G:\2005 Work\Borgen\pa.aspen2006.doc

NATIONAL CLE CONFERENCE

COLORADO BAR ASSOCIATION CLE

ASPEN, COLORADO

JANUARY 4, 2006

Major Areas of Liability in Wage and Hour Law

DAVID BORGEN

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN

OAKLAND, CA

www.gdblegal.com

I. INTRODUCTION

This paper will focus on three topics of interest to employment lawyers who practice in the wage/hour area. First, on October 3, 2005, the United States Supreme Court heard oral argument on a substantive FLSA issue for the first time in several years. As this paper was written, no decision had been issued in the two cases at issue: Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), cert. granted, 125 S.Ct. 1292 (2005), and Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), cert. granted, 125 S.Ct. 1295 (2005). At minimum, the Supreme Court will provide guidance on the compensability of walking time and waiting time, but the decision could have far reaching impact on issues like *de minimis* time and other pre-shift and post-shift compensable time issues.[1] The first section of this paper will address Tum and Alvarez. Second, there appear to be new rules at play with regard to who may be considered a "joint employer" in the wake of the seminal Zheng v. Liberty Apparel Co., 355 F.3d 61 (2nd Cir. 2003) decision and the cases that have followed its liberalized joint employment test. The second section of this paper will discuss these joint employment issues (including this year's Opinion Letter on joint employment). Finally, there has been an increase of activity from the Department of Labor (DOL) in issuing opinion letters on FLSA compliance issues. The final section of this paper will discuss some of these recent opinion letters (through August 26, 2005), and what they mean for your practice.

II. THE TUM/ALVAREZ CASE AT THE SUPREME COURT

Wage and hour specialists have been closely watching both the Tum case in the First Circuit and the Alvarez case in the Ninth Circuit for several years. These cases, both arising from the packing plant context,[2] involve donning and doffing issues. However, these cases did not go up to the United States Supreme Court as to the compensability of the donning/doffing time, but rather as to the compensability of time spent walking to stations to access or return the protective gear and also as to waiting in line to receive/return the protective gear. As such, we can anticipate a Supreme Court opinion that may clarify several issues as to compensable pre-shift and post-shift work time, including the treatment of *de minimis* time, walking time, waiting time, and travel time. We may (or may not) be provided with guidance as to the proper interpretation of several DOL regulations and the scope of the Portal to Portal Act's exclusion of travel time from "time worked." While the precise issues in these cases arose in the packing house context, there may be impact on cases arising in numerous other sectors of the economy where travel and/or waiting time issues have been litigated in recent years including, but not limited to: refineries, laboratories, power stations, construction, chemical plants, clean rooms, plumbing, insurance, call centers, and temporary labor agencies.

[1] The author's amicus brief to the Supreme Court on these cases, filed on behalf of the National Employment Lawyers Association (NELA), may be accessed from the "Resources" page of his firm's website at www.gdblegal.com.

[2] See The Jungle, by Upton Sinclair, or the more recent Fast Food Nation, by Eric Schlosser.

Much of the briefing for the Tum/Alvarez argument is available on-line. Our brief, filed as *amici curaie* on behalf of the National Employment Lawyers Association (NELA), the Employment Law Center, and the National Employment Law Project (NELP), may be accessed on our firm's website at www.gdblegal.com (see Resources page). The DOL briefing may also be available on its website at www.dol.gov.

At issue in Tum/Alvarez, and in the related cases in other contexts, is just what activity triggers the start of the work day and whether once started the employer is required to pay for all work time through to the end of the work day. In these consolidated cases, the Court will consider the narrow question of whether "waiting and walking time" is compensable under the Fair Labor Standards Act and the Portal-to-Portal Act. "Waiting time" is the time a worker spends waiting in line to punch a time clock or to acquire protective gear. "Walking time" is the time a worker spends walking from the place where she puts on the gear to the place where she works, and back. In these cases, employees at meat and poultry processing plants were not paid for time they spent donning and doffing specialized protective clothing before beginning work, at the end of work, and during unpaid lunch breaks.

In Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), the 9th Circuit held that once it is established that donning protective gear or any other preparatory work activity is integral and indispensable, all subsequent work and any attendant employer-controlled wait-time is compensable. The 1st Circuit in Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), on the other hand, adopted an *ad hoc* standard that will require every court facing a "walk time" or "wait time" issue to determine whether an activity the court deemed integral and indispensable also justifies a second determination of whether attendant wait time or subsequent walk time is also compensable. The concurrence in Tum further suggests a rule that only donning and doffing time that is not *de minimis* triggers the start or end of the workday. Plaintiffs seek a bright-line rule that the compensable workday begins with the first principal activity, regardless of whether the time for the activity is *de minimis.* Such a rule is the most straightforward for employers and regulators to administer, and will be less subject to abuse than a rule that permits employers to carve up the workday.

