclassification of Exempt Employees

All employees are non-exempt unless they fall within an exemption. The most common misclassification cases deal with the administrative, outside sales, and retail commissioned employee exemption. There has also been a mini-surge in cases arising from issues related to employers' efforts to comply with the DOL's now-stalled revisions to the executive, administrative, and professional exemptions, as well as to the reclassification of jobs -- unrelated to those stalled rule changes -- from exempt to non-exempt status.

b. "Off The Clock" Time

Common "off the clock" time allegations include instructions to underreport all hours worked, log-on and log-off time, donning and doffing time, missed meal and rest periods, travel time, and waiting/ on-call time.

c. Incorrectly Computing Overtime Pay

This can include non-payment of one and one-half times the regular rate for overtime hours, failure to include nondiscretionary bonuses, incentives, and/or commission payments in the regular rate calculation, failure to properly calculate overtime when an employee works at two or more rates, and calculating overtime across two weeks rather than a single workweek.

d. Improper "Independent Contractor" Designation

Many times employers will rely solely on the written contracts between them and the purported independent contractor that provides work for the company rather than actually

looking at the economic realities of the relationship, i.e., whether the worker is in business for himself (thus an independent contractor) or economically dependent on the company (thus an employee who is entitled to certain benefits and protections under the law such as overtime pay and minimum wages). Employers must consider all aspects of the working relationship between it and the worker to properly designate him/her as an independent contractor.

e. Joint Employment

An employee may have more than one employer who is to jointly and severally responsible for properly paying the employee the overtime pay and/or minimum wages to which he is entitled. Joint employment issues commonly arise in situations where an independent contractor business model is used by company who provides contracted services and/or labor to another company.

f. Improper Use of Fluctuating Work Week

Under the fluctuating workweek method ("FWW") for calculating overtime pay for non-exempt employees, the fixed salary is defined as compensation for all hours that an employee has worked in any workweek. That is, the payment of the salary is compensation at the regular rate of pay for all of the hours the employee works in that week, including overtime hours. Issues arise when employers do not notify their employees that they are using the FWW. Additional issues arise when the FWW is calculated incorrectly and when factoring in holidays and bonuses. It is also important that the employees' weeks are actually fluctuating.

g. Improper Deduction of Wages

There are several common times that employers make deductions: meal breaks (whether or not the employee is actually working), uniforms (required or suggested attire, logo branded), items/tools employees need, tips, tip pools, and deducting exempt employee's pay for sick days/ holidays. These can all lead to violations under the FLSA.

5. Noteworthy Decisions

a. Circuit Court Decisions

***Meeks v. Pasco Cty. Sheriff,* 688 Fed. App'x 714 (11th Cir. 2017) (*per curiam*)**

A former county sheriff's deputy alleged that defendant failed to pay him for time spent transporting his patrol car to and from a secured parking lot in violation of the FLSA. The Eleventh Circuit, in a per curiam opinion, affirmed the district court's grant of summary judgment to plaintiff and award of liquidated damages. The appellate court agreed that transporting a patrol car between the Patrol Division Office's secure parking lot and plaintiff's patrol zone was a compensable activity because it was "an integral and indispensable part of" his patrol duties. The Eleventh Circuit also found no error in the district court's determination that defendant did not have a viable good-faith defense to liquidated damages because defendant was aware that the Department of Labor was investigating the compensation practice in question and was familiar with a decision from the Eleventh Circuit that called into question the legality of this practice.

***Romero v. Top-Tier Colo., LLC*, 849 F.3d 1281 (10th Cir. 2017)**

In *Romero*, the Tenth Circuit refused to apply the essential ruling in *United States v. Klinghoffer*, 285 F.2d 487 (2d Cir. 1960)—that an FLSA plaintiff does not state a minimum wage violation claim under 29 U.S.C. § 206(a) so long as total weekly wage equals or exceeds the number of hours worked multiplied by the statutory minimum wage—to a case involving tipped employees and proper application of the tip credit. The district court in *Romero* dismissed the plaintiff's minimum wage claim on the sole grounds that her complaint did not allege that she had been paid less than $7.25 per hour when her wages and tips were combined. The problem, according to the Tenth Circuit, is that "an employer doesn't comply with its federal minimum-wage obligations just because its employees receive at least $7.25 an hour in tips." Rather, the Tenth Circuit reasoned, the district court must first consider whether the employer properly applied the tip credit in the first place and, if it did not, then it was required to pay the employee a cash wage of at least the statutory minimum wage.

