An Overview of the Potential Impact of Emerging Technology on the Fair Labor Standards Act

Presented by Steven Gutierrez, Esq.
&
Joseph Neguse, Esq.

Holland & Hart, LLP
555 17th Street, Suite 3200
Denver, CO 80202
303-295-8000

Holland & Hart LLP

- Holland & Hart is the largest law firm in the Mountain West, with over 400 attorneys in 15 offices in seven states. With our firm-wide resources, local presence, and coordinated efforts, we deliver integrated legal solutions to regional, national, and international clients of all sizes, from emerging businesses to Fortune 500 corporations.

- Our goal is to develop long-term client relationships, based on close cooperation and solid results. We are committed to providing quality legal services to our clients, while maintaining a dynamic and satisfying work environment, and encouraging the professional and personal growth of individuals in the firm.

Steven M. Gutierrez Bio

- Mr. Gutierrez is the chair of Holland & Hart's Labor and Employment practice group.

- He has extensive litigation experience and has handled claims concerning wrongful termination, breach of express or implied employment contracts, violation of covenants not to compete, contracts for the protection of trade secrets, employment discrimination, wage matters (including FLSA collective actions), FMLA claims, defamation, torts and claims of retaliatory discharge.

- He speaks frequently at national programs on topics that address the employment relationship. He has provided training to professionals on a wide range of employment-related topics, including workplace investigations techniques and practice and workplace violence prevention.

Joseph Neguse Bio

- Mr. Neguse is a member of Holland & Hart's Litigation Department. He first joined the firm as a summer clerk in 2007, and now focuses his practice on commercial litigation.

- In November of 2008, Mr. Neguse was elected by the voters of Colorado's 2nd Congressional District to serve as a Regent for the University of Colorado. He serves as a member of the Regent's Audit Committee and as a non-voting member of the Investment Advisory Committee.

TABLE OF CONTENTS

Emerging Technology &The FLSA:

Overview of the Potential Impact of Emerging Technology on the Fair Labor Standards Act

By Steven M. Gutierrez and Joseph Neguse[1]

I. Introduction

The Fair Labor Standards Act ("FLSA") became law over seventy years ago, in 1938.[2] Since then, Congress has enacted countless statutes that govern the rights of employees and employers, including the Family and Medical Leave Act ("FMLA"), the Occupational Safety and Health Act ("OSHA"), and Title VII of the Civil Rights Act. The U.S. Department of Labor has followed a similar approach, promulgating thousands of employment related regulations. Not to be outdone, nearly all states have enacted their own employment statutes, creating various independent regulatory entities in the process. Despite this expansive statutory and regulatory regime, however, the FLSA remains the foundation for regulatory supervision and enforcement in the wage and hour context. It has survived many Presidents, countless sessions of Congress, and a Supreme Court that has at times expressed both ardent support and vehement opposition to the regulation of the American workplace. Yet, while the FLSA has survived the political fluctuations of the federal government, it has continually struggled to maintain its relevance in the face of technological development and progress.

II. Emerging Technology & the FLSA

The FLSA is codified as 29 U.S.C. § 201, along with corresponding regulations from the U.S. Department of Labor ("Department"), specifically 29 C.F.R. 510-794.[3] The FLSA is enforced by the Wage and Hour Division of the Department,[4] and impacts an estimated "130 million workers."[5] Among the FLSA's most well-known provisions is the requirement that employees be paid one and a half times their regular wage for any hours worked over the standard "workweek," defined as 40 hours per week.[6] This general requirement for "overtime" pay is riddled with exceptions, much of which has been the subject of constant litigation year after year.