The issues presented in these cases will affect employees in numerous lines of work, and many industries may be affected by the outcome of these cases. Reports from the oral argument on October 3, 2005, (the first in which new Chief Justice Roberts participated) suggested that the Court would reject the First Circuit's tinkering with established compensable time rules.

III. JOINT EMPLOYMENT UPDATE

One of the many issues facing employment lawyers in bringing FLSA collective actions and one which may often dictate the scope of the collective action "class" is whether several related employer entities may be treated as "joint employers." While there is much guidance on this issue in the applicable regulation (29 C.F.R. § 791.2) and in the cases discussing the "economic reality test," there are several important new cases that tend to broaden this already expansive concept, most notably Zheng v. Liberty Apparel Company, Inc., 355 F.3d 61 (2nd Cir. 2003). There is also a recent DOL opinion letter (FLSA 2005-15, dated April 11, 2005) that is helpful on this issue.

Many of the leading cases in this area involve the garment industry, where workers sew clothes for small "jobber" employers but the work is controlled by a big manufacturer, and also janitorial services where contract labor works exclusively for the large corporation whose facilities are being cleaned. The issue also often appears in the context of farm labor operations, hospitals, grocery stores, health care facilities, and temporary employment agencies. We have also seen cases in which an employee may be employed by one public "employer" for some number of hours each week and another number of hours for another, supposedly separate, public employer entity. If it can be proved that the two entities are joint employers, then the worker in question is entitled to overtime pay for all hours over 40 hours per week (aggregating both schedules). The same rules apply in all these and other contexts, but NELA members should be alert to these industries at a minimum.

It is important to remember is that this is not a common law or "piercing the corporate veil" test. The FLSA provides one of the most expansive and employee friendly tests for proving that a parent corporation or some other entity may be liable as an employer under a joint employer theory.

As explicitly outlined in the DOL regulations at Section 791.2(a), there is nothing in the FLSA that prevents an individual from being employed by more than one employer. The joint employment analysis is fact specific. The test is whether the two employments in question are "completely disassociated" from each other. Section 791.2(b) then sets out the factors for finding whether a joint employment relationship exists, including:

(1) where the employers share the employee's services or "interchange employees";

(2) where one employer acts directly or indirectly in the interest of the other in relation to the employee;

(3) where the employers "are not completely disassociated with respect to the employment of a particular employee," share control over the employee (directly or indirectly), or where one employer controls the other or is under the "common control" with the other employer (this opens the door for discovery of corporate organization/ownership issues).

In sum, the basic DOL regulation provides a map leading to a finding of joint employment.

The DOL also issued an Opinion Letter (No. FLSA2005-15) on April 11, 2005, that provides further useful guidance in joint employer situations. The Opinion Letter responds to a management attorney who represented "a health care system" that included two acute care hospitals, a nursing home, and another facility that combined a long-term hospital and nursing home. The "system" itself was a holding company with no employees. Each facility had its own Human Resources staff, employee handbook, payroll system, retirement system, and tax payer ID number. There was no regular sharing of employees, however a nurse (LPN) worked at two different facilities of the system and her combined hours exceeded 40 per week. Even in these circumstances, the DOL opined that there was joint employment liability, relying on Chao v. A-One Medical Services, Inc., 346 F.3d 908 (9th Cir. 2003). Here the DOL found that the various entities were sufficiently associated in terms of a common President and Board of Directors. The

DOL also relied on the fact that several senior HR executives appeared to provide support for several of the entities. There were numerous HR policies that were identical and some employees shared a common health insurance plan. Job openings were posted within the system's entities before they were advertised to the public. Therefore, all hours worked were aggregated and each employer entity was jointly and severally liable for any overtime compensation.