***Marsh v. J. Alexander's, LLC*, 869 F.3d 1108 (9th Cir. 2017)**

The court of appeals vacated a judgment and remanded. The court held that the Department of Labor's interpretation of a tip regulation was inconsistent with the regulation and thus not entitled to deference. Alec Marsh sued employer J. Alexander's LLC, alleging that the restaurant improperly applied a "tipping credit" to work he performed that was unrelated to his duties as a server. Marsh alleged that his duties regularly included tasks such as taking out trash, cleaning floors and walls, and cleaning bathrooms. Marsh argued that under the Department of Labor (DOL) Wage and Hour Division's Field Operations Handbook (FOH) §30d00(f) (2016), J. Alexander's was categorically not allowed to take a tip credit for any of the time spent on those duties.

Consolidating Marsh's complaint with other like cases, the district court rejected their claims, granting the employers' motions to dismiss, and denying the employees' motions to amend as futile. The court of appeals vacated and remanded, holding that the district court properly declined to give deference to FOH § 30d00(f), but erred in denying the employees leave to amend. At issue was the DOL's interpretation of the "dual jobs" regulation, 29 C.F.R. § 531.56(e), which provides that where an employee is employed in dual jobs, as both a waiter and a maintenance person, for example, his or her employer is barred from taking a tip credit for the employee's hours of employment as a maintenance person. FOH § 30d00(f) improperly ignores § 531.56(e)'s requirement that the employee hold two distinct jobs. Rather, it allows an employee to be deemed to be engaged in two jobs if the employee spends any time at all on tasks not related to the tipped occupation, or if a time-tracking analysis shows that the employee has spent 20 percent or more of his or her hours worked over the course of a workweek in tasks unrelated to the tipped occupation. But, as § 531.56(e)'s examples indicate, an employee is not engaged in two distinct jobs merely because he or she performs different tasks over the course of the day; rather, it requires assessment of whether a cluster of different tasks constitutes a particular job, as that job is ordinarily understood. Because FOH § 30d00(f) is both inconsistent with § 531.56(e) and attempts to create de facto a new regulation, it does not merit deference. The employees should nonetheless have been afforded the opportunity to amend their complaints. Judge Paez dissented in part, finding § 531.56(e) entitled to deference.

***McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847 (9th Cir. 2017), *cert. denied* No. 17-371 (S. Ct. Nov. 27, 2017)**

A class of mortgage underwriters sought overtime compensation under the FLSA, alleging the defendant misclassified them as exempt under the administrative exemption. The district court initially denied cross motions for summary judgment, but on the parties' joint motion for reconsideration, the district court concluded that plaintiffs qualified for the exemption. On appeal, the Ninth Circuit reversed the district court's grant of summary judgment for the defendant. Applying the Secretary of Labor's "short duties test" for the administrative exemption, the appellate court reasoned that the underwriters' duties go to the heart of defendant's marketplace offerings and not to the internal administration of defendant's business. The Ninth Circuit acknowledged that the Second Circuit and Sixth Circuit have reached opposite conclusions regarding whether mortgage underwriters are administratively exempt, but determined to adopt the Second Circuit's interpretation in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009). According to the Court, mortgage underwriters do not decide whether defendant "should" take on risk, but instead whether, given defendant's proscribed guidelines, the particular loan at issue falls within the range of specified risk. The Ninth Circuit also rejected defendant's argument that plaintiffs' work reflected "quality control" because defendant used an outside company to perform quality control functions and had a separate internal committee that completely re-underwrites 10% of the loans.

***Nance v. May Trucking Co.*, 685 Fed. App'x 602 (9th Cir. 2017)**

Truck drivers alleged that their former employer violated the FLSA and Oregon wage and hour laws by not paying job applicants for the time they spent during a mandatory, three-day orientation program. Truck drivers also challenged defendant's pay policy for entry-level drivers in which they ride along with experienced drivers, with some of this time spent in the sleeper berth of a moving truck. Finally, the drivers challenged the company's policy of deducting from drivers' paychecks fuel costs for excess engine idling. The district court certified a class for the orientation policy and entry-level drivers' policy, but denied certification for the fuel costs deduction policy. The district court awarded one plaintiff $200 in damages on his individual claim after a one-day bench trial and denied reconsideration of its class certification decision. On appeal, the Ninth Circuit affirmed the district court's decision that drivers who attend orientation are not "employees" under the FLSA, but on other grounds. The appellate court characterized the orientation program as a method for determining drivers' training and abilities, and that not all orientation participants are hired upon the program's completion. Regarding the entry-level drivers program, the Ninth Circuit affirmed the district court's grant of summary judgment for defendant by relying on federal and state regulations finding drivers are not entitled to compensation for the time they are permitted to sleep in the berths of moving trucks. The Court, however, remanded the issue of whether defendant paid entry-level drivers less than a minimum wage before a specific date and affirmed the district court's denial of class certification and denial of reconsideration for the pay deductions issue because individual issues of whether each driver allowed his/her truck to idle for his/her own benefit predominated over common issues.