Most recently, some employees have sought to extend the protections afforded by the FLSA to the work they are able to perform as a result of continued technological advances. The clearest example is the emergence of Personal Data Assistants ("PDA's"), which have grown drastically in use over the last decade. As more employees use mobile telephones, blackberries, and I-phones, employers and regulatory agencies are faced with several critical questions. Commentator Carmel Sileo articulates these questions most effectively, observing that:

> "Modern technology has made it easy and convenient for workers to telecommute, fielding work-related phone calls and e-mails when away from their offices. But that convenience has a catch: When is time "off" really off?"[7]

Thus, "new technology that enables people to work from off-site locations has muddled the distinctions between work and home."[8] The growth of online social networking websites like "Facebook," "Twitter," and other online communication mediums have further distorted these distinctions, as an employee's personal life and professional duties becomes increasingly interrelated. These new mediums of communication have one thing in common: they challenge the validity of the "nine-to-five" workday, a premise that remains inextricably connected to the FLSA framework. While there are no easy answers, this article sheds further light on the question, and provides a brief summary of steps employers should consider taking to satisfy the FLSA and the demands of the 21st century ways of doing business.

III. Requirements For Overtime Pay Under the FLSA

First and foremost, the FLSA exempts a large portion of employees from the overtime requirement so long as they satisfy specific statutory tests and thresholds. These exemptions include "bona fide" Executive, Administrative, Professional, Computer, and Outside Sales Employees, each further defined by 29 U.S.C. 201(13)(a)(1).[9] These classifications have often been called the "white-collar exemptions," as they do not apply to blue collar workers.[10] Importantly, these white collar exemptions were recently revised by the Department in 2004.[11] Though many of the antiquated standards articulated by the FLSA were abandoned, the central thrust of the FLSA remains intact: employers must compensate an employee for overtime work unless the employee is properly classified as exempt under the FLSA. Moreover, as recently as 2007, "about 115 million employees—86 percent of the workforce" were "covered by the federal overtime rules,"[12] making the FLSA overtime provisions all the more important.

The various tests associated with classifying employees as exempt and non-exempt can be both tedious and cumbersome. Nonetheless, the decision to classify an employee as exempt can expose employers to significant legal liability. As a general matter, to be classified as an exempt employee, an employee must meet a series of tests based on his or her salary and employment duties. For example, to qualify as an exempt administrative employee, an employee must be paid a salary of at least $455 per week and must have a primary duty of office work that is directly related to "the management or general business operations of the employer."[13] Additionally, the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance."[14] To qualify as an exempt executive employee, the employee must be paid a salary of at least $455 per week, "customarily and regularly direct the work of at least two or more" full-time employees, have some authority concerning employee personnel decisions, and have a primary duty of "managing the enterprise, or managing a customarily recognized department" of the enterprise.[15] The tests for the various exempt categories are different in many respects, which is why employers are well-advised to pay particular attention to both the statute and corresponding regulations.

One important requirement, however, applies universally under the FLSA: all non-exempt employees must be paid "overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek."[16] Importantly, the FLSA "defines the term "employ" to include the words "suffer or permit to work.""[17] Thus, "time spent doing work not requested by the employer, but still allowed, is generally hours worked."[18] This construction of the FLSA makes the exempt classifications critically important. Simply put, employees who are classified as non-exempt must be paid one and a half times their hourly wages, in some cases, even when an employer did not authorize the overtime.

IV. FLSA Violations: A Growing Trend?

Since its passage, many employers have struggled to comply with the complex rules and procedures mandated by the FLSA. Anecdotally, some have observed "a massive rise in cases alleging wage-and hour violations."[19] Empirical data confirms the trend, as non-compliance with the FLSA has literally skyrocketed, with more employers coming under the ire of the Department in enforcement actions. For instance, since 2000, the Department's Wage and Hour Division has collected over $1.4 billion in back wages.[20] Just last year, the Department "recovered more than $185 million in back wages for over 228,000 employees."[21] This was coupled with "over 9.9 million in civil money penalties."[22] The enforcement statistics concerning overtime pay are no less staggering. There were 10,105 violation cases reported by the Department in 2008, with 182,964 employees receiving $123,686,617 in back wages.[23] Notably, there were 875 violations committed by hotels and motels in 2008.[24] Though this number appears small, the cost is exponentially higher, as the cases involving hotels and motels alone resulted in the payment of $2,445,094 in back wages to an estimated 5,034 employees.[25]