In the landmark case of Zheng v. Liberty Apparel Company, Inc., 355 F.3d 61 (2d Cir. 2003), the Second Circuit reversed the district court's entry of summary judgment for the garment manufacturer defendant and, in so doing, established a liberalized rule for the joint employer analysis. It repudiated more recent court of appeal precedent as overly restrictive and reinstated an analysis more consistent with the FLSA's protective intent and with earlier case law. The plaintiffs, 26 adult non-English speaking garment workers employed in New York City, alleged that they were employees of both the garment assembly contractors and the manufacturer [Liberty]. Plaintiffs' claimed that they were jointly employed because they "worked predominantly on the manufacturers' garments, performed a line-job that was integral to the production of the manufacturers' garments, and their work was frequently and directly supervised by the manufacturers' agents."[3] The district court granted summary judgment in favor of the manufacturers, concluding that pursuant to the four factors enunciated in Carter v. Dutchess Community College,[4] the manufacturers were not joint employers of the plaintiffs for purposes of the FLSA. The court held that pursuant to Rutherford Food Corporation v. McComb,[5] it could not require all four Carter factors to be present to support a finding of joint employment. Instead, the Carter factors are only factors which could be "sufficient" but not "necessary" to support a claim of joint employment.[6] The Second Circuit remanded the matter to the district court with instructions to consider the following six (6) factors, and "any other factors it deems relevant to its assessment at the economic realities."[7]

(1) whether Liberty's premises and equipment were used for the plaintiffs' work;

(2) whether the contractors had a business that could or did shift as a unit from one putative joint employer to another;

(3) the extent to which plaintiffs performed a discrete line-job that was integral to manufacturer's process of production;

---

[3] Id. at 63.

[4] 735 F.2d 8 (2d Cir. 1984).

[5] 331 U.S. 722 (1947)(seminal joint employment case involving "meat boners" in slaughterhouse).

[6] Zheng, 335 F.3d at 69.

[7] Id. at 72.

(4) whether responsibility under the contracts could pass from one sub-contractor to another without material changes;

(5) the degree to which the manufacturers supervised plaintiffs' work; and

(6) whether plaintiffs worked exclusively or predominantly for the manufacturer.[8]

The Second Circuit advised that findings of fact as to these factors would be reviewable only as to whether such findings were "clearly erroneous." The district court's ultimate decision as to joint employer status would be reviewable *de novo* as a legal conclusion. In sum, the Second Circuit dictated a broad application of Section 203(g) as interpreted by Rutherford Food Corp., requiring an analysis that goes beyond traditional agency principles, while respecting "normal strategically-oriented contracting" or legitimate out-sourcing arrangements.[9]

Several significant recent joint employment cases following Zheng should be reviewed carefully, including:

Quintanilla v. A & R Demolition, Inc., 2005 WL 2095104 (S.D. Tex., August 30, 2005). In this case, the District Court granted summary judgment in favor of two large general contractors (Swinerton Builders and Satterfield & Pontikes) and against asbestos removal workers employed at construction sites in Texas by a sub-contracting entity. The District Court found that there was no joint ownership interest and that wages for the employees were set by prevailing wage rates applicable to the project. While the general contractors had supervisors on site, so did the subcontractor, which was one of numerous subcontractors on the construction sites. The subcontractor handled all payroll and maintained employment records. In sum, it was found that the work on the construction sites was consistent with typical legitimate subcontracting arrangements and that there were no triable issues as to joint employment.

Tumulty v. Fedex Ground Package System, Inc., 2005 WL 1979104 (W.D. Wash., August 16, 2005). This Court had previously ruled on summary judgment that Fedex was a joint employer of the contracting package delivery drivers. The significance of this case is the ruling, on summary adjudication, that Fedex was liable for liquidated damages as there was no reasonable grounds to believe that it was not the plaintiffs' joint employer. There was also a triable issue as to whether Fedex would be liable for the three year FLSA liability period for a willful violation as to this issue.

Ouedraogo v. Durso Associates, Inc., 2005 WL 1423308 (S.D.N.Y., June 16, 2005). In this case, a grocery store owner moved to dismiss the complaint on the grounds that it failed to state a claim against him as a joint employer. This case is akin to the familiar Ansoumana v. Gristede's Operating Corp., 255 F.Supp.2d 184 (S.D.N.Y. 2003) case which also involved the issue of the proper corporate employer defendants where deliverymen were employed through

[8] Id.

[9] Id. at 76. However, it is not clear what would be normal or legitimate outsourcing or contracting that would not trigger a joint employment finding.

labor agents to deliver customers' purchases from New York City grocery stores. Following both Ansoumana and Zheng, the District Court had little trouble applying the economic reality test and found that dismissal of the joint employer claims was inappropriate prior to the conduct of discovery.

Chen v. Street Beat Sportswear, Inc., 364 F.Supp.2d 269 (E.D.N.Y., April 6, 2005). Here, the District Court denied the garment manufacturer defendant's motion for summary judgment finding disputed factual issues as to whether the manufacturer was a joint employer with the assembly contractor and sending this issue to trial. The judge analyzed the six joint employment factors from