***Stiller, et al. v. Costco Wholesale Corp.*, Case No. 673 Fed. App. 783 (9th Cir. 2017)**

Plaintiffs, a group of hourly employees, brought a collective action and class action alleging that Defendant violated the FLSA and California wage & hour laws through the implementation of closing procedures that resulted in unpaid off-the-clock ("OTC") time. Plaintiffs alleged that they and other hourly non-exempt employees were regularly forced against their will to remain locked inside of Defendant's warehouses after clocking-out at the end of their closing shifts during which Defendant's supervisors and managers performed closing activities, such as removing jewelry from cases and emptying cash registers. The district court certified Plaintiffs' class claims under Rule 23, and conditionally certified their FLSA claims under 29 U.S.C. § 216(b). Subsequently, Defendant moved to decertify the collective action and the class action. The district court found that Plaintiffs failed to show that issues common to the class predominated over individual issues, and if granted Defendant's motion. On appeal, the Ninth Circuit affirmed the district court's ruling. Plaintiffs contended that the district court erred in granting decertification because it required that common questions resolve the liability for every class member. The Ninth Circuit disagreed and opined that the district court did not impose a "100%" predominance requirement. The Ninth Circuit reasoned that the District Court correctly looked to the three elements of an "off-the-clock claim" under California law. The Ninth Circuit found that Defendant put forward sufficient evidence to show that the individual policies comprising the policy at issue were not implemented and applied uniformly as to all potential class members. The Ninth Circuit held that the district court properly determined that proving that class members actually performed unpaid work—as required to establish liability—would require class members to present evidence that varied from class member to class member. As such, the Ninth Circuit found that whether class members actually performed unpaid work was not a common question capable of class-wide resolution. The Ninth Circuit therefore concluded that the district court did not abuse its discretion in ruling that individualized issues would predominate over common issues. Accordingly, the Ninth Circuit affirmed the District Court's ruling granting Defendant's motion for decertification.

***Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183 (6th Cir. 2017)**

Wielding inspectors alleged that defendant failed to provide overtime pay in violation of the FLSA and the Ohio Minimum Fair Wage Standards Act. The district court granted summary judgment for defendant, finding that plaintiffs were highly compensated employees and were therefore exempt from the FLSA's overtime requirements. The Sixth Circuit reversed, agreeing with plaintiffs that under the salary basis test, whether the employer guaranteed plaintiffs' salaries mattered for exempt status. The Court then determined that an issue of fact remained regarding whether plaintiffs were guaranteed a qualifying minimum weekly salary because one could reasonably conclude that the consistent payments during plaintiffs' relatively brief tenure were "matters of grace rather than right."

***Monroe v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017), *denying cert.* No. 17-637 (S. Ct. Feb. 20, 2018)**

Cable technicians alleged that defendant implemented a company-wide time-shaving policy that required its employees to systematically underreport their overtime hours in violation of the FLSA. A jury returned a verdict for the collective class consisting of almost 300

technicians. The district court upheld the jury's verdict and awarded damages based on the jury's factual finding of the number of unrecorded hours the testifying representative plaintiffs worked. On appeal, the Sixth Circuit affirmed the district court's certification of the collective, but reversed the calculation of damages. After defendants filed a petition for a writ of certiorari, the U.S. Supreme Court issued a grant, vacate, and remand order for further consideration in light of *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Upon reconsideration, the Sixth Circuit found that *Tyson Foods* did not compel a different resolution, affirmed the district court's certification of the case as a collective action and its finding that sufficient evidence supported the jury's verdict. The Sixth Circuit determined that *Tyson Foods* supported its prior decision because Tyson Foods reaffirms the *Mt. Clemens* burden-shifting framework, and the inferences to be drawn from plaintiffs' evidence where employers do not keep required records. Second, the Court rejected a Rule 23-type certification analysis and applied the "similarly situated" standard from the FLSA text in affirming the district court's decision for final certification post-trial. Next, the Court acknowledged other circuit courts' use of representative testimony to establish a pattern of violations that include similarly situated employees who did not testify at trial and concluded that the plaintiffs' evidence was sufficient to support the jury's verdict for all plaintiffs in the class. Finally, the Court reversed and remanded the lower court's calculation of damages without ordering a new trial on liability. The Court rejected defendants' argument that the district court took the calculation of damages away from the jury in violation of the Seventh Amendment. However, the Court reversed the district court's use of a 1.5 multiplier.

***Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017)**

In Hills v. Entergy Operations, Inc., the Fifth Circuit reversed and remanded the district court's summary judgment ruling that the "half-time" method should be used to calculate overtime allegedly owed to "security shift supervisors" at a nuclear power plant who claimed that they had been misclassified as exempt administrative employees. According to the Fifth Circuit, "[t]he parties' initial understanding of the employment arrangement as well as the parties' conduct during the period of employment must both be taken into account in determining whether the parties agreed that the employee would receive a fixed salary as compensation for all hours worked in a week, even though the number of hours may vary each week." The Fifth Circuit cited conflicting evidence as to whether the plaintiffs agreed and understood that their salary would compensate them for all hours worked, or only for the alternating 36-hour/48-hour work weeks to which they were assigned. The Court concluded, "The fluctuating workweek method may be applied only where the employee 'clearly understands' that her salary is intended to compensate any unlimited amount of hours she might be expected to work in any given week . . . . It does not necessarily apply, as a matter of law, to any and all deviation from week to week." The Court emphasized that in granting summary judgment, the district court improperly relied on some plaintiffs' testimony that they did not expect to receive overtime. "Salaried, but misclassified, employees may well understand themselves not be to receiving overtime compensation. That does not alleviate liability under the FLSA, nor does it reduce the backpay they are owed if they are misclassified. That they understood they were not receiving overtime pay does not imply that they clearly understood their salary to compensate unlimited hours each week." The Fifth Circuit expressly disagreed with the Fourth Circuit's conclusion that the "fluctuating work week" overtime calculation method applied on similar facts in *Griffin v. Wake Cty.*, 142 F.3d 712 (4th Cir. 1998).

***Clark v. Centene Co. of Texas*, 656 Fed. App'x 688 (5th Cir. 2016) (per curiam)**

Utilization review nurses (also referred to as "Case Managers") whose primary job duty was to review medical authorization requests against criteria and guidelines for insurance coverage purposes, alleged that they were improperly denied overtime compensation in violation of the FLSA. The parties filed cross motions summary judgment, and the district court held that the utilization review nurses were not exempt under either the FLSA's administrative and professional exemptions. The Fifth Circuit affirmed the district court's decision with respect to both exemptions. First, according to the Court, the case managers did not qualify for the administrative exemption because their primary duties did not include "the exercise of discretion and independent judgment with respect to matters of significance." The Court contrasted the nurses with insurance claims adjusters noting that the nurses' work more closely resembled "ordinary inspection work" consisting of comparing the information they were provided in the authorization request to well-established industry standard guidelines. Second, the professional exemption did not apply because the utilization review work performed by the case managers could be and was in fact performed by licensed vocational nurses as well as registered nurses. Accordingly, the utilization review nurse work did not require "specialized academic training [necessary] for entrance into the profession."

***Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017)**

Defendant, a general contracting company, subcontracted with a framing and drywall installation company that employed plaintiffs. The district court granted summary judgment for defendant, holding that it did not jointly employ plaintiffs because it had engaged in a "legitimate contractor-subcontractor relationship." Finding that courts' reliance on common law agency principles no longer coincides with Congress's broad definition of "employee" under the FLSA, the Fourth Circuit adopted a non-exhaustive collection of six factors to determine whether putative employers constitute joint employers. These factors include: (1) whether the putative joint employers jointly determine, share, or allocate power to direct, collect, or supervise the worker directly or indirectly; (2) whether the putative joint employers directly or indirectly share the power to hire, fire, or modify the working conditions of workers; (3) the degree or permanency and duration of the relationship between the putative joint employers; (4) whether one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) whether the work is performed on a premises owned or controlled by one or more of the putative joint employers independently or in connection with one another; and (6) whether the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer. The court reasoned that these factors help refocus courts' attentions on the relationship *between* putative joint employers, rather than the relationship between an employee and putative employer. In applying this new test, the court found that defendants were plaintiffs' joint employers.

***Hall v. DIRECTV, LLC*, 846 F.3d 757 (4th Cir. 2017), *cert. denied* No. 16-1449 (U.S. Jan. 8, 2018)**

Plaintiffs, satellite television technicians whose primary job duty was to install and repair DIRECTV equipment, brought unpaid overtime claims under the FLSA and Maryland wage and hour statutes. They argued that DirectTV along with DirectSat, an intermediary company that