These statistics demonstrate a growing trend of FLSA violations. However, there are several other consequences employers face when they have violated the FLSA overtime provisions, including potential multi-million dollar settlements. As a practical matter, businesses that have unwittingly violated the FLSA may have to travel a long and difficult road to resolve the dispute. Resolution of an FLSA overtime claim can include civil penalties and fines, potential criminal prosecution,[26] countless hearings, attorneys' fees, back pay and liquidated damages,[27] negative publicity, and ultimately, expensive collective action settlements. For instance, during the last three months, two multi-million dollar settlements were reached in overtime FLSA disputes. In August 2009, Cintas Corp. settled for an estimated $23 million to resolve a "class-action complaint in federal court that alleged the company illegally withheld overtime pay to drivers on its delivery routes."[28] More specifically, the delivery drivers claimed that "Cintas misclassified route drivers as exempt employees under wage and hour laws in order to avoid having to pay them overtime"[29] Even after insurance proceeds and taxes, which reduced the impact of the settlement on Cintas' bottom line, "at $12 million, the after-tax charge from the settlement would have reduced Cintas' fiscal 2009 (ended in May) net profits of $226 million by about 5 percent."[30] Similarly, after seven years of litigation, Lowe's Companies Inc. settled an overtime compensation dispute for $29.5 million in September of 2009.[31] The crux of the lawsuit was an allegation that two employees and

"thousands of other hourly Lowe's workers were required to work before and after their normal shifts but were not paid for the extra work."[32] Interestingly, the trial court initially denied class certification to the Lowe's workers, and "not only did the Court of Appeals reverse the decision by the trial court but, in an unusual move, rather than ordering the lower court to reconsider the issue, actually ordered that the case be granted class certification status."[33]

Potential FLSA claims are likely to increase due to several different factors, including increased enforcement by the Department and the rise of collective actions under the FLSA. The former is best illustrated by events that have transpired over the last several months concerning the Department's Wage and Hour Division. Earlier this year, the U.S. Government Accountability Office ("GAO") released a wide-ranging investigative report that criticized the Department for inadequate enforcement of the FLSA overtime provisions.[34] As noted by commentator Carmel Sileo, the GAO found that the "Wage and Hour Division mishandled 9 out of 10 complaints" and that the Department's investigators "failed to file complaints about overtime pay."[35] On July 15, 2008, the GAO testified before the House Education and Labor Committee, and categorically stated that the Department "does not sufficiently leverage its existing tools."[36] This indictment of the Department was shared by many members of Congress, with the Chairman of the House Committee, Congressman George Miller, proclaiming that "the Wage and Hour Division has simply dropped the ball in pursuing employers that cheat its workers out of their hard earned wages."[37] The Secretary of the Department, Ms. Hilda Solis, has now declared that 150 new investigators will be added to the Department's field offices.[38] This announcement is augmented by the increase of 100 investigators authorized and funded by the American Recovery and Reinvestment Act approved earlier in 2009.[39] Both staffing increases, coupled with increased scrutiny from Congress, suggest that the federal government will vigorously enforce the FLSA overtime provisions in the future.

In addition to increased governmental enforcement, the growing number of "collective action" claims under the FLSA should give employers and businesses alike much pause. Under 29 U.S.C. § 216(b), the FLSA "permits the aggregation of hundreds or thousands of claims requiring only that the employees be 'similarly situated.'"[40] These claims differ from a typical class action under F.R.C.P. 23 in many ways. Most notably, the standard for aggregating an FLSA claim is much "less stringent" than the standard employed under F.R.C.P. 23.[41] Procedurally, courts typically employ a "two-tiered review" when adjudicating potential FLSA collective actions.[42] The initial review, however, "known as the notice-stage determination. . . typically results in "conditional certification" of a representative class."[43] As articulated by David Borgen, member of the ABA Labor and Employment Section's Equal Employment Opportunity Committee:

> "Because of the liberal standard for authorizing notice and the remedial purpose of the FLSA, courts typically order notice based only on the allegations of the complaint and affidavits furnished from class members."[44]

For example, in *Roebuck v. Hudson Valley Farms, Inc.*, the U.S. District Court for the Northern District of New York held that three employee affidavits were "sufficient to constitute a preliminary showing" of a potential FLSA violation.[45] The case involved a migrant farm worker who alleged that his employer violated the FLSA by not paying him and other "similarly situated" employees for their overtime work.[46] Though the worker offered only three affidavits to support these allegations, the court found the affidavits sufficiently demonstrated that his employer may have not paid him and others "time and a half for overtime when the employees performed work which fell outside the agricultural exemption from the overtime pay requirement of the FLSA."[47] Significantly, the court reasoned that, under 29 U.S.C. § 216(b), "plaintiffs need only make a *modest* factual showing"[48] to proceed with notice to the potential class of litigants.

As demonstrated by *Roebuck*, the standard for collective actions under the FLSA can, in some cases, be an undemanding one. Also worth noting, collective actions under the FLSA can be costly, as recovery under the statute can include "near-automatic double-damages for successful plaintiffs and attorneys fees."[49] In summary, the prospect of a collective action claim under the FLSA makes clear that employers must carefully evaluate their business practices to ensure compliance with the FLSA.

V. Emerging Risks Posed by New Technology

Such compliance, however, has become increasingly difficult in light of developing technology and its impact on the workplace. As explained above, because employers must compensate non-exempt employees for any hours worked, the central issue in an enforcement action is often whether or not overtime work was in fact performed. This issue is further complicated by the growing trend of employees engaging in work outside of their standard workday. More precisely, technological advances through PDA's, email, and other communication devices have eviscerated the traditional notion of "overtime."

Hence, employers are faced with an ever-increasing list of conceptually difficult questions regarding legal compliance with the FLSA. For example, is an employee who checks his blackberry at home entitled to overtime compensation? Moreover, if an employee engages in work-related email at home, on his own volition, must he be paid for it? Should he be compensated for the time he spends updating his professional bio on "Facebook" or "LinkedIn"? Or for the written updates he provides concerning his company's services on his personal "Twitter" page? And, finally, does an employee's use of a cell phone or blackberry after-hours constitute 'hours worked' under the FLSA? Over the last several months, various courts have begun the process of answering these questions. As commentator Carmel Sileo notes, "two recent lawsuits highlight the problems of this blurred boundary."[50]

In *Agui v. T-Mobile Inc.*, several former and current employees of T-Mobile sued the company, "claiming they were required to use company-issued smart phones to respond to work messages after hours without pay."[51] The facts of the dispute are relatively straight-forward. The three plaintiffs were each employed as non-exempt sales

representatives at T-Mobile for several years.[52] During that time, each plaintiff was provided with a "company blackberry or other smart device."[53] The plaintiffs allege that they were "required to review and respond to T-Mobile related emails and text messages at all hours of the day, whether or not they were punched into T-Mobile's computer based timecard system."[54] This allegation, among many others, is the basis for their claims. As non-exempt employees, the plaintiffs argue that they were entitled to overtime wages for the ten to fifteen hours they spent every week "reviewing and responding to emails, texts, phone calls" and more.[55] Making matters worse, "when they complained, the suit alleges, managers told them this was one of T-Mobile's standard business practices."[56] Furthermore, the plaintiffs argue that they are entitled to not only back wages, but also "an additional amount equal as liquidated damages, additional liquidated damages for unreasonably delayed payment of wages, reasonable attorneys' fees and costs."[57] Although the complaint was filed by three individual employees, the plaintiffs have pled their claim on behalf of "all other similarly situated current and former employees" of T-Mobile.[58] Given that T-Mobile employs at least 36,000 employees nation-wide,[59] the certification of a collective action in *Agui v. T-Mobile* could prove significant.