contracts with DirectTV as part of its "Provider Network" were their joint employers. DirectSat acts as a "middle-manager" and contracts with smaller entities who contract with individual technicians throughout the country. The district court granted the defendants' motion to dismiss by devising and applying a two-step inquiry requiring the plaintiffs to first show that they were employees of each of the putative joint employer before reaching the joint employer question. Remarkably, the district court identified other relevant considerations such as whether the intermediary entities were undercapitalized and "merely charades" created by DirectTV that followed every suggestion and payment decision made by DirectTV because if they were, then DirectTV might be a joint employer. Adopting the *Salinas* court's six factor test, the Fourth Circuit found that the district court erred by inverting the analytical framework and considering whether Plaintiffs qualified as employees "without first determining whether a joint employment relationship existed" between DIRECTV, DirectSat, and Plaintiffs' other putative joint employers. According to the Fourth Circuit, "if a worker performs work for two or more entities that are "not completely disassociated" with respect to that worker's employment, 29 C.F.R. § 791.2(a), courts must aggregate the levers of influence over the key terms and conditions of the worker's employment exercised by *all* of the entities when determining whether the worker is an "employee" within the meaning of the FLSA." Moreover, the Circuit Court specifically rejected the other considerations that the district court found relevant, concluding "the FLSA does not require that an entity have unchecked—or even primary—authority over all—or even most—aspects of a worker's employment for the entity to qualify as a joint employer. Rather, the entity must only play a role in establishing the key terms and conditions of the worker's employment.

***Sec'y U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420 (3d Cir. 2017),** *petition for cert. docketed* No. 17-995 (U.S. Jan. 18, 2018)

A business publication distributor changed its policy of providing two fifteen-minute paid breaks per day to allowing employees to log off of their computers at any time. Defendant, however, only paid sales representatives for time they were logged off of their computers if they were logged off for less than ninety seconds. The Secretary brought an FLSA minimum wage action, alleging that defendant unlawfully failed to compensate its sales representatives for breaks of 20 minutes or less during which they are logged off of their computers and free of any work-related duties. The district court denied defendant's motion for summary judgment and granted the Secretary's motion for partial summary judgment. The district court followed the Department of Labor's rest break regulation, 29 C.F.R. § 785.18. The Third Circuit affirmed and rejected defendant's argument that its "flexible time" break policy was not covered by the FLSA because it did not constitute "hours worked." Instead, the Third Circuit granted *Skidmore* deference to the DOL's interpretation of 29 C.F.R. § 785.18 regarding paid rest breaks. Specifically, the Court affirmed § 785.18, finding that this regulation rather than § 785.16 regarding relief from duty applied to defendant's "flexible time" policy. The Court also rejected defendant's argument that § 785.18 requires an analysis regarding whether the break is intended to benefit the employer or the employee, adopting a bright-line rule. Finally, the Court affirmed the district court's award of liquidated damages on the basis that defendant refused to waive its attorney-client privilege to prove a good-faith defense.

***Opalinski v. Robert Half Int'l Inc.*, 677 Fed. Appx. 738 (3d Cir. 2017)**

Following the employer's Third Circuit victory reversing the district court's decision to allow this exempt misclassification case to proceed as a class arbitration, the two plaintiffs sought review by the U.S. Supreme Court. Notwithstanding the Supreme Court's prior expressed interest in the issue raised in the Third Circuit's decision--whether the court or an arbitrator decides if an arbitration agreement calls for class arbitration--the employer defeated plaintiffs' attempt to obtain Supreme Court review. The case was then returned to the district court for decision as to whether the parties' arbitration agreement allowed class arbitration. After extensive briefing, the district court agreed with Robert Half's arguments and ruled, contrary to a prior arbitrator's decision, that plaintiffs could not pursue class arbitration and were limited to arbitrating their individual claims. The plaintiffs again appealed the district court's decision to the Third Circuit, arguing that (1) an arbitrator should have decided whether the arbitration agreement calls for class arbitration; (2) the district court erred in finding that the agreement does not allow class arbitration; and (3) the National Labor Relations Act prevents enforcement of arbitration agreements that do not permit class arbitration. On January 30, 2017, the Third Circuit upheld the district court's ruling. The Third Circuit accepted the employer's arguments that (1) the court, rather than an arbitrator, should decide if an arbitration agreement calls for class arbitration; (2) the arbitration agreement cannot be read to allow class arbitration; and (3) the plaintiffs had waived their argument that the National Labor Relations Act prevents enforcement of arbitration agreements that do not permit class arbitration by not raising it to the district court. The Third Circuit's decision precludes the plaintiffs from proceeding as a class. Plaintiffs again filed a petition for Supreme Court review, which remains pending at this date.

***Wang v. Hearst Corp.*, 877 F.3d 69 (2d Cir. 2017)**

Five participants in internship programs with defendant's print magazines alleged that they were deprived of wages in violation of the FLSA and NYLL. The Second Circuit affirmed summary judgment for defendant, concluding that the unpaid interns were not employees. The Court reaffirmed the "primary beneficiary" test *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-537 (2d Cir. 2015) as a way to distinguish employees from bona fide interns. This test provides the following seven considerations in analyzing unpaid internships:

> "(1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa;
>
> (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
>
> (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
>
> (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

(5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;

(6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and

(7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship."