Similarly, in *Rulli v. CB Richard Ellis Inc.*, the plaintiff, John Rulli, filed a collective action claim (per 29 U.S.C. § 216(b)) against CB Richard Ellis for unpaid overtime compensation.[60] Mr. Rulli alleges that he and other employees were "given personal data assistants, such as Blackberries, smart phones, cell phones, pagers or other communication devices."[61] Further, he claims that all employees were required to use such devices "outside their normal working hours without receiving any compensation."[62] More specifically, Mr. Rulli argues that CB Richard Ellis required him and others to respond to incoming messages on these devices within "fifteen minutes" of receiving them.[63] Mr. Rulli's attorney, Nola Hitchcock, claims that:

> "'These workers were getting text messages from their supervisors while they were at home having dinner or out watching a movie. And they had to respond, even though they were off the clock and not being paid for it. It was really intrusive.'"[64]

The damages sought are similar to those requested by the T-Mobile employees in *Agui*, namely, unpaid back wages and liquidated damages under 29 U.S.C. § 216(b).[65] Again, perhaps more damaging, "potential clients could number in the thousands."[66] Both *Agui* and *Rulli* could provide important guidance in the context of the FLSA and emerging technologies, as "*Rulli* is the first case that focuses on this technology."[67]

Though each case is far from being resolved, past litigation in this context could shed further light as to what compliance under the FLSA may ultimately require. For example, recently in *West v. Verizon Communications Inc.*, the U.S. District Court for the Middle District of Florida upheld a Magistrate's denial of class certification in a 29 U.S.C. § 216(b) collective action.[68] In *West*, several Verizon Personal Account Managers ("PAM's") alleged that they were not "compensated at time and one-half for overtime hours in violation of the Fair Labor Standards Act."[69] The magistrate did not dispute that

Verizon provided PAM's with "a Blackberry with a cell phone" and that "because PAM's can take their Blackberry outside the home and work from a remote location, PAM's have the ability to do their jobs anywhere."[70] As a result, "many PAM's opt to work from home."[71] However, this also allowed "PAM's periods of time during the day to engage in other, often significant, non-PAM-related activities such as working around the home" and "shopping."[72] Thus, because the PAM's "had such opportunities to engage in non-work related activities during "on-call" time," they were not "similarly situated" under 29 U.S.C. 216(b).[73]

The district court agreed with the magistrate's denial of class certification, and concurred with its interpretation of the PAM's "on-call" requirements.[74] Further, it found no error with the magistrate's rejection of the "two-tiered analysis" referenced earlier, observing that "the two-tiered analysis is not mandatory."[75] In fact, the court went further, declaring that while it agreed that "class certification issues should be determined separately from the merits of the case," the issues surrounding certification "cannot be decided in a vacuum."[76] Hence, the plaintiff's contention that the magistrate inappropriately considered the merits of the case at the certification stage was also rejected.[77]

Although the court's denial of class certification in *West* is informative, it is not dispositive, as "whether time spent on call is compensable is a question of fact *decided in the context of each case*."[78] Simply put, no two overtime cases are alike under the FLSA. Furthermore, neither *Agui* nor *Rulli* involve "on-call" time per se. Rulli's attorney in particular "has stressed that "CBRE's actions are different from the practice of designating certain employees "on call," in which employees are paid if they're called into a work site.""[79] Thus, the central issue that must be resolved in *Agui* and *Rulli* is not the parameters of "on-call" time, but instead whether non-exempt employees are entitled to overtime compensation when performing unauthorized work on electronic devices outside of the office. Under the statutory text of the FLSA, the answer may be yes. Again, as articulated by the Department, hours worked outside of the regular work week are considered overtime when the employee is made to "suffer" or "permitted" to work.[80] Therefore, as a practical matter, overtime is mandated when the "employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done."[81] In *Agui* and *Rulli*, the provision of PDA's to employees could suggest that each employer knew these individuals might engage in work-related activities beyond the office. Further, as noted by the *Wall Street Journal*, "court decisions have interpreted the law to require some hourly employees to be paid for putting on and taking off work uniforms."[82] In fact, other courts have ordered that employees be compensated "for the time spent while booting up computers."[83] Whether these decisions will prove persuasive to the courts in *Agui* and *Rulli*, however, remains to be seen.

VI. Staying Ahead of the Curve: Recommendations on Complying with the FLSA

As observed by *The National Law Journal*, "management-side attorneys fear a new wave of wage and hour litigation is just around the corner, in which employees will

claim overtime for all the hours they've spent clicking away on their Blackberries or other digital communication devices."[84] Regardless of whether this wave actually occurs, employers should be vigilant in ensuring full compliance with the FLSA overtime provisions. There are a number of strategies that can help employers do just that, including the following.

1. Draft and Enforce Comprehensive Human Resource Policies

As explained earlier, exempt employees are not entitled to overtime compensation. If an employee is misclassified as exempt, however, an employer could owe thousands of dollars in unpaid overtime compensation. Employers must carefully draft their policies concerning exempt and non-exempt employees, to ensure that their workforces are properly classified under federal statute.

2. Discourage Overtime Work for Non-Exempt Employees

Non-exempt employees are entitled to overtime compensation for hours worked regardless of whether their employer authorized such work. Employers should advise against overtime that has not been authorized by an employee's proper supervisor. Furthermore, policies that encourage (and indeed require) prompt notification from employees of hours worked will ensure an expedited resolution to potential FLSA violations.

3. Provide PDA's Sparingly to Non-Exempt Employees

By providing an employee with a PDA or other communication device, some could argue that the employer is implicitly acknowledging that the employee will perform work outside of normal business hours. While an employer might not expressly authorize the employee to respond to emails late in the evening, the employee's possession of the device raises several legal issues. Employers should restrict company owned PDA's to exempt employees whenever possible.[85] Further, those non-exempt employees who must be provided PDA's should be advised that they should use the instruments only with prior authorization.[86]

4. Conduct Regular Audits

Performing regular audits of employee exempt and non-exempt classifications, and hours worked by all employees, is a prudent step employers can take to protect their businesses from prospective liability under the FLSA. An audit can be performed in several steps, including information gathering, an on-site interview, and subsequent analysis of the information acquired.[87] Also, an audit can produce better "risk management mechanisms"[88] and internal payroll and timekeeping controls for non-exempt employees, which can further reduce the risk of violating the FLSA's overtime provisions, among others. An audit can also be useful in developing "proper decision-making protocols for dealing with particular employment-related risks."[89] Thus, the next time an employee alleges an FLSA violation, your organization will be prepared, and

more importantly, the process used to resolve the dispute will be clearly articulated and defined. All in all, an audit of your human resource policies and procedures can prove immensely helpful, as it will assist your organization in complying with the FLSA and a host of other federal and state employment statutes.

VII. Conclusion

Some commentators believe that it is "only a matter of time" before a "wave" of litigation in this area ensues.[90] Though this wave may impact all employers, those who take the right steps may be able to dodge the biggest ones. Hence, irrespective of the outcomes of *Agui* and *Rulli*, employers should implement the recommendations described above to ensure their compliance with the overtime provisions of the FLSA. By performing an audit of your internal human resource policies, your organization can engage in useful risk assessment and revise the areas that require clarification. Such clarifications, specifically as it relates to mobile technology, will better protect your organization from FLSA overtime claims. While there is no perfect solution, taking these steps will go a long way in preparing your organization for potential FLSA claims that involve Blackberry's, I-phones, and future technologies that will surely emerge in the future.

---

[1] Mr. Gutierrez is the chair of Holland & Hart's Labor and Employment practice group. Mr. Gutierrez has extensive experience addressing claims concerning wrongful termination, breach of express or implied employment contracts, violation of covenants not to compete, contracts for the protection of trade secrets, employment discrimination, wage matters (including FLSA collective actions), FMLA claims, defamation, torts and claims of retaliatory discharge.