In applying these factors to the facts in *Wang*, the Second Circuit found that all of the factors, except for the sixth factor on displacement, favored defendant. With respect to the sixth factor, the Court agreed with the lower court that plaintiffs completed some work regularly performed by paid employees, but that this single factor alone was not dispositive. With respect to factors one and seven, the Second Circuit agreed that the internship programs were specifically described as unpaid internships for students. With respect to factors three and four, the Court also agreed that the internships were clearly arranged to fit students' academic calendar and required academic credit as a prerequisite. In interpreting factor two, which was at dispute on appeal, the Second Circuit emphasized that the key element of the intern relationship is "the expectation of receiving educational *or vocational benefits*." The Court rejected plaintiffs' arguments that experience sitting in on marketing meetings should be discounted by the assignment to "take meeting minutes," and that "learning about photo shoots" should be disregarded because the plaintiff already knew how to use a camera, because these activities are within a broad understanding of "vocational benefits."

b. District Court Cases

***Rodriguez, et al. v. Nike Retail Servs., Inc.*, 2017 U.S. Dist. LEXIS 147762 (N.D. Cal. Sept. 12, 2017)**

Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay for all time spent waiting while for security inspections after they had clocked-out of work and were exiting Defendant's stores in violation of the FLSA. Defendant filed a motion for summary judgment, arguing that the time spent checking bags was *de minimis.* The Court granted Defendant's motion. Defendant hired an expert to conduct a study of exit inspections, which showed that the average inspection took no more than 16.5 seconds and that 60.5% of all exits required zero wait time. Rather than submit contradictory evidence in response to Nike's 700 hours of video, which the Court found to be representative of the class period, Plaintiffs relied on an expert declaration to support his allegations. The Court found that Plaintiffs' strategy was "misguided," and it rejected Plaintiffs' "attempt to equate this situation to a battle of experts sufficient to deny summary judgment." The Court held that "pointing out flaws in the other side's evidence," was not the same as "offering any conflicting evidence for the jury to consider at trial on the relevant claim or defense." Evaluating Defendant's evidence under the *de minimis* defense, and recognizing that dairy periods of up to 10 minutes have been found to be *de minimis*, the Court ruled that Plaintiffs failed to show that their off-the-clock exit time was close to meeting that threshold. Although Plaintiffs pointed to testimony from three store managers who estimated that some employees may have had a few inspections with higher wait-times, the Court found that wait-times of two or five minutes were loo trivial, irregular, and

administratively difficult to capture. The Court also agreed that repositioning time clocks to the front of the store so that employees could clock-out after the check was not required. Accordingly, the Court granted Defendant's motion for summary judgment.

***Lawson v. Grubhub, Inc.*, 2017 U.S. Dist. LEXIS 106291 (N.D. Cal. July, 2017)**

In *Lawson*, the court determined that a former Grubhub Inc. delivery driver was an independent contractor and not Grubhub's employee, in the first case of its kind against a "gig economy" company that went to trial. The court found Grubhub did not control the plaintiff's work, did not supervise the plaintiff, tell him when to work, what kind of transportation to use, or what routes to take.

Lawson worked for the company for four months but was blocked from Grubhub's smartphone app in 2016 for not making deliveries while he was signed on. Lawson claimed that several factors established that he was an employee, including that the fact that delivery work was critical to Grubhub's business model and because he was paid a minimum hourly rate rather than a per delivery fee. Grubhub argued it was a software development company, and not a food delivery service, so workers like Lawson were not central to its business. Grubhub also said it did not have control over its drivers.

***Salazar v. McDonald's Corp.*, 2017 U.S. Dist. LEXIS 9641 (N.D. Cal. Jan. 5, 2017)**

Plaintiffs, a group of restaurant crew members at McDonald's franchisees, brought a putative class action alleging that Defendants—both the franchisees and McDonald's Corp., the franchisor ("McDonald's")—failed to pay them wages for all hours worked and denied them overtime wages in violation of the California Labor Code. Previously, McDonald's moved for summary judgment on the ground that it did not jointly employ Plaintiffs. The Court granted the motion in part, but allowed Plaintiffs to proceed with their claims against McDonald's under an ostensible agency theory. Plaintiffs subsequently filed a motion for class certification and McDonald's filed a motion to deny class certification and to strike Plaintiffs' representative claims under the Private Attorneys General Act ("PAGA"). The Court granted McDonald's motions and denied Plaintiffs' motion. The Court stated that as a threshold matter, Plaintiffs must show that their claims under the theory of ostensible agency were amenable to class-wide treatment. McDonald's argued that Plaintiffs could not satisfy Rule 23's commonality or predominance requirements. The Court observed that applicable case law authorities describe three requirements necessary before recovery could be had against a principal for the act of an ostensible agent, including: (i) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one: (ii) the belief must be generated by some act or neglect of the principal sought to be charged; and (iii) the third person relying the agent's authority must not be guilty of negligence." As to whether Plaintiffs had actual belief that the franchise was an agent of McDonald's, the Court found that the record showed that crew members did not all receive the same orientation materials, see the same job training videos or attend the same orientation sessions. Further, testimony of crew members demonstrated that some class members understood that McDonald's did not employ them, and some did not. Thus, the Court opined that these differences precluded an inference of common belief among class members. As to the second factor of a reasonable, non-negligent belief, the Court held that Plaintiffs failed to show how reasonable belief can be established on a class-wide basis, because

that belief depended upon information known or available to each individual party. As to the reliance factor, the Court determined that whether each class member knew, or should have known his or her employer, was necessarily an individual inquiry, and therefore could be established through common questions. The Court concluded that Plaintiffs could not establish commonality because individual inquiries would be required to establish liability under the theory of ostensible agency and thereby denied Plaintiffs' motion for class certification. The Court also denied certification under Rule 23(b) because Plaintiffs failed to describe the injunctive relief sought. Finally, the Court denied Plaintiffs' motion for certification of their proposed PAGA class because the class was unmanageable. The Court reasoned that although Plaintiffs asserted claims on behalf of hourly, non-exempt, non-managerial workers, they offered no easy way to identify those who actually might be aggrieved under the ostensible agency theory. The Court opined that proposed class contained over 1,200 putative class members, all of whom received different orientation, training, hiring documents, and had different understandings of the franchise relationship. The Court thus ruled that Plaintiffs' PAGA claims were unmanageable and it struck the representative claims. Accordingly, the Court granted McDonald's motions and denied Plaintiffs' motion.

***Reyes, et al. v. Transamerica Life Ins. Co., et al.*, Case No. 2:15-cv-03452-DMG-FFM (C.D. Cal.)**

Transamerica Life Insurance won a five-day jury trial in a wage and hour case alleging exempt misclassification, missed meal and rest periods, and unpaid overtime initially brought by 13 current and former employees. Through motion practice and mediation, eight plaintiffs were dismissed before trial. At trial, a jury returned a unanimous verdict, finding Transamerica proved that all of the remaining five plaintiffs were exempt under California law.

To establish estimates of actual time that the plaintiffs worked, in counter-point to their claims, the defendant harmonized millions of data points gathered from several years of multiple raw data sources. The data sources included keycard badge swipes, telephone logs, computer program activity logs, sent e-mail logs, parking data, and even gym access. These data sources allowed Transamerica to reconstruct every work day of each plaintiff to the most minute detail. The data, visualized on daily timelines, revealed that employer's liability could only be a very small fraction of what the plaintiffs claimed to have worked, which allowed the defendant's trial team to undermine the plaintiffs' overall credibility in front of the jury.

***McEarchen v. Urban Outfitters, LLC*, 2017 U.S. Dist. LEXIS 144203 (E.D.N.Y. Sept. 6, 2017)**

Plaintiffs, a group of department managers ("DMs"), brought an action alleging that Defendant violated federal and state wage laws by misclassifying them and other DMs as managerial employees exempt from the laws' requirement to pay premium wages for overtime hours. The Court previously conditionally certified a collective action under the FLSA. After discovery, Defendant sought to decertify the collective action, and the Magistrate Judge recommended that the Court grant Defendant's motion. On Rule 72 review, the Court agreed that the collective action should be decertified, and adopted the Magistrate Judge's report and recommendation. The Court found that the record reflected significant variations among the named and opt-in Plaintiffs, as to both the amount of exempt work they performed and the level of managerial authority they exercised. The Court determined that the variations made it unduly

difficult for Defendant to counter the claims against it using "representative" proof. Finally, the Court held that the differences in various Plaintiffs' duties and levels of authority would require inefficient mini-trials for over a hundred claimants, such that a collective action would not enhance fairness or procedural economy. Accordingly, the Court adopted the Magistrate Judge's report and recommendation decertifying the collective action.