Mr. Neguse is a member of Holland & Hart's Litigation Department. He first joined the firm as a summer clerk in 2007, and now focuses his practice on commercial litigation. In November of 2008, Mr. Neguse was elected by the voters of Colorado's 2nd Congressional District to serve as a Regent for the University of Colorado. He serves as a member of the Regent's Audit Committee and as a non-voting member of the Investment Advisory Committee.

[2] *See* Grossman, Jonathan, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Monthly Labor Review, (1978), available at: http://www.dol.gov/oasam/programs/history/flsa1938.htm
[3] *See Employment Law Guide: Wages and Hours Worked, Minimum Wage and Overtime Pay*, U.S. Dep't of Labor, Sep. 2009, available at: http://www.dol.gov/compliance/guide/minwage.htm
[4] *Id.*
[5] *Id.*
[6] *Id.* ("the Act requires employers to pay covered employees not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt").
[7] Sileo, Carmel, *More Workers Look to Lawsuits for Paycheck Protection*, Trial Trends, 45 NOV JTLATRIAL 12, American Association for Justice, at ¶ 1, Nov. 2009.
[8] *Id.*
[9] *See Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. Dep't of Labor-Wage and Hour Division, available at: http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf
[10] *See id.*
[11] *See* Tilson, Joseph et. al, *Hot Topics in Wage and Hour Law*, Practicing Law Institute (38th Annual Institute on Employment Law), 802 PLI/LIT. 681, 687, Oct. 1-2, 2009. ("On August 27, 2004, the

Department of Labor ("DOL") implemented sweeping changes to the Regulations governing the "white collar" overtime exemptions under the FLSA").
[12] Orey, Michael, *Wage Wars: Workers—from truckers to stockbrokers—are winning overtime lawsuits*, BusinessWeek, Sep. 24, 2007, available at: http://www.msnbc.msn.com/id/20908975/
[13] U.S. Dep't of Labor-Wage and Hour Division, *supra* note 8.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *FLSA Hours Worked Advisor*, U.S. Dep't of Labor, available at http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1d.asp
[18] *Id.*
[19] Sileo, *supra* note 6, at ¶ 6; *See also* Tilson, *supra* note 10, at 781 ("Recent years have seen a staggering increase in the number of lawsuits filed under the federal and state wage and hour laws").
[20] *Wage and Hour Collects Over $1.4 Billion In Back Wages For Over 2 Million Employees Since Fiscal Year 2001*, U.S. Dep't of Labor-Wage and Hour Division, Dec. 2008.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] U.S. Dep't of Labor, *supra* note 2 ("willful violators may be prosecuted criminally and fined up to $10,000. A second conviction may result in imprisonment").
[27] *Id.*
[28] *Cintas Reaches Settlement in Lawsuit*, Business Courier of Cincinnati, at ¶ 1, Aug. 20, 2009, available at: http://www.bizjournals.com/cincinnati/stories/2009/08/17/daily43.html
[29] *Id.* at ¶ 5.
[30] *Id.* at ¶ 7.
[31] *Lowe's to pay $29.5 million to settle overtime lawsuit*, Central Valley Business Times, at ¶ 1, Sep. 23, 2009, available at http://www.centralvalleybusinesstimes.com/stories/001/?ID=13150
[32] *Id.* at ¶ 2.
[33] *Id.* at ¶ 8.
[34] *See* Sileo, *supra* note 6, at ¶ 19.
[35] *Id.*
[36] *See also GAO Investigation Finds Labor Department Not Effectively Fighting Wage Theft*, U.S. House of Representatives Committee on Education and Labor, at ¶ 4, July 15, 2008, available at: *http://www.house.gov/apps/list/speech/edlabor_dem/071508.html*
[37] Sileo, *supra* note 6, at ¶ 20; *See also* House Committee on Education and Labor, *supra* note 36, at ¶ 5.
[38] *See id.* at ¶ 21; *See also Statement of U.S. Secretary of Labor Hilda L. Solis on GAO Investigation regarding past Wage and Hour Division Enforcement*, U.S. Dep't of Labor, March 25, 2009, available at: http://www.dol.gov/opa/media/press/esa/esa20090324.htm
[39] *Id.*; *See also* U.S. Dep't of Labor, *supra* note 37.
[40] Borgen, David, *An Introduction to Litigating FLSA Collective Actions for the EEO Lawyer*, American Bar Association-Labor & Employment Section, Equal Employment Opportunity Committee, at ¶ 5, March 29, 2001.
[41] *Id.* at ¶ 7 (citing *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir.1996)).
[42] Tilson, *supra* note 10, at 783, 787 (explaining that "notwithstanding the lack of uniformity, a majority of courts including the Fifth, Tenth and Eleventh Circuits, apply the two-tiered approach. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001)").
[43] *Id.*
[44] Borgen, *supra* note 39.
[45] *See* Tilson, supra note 10, at 790; *See also Roebuck v. Hudson Valley Farms, Inc.*, 239 F. Supp. 2d 234, 239 (N.D.N.Y. 2002).
[46] *See Roebuck*, 239 F. Supp. at 235.