***Brown v. Barnes & Noble, Inc.*, 252 F. Supp. 3d 255 (S.D.N.Y. May 1, 2017)**

Plaintiffs, a group of former managers, alleged that Defendant's policies violated the FLSA and the New York Labor Law ("NYLL"). Plaintiffs alleged that they, and others similarly-situated, were misclassified as exempt, and they sought unpaid overtime and other pay. Two months after filing the complaint, and before conducting any discovery, Plaintiffs moved for conditional certification of their FLSA claim. Plaintiffs argued that because the café managers had been uniformly classified as exempt, were all reclassified as non-exempt, work under the same job description, and because Defendant maintained detailed policies, procedures, and rules that control how the café managers, regardless of location, performed their work, that all such managers were "similarly-situated" to the named Plaintiffs. The Magistrate Judge first dispelled the three theories advanced by Plaintiffs to obtain conditional certification, including: (i) that a uniform classification of exempt status standing alone, can satisfy the low threshold for conditional certification under 29 U. S.C. § 216(b); (ii) that the employer's reclassified of a position from exempt to non-exempt showed that the position was uniformly misclassified previously; and (iii) that a common job description means the position is the same everywhere. As to the first contention, the Magistrate Judge held that a uniform classification of exempt status was not sufficient, in and of itself, to establish the commonality required for conditional certification. The Magistrate Judge stated that as to the second point, "there could be many legitimate business reasons for an employer to reclassify employees." On the third point, the Magistrate Judge reasoned that "a common job description does not mean that conditional certification is *per se* warranted in every case." The Magistrate Judge determined that here, the job description "is of little utility ... when, under Plaintiffs' own theory of the case, [it] did not accurately reflect the duties they personally performed." The Magistrate Judge therefore held that based on the evidence before the Court, she could not "infer that Defendant had *de facto* policies of requiring all 1,100 café managers to perform non-exempt work based on the personal experiences of the nine people who have joined this suit" and "nor can it infer such a policy from general assertions" and "cookie-cutter declarations." Accordingly, the Magistrate Judge found that Plaintiffs failed to meet even the lenient standard for conditional certification, and denied Plaintiff's motion.

***Gorczyca v. NVR., Inc.*, No. 13-CV-6315-L (W.D.N.Y. Dec. 2016)**

The court granted summary judgment on behalf of NVR, Inc. and also severed the joint claims. As a result, 130 individuals would have to pursue their own claims. Plaintiff was one of approximately 130 current or former employees of NVR who jointly brought claims against NVR alleging that they were denied overtime compensation required by the FLSA and the New York Labor Law.

***Crawford, et al. v. Saks & Co.*, Case No. 2016 U.S. Dist. LEXIS 71805 (S.D. Tex. June, 2016)**

The court granted summary judgment on behalf of Saks & Co. in a major lawsuit filed as an alleged collective action by former sales associates. Plaintiffs sought certification of a collective of all Saks' non-exempt sales employees nationwide based on their theory that Saks should be required to compensate them for all work breaks lasting 20 minutes or less. On June 2, 2016, the court granted Sak's motion for summary judgment based on the defendant's argument, not previously accepted in the Fifth Circuit, that all of these employees were exempt from the federal law's overtime requirements as commissioned inside sales employees. As a result of that ruling, the court also denied class certification in its entirety.

***Leonard, et al. v. Delaware North Companies Sport Service, Inc.*, Case No. 4:15-cv-01356-CDP (E.D. Mo.)**

Delaware North secured an appellate victory before the Eighth Circuit. This case was brought as a nationwide FLSA collective and Missouri class action against Delaware North, whose subsidiary operates the concession stands at the St. Louis' Cardinals Busch Stadium and a minor league park in the western part of the state. The plaintiff alleged that he and others like him had worked at a concession stand but were improperly classified as volunteers rather than as employees. As a result, he claimed that he along with thousands of volunteers at venues throughout the country were not paid the wages owed to them as employees. These allegations directly challenged Delaware North's practice of allowing volunteers of charitable organizations to participate in Delaware North's charitable fundraising program.

Delaware North successfully moved to compel Plaintiff to arbitrate his individual, non-collective and non-class claims pursuant to an arbitration agreement that Plaintiff signed in connection with his volunteer activities. Accordingly, the court dismissed Plaintiff's complaint.

c. State Court

***Wilson, et al. v. Farmers Insurance Exchange*, Case No. B260729 (Cal. App. 2017)**

Farmers defeated class certification on behalf of in this lawsuit brought by more than 600 commercial lines claims adjusters alleging that they were misclassified as overtime-exempt. In May 2016, the California Court of Appeal upheld the trial court's denial of class certification. In December 2016, Farmers moved for summary judgment on the named plaintiffs' individual claims. On April 17, 2017, the court granted Defendant's motion for summary judgment finding that the undisputed facts demonstrated that plaintiffs' job duties met all prongs of the administrative exemption.