[47] *Id.* at 239.
[48] *Id.* at 238 (quoting *Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 306 (S.D.N.Y. 1998)) (emphasis added).
[49] Tilson, *supra* note 10, at 782.
[50] Sileo, *supra* note 6, at ¶ 2.
[51] Sanserino, Michael, *Theory & Practice: Suits Question After-Hours Demands of Email and Cellphones*, The Wall Street Journal, at ¶ 3, Aug. 10, 2009.
[52] Class & Collective Action Complaint, *Agui v. T-Mobile USA Inc.*, No. 2009cv092955, at (E.D.N.Y. filed July 10, 2009).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Sileo, *supra* note 6, at ¶ 5.
[57] *Agui*, supra note 51.
[58] *Id.*
[59] *T-Mobile Company Information*, T-Mobile, available at: http://www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_CompanyOverview
[60] Collective Action Complaint, *Rulli v. CB Richard Ellis, Inc.*, No. 2009cv00289 (E.D. Wis. Filed Mar. 13, 2009).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Sileo, *supra* note 6, at ¶ 9.
[65] *Rulli*, *supra* note 59.
[66] Sileo, *supra* note 6, at ¶ 4 (citing Nola Hitchcock).
[67] *Id.* at ¶ 7.
[68] *West v. Verizon Communications Inc.*, 2009 WL 2957963, at *7 (M.D. Fla. 2009)
[69] *Id.* at *1.
[70] *Id.* at *2.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at *6.
[75] *Id.* at *3.
[76] *Id.* at *4.
[77] *See id.*
[78] *Letter from Office of Enforcement Policy (No. FLSA2008-14NA)*, U.S. Dep't of Labor, Dec. 18, 2008.
[79] Sileo, *supra* note 6, at ¶ 8.
[80] U.S. Dep't of Labor, supra note 16.
[81] *Id.*
[82] Sanserino, supra note 50, at ¶ 9.
[83] *Id.*
[84] Baldas, Tresa, *Overtime suits may ripen with BlackBerrys*, The National Law Journal, at ¶ 3, April 28, 2008, available at: http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1208774508977&slreturn=1&hbxlogin=1
[85] *Id.* at 15 (explaining that some attorney suggest their clients "give BlackBerrys only to exempt employees").
[86] *Id.* at ¶ 15 ("some employers may want to require that employees get permission first before using their Blackberrys after work hours").
[87] *Overview of Holland & Hart's Labor Law Audit*, Holland & Hart LLP.
[88] *Id.*
[89] *Id.*
[90] Baldas, *supra* note 83, at ¶ 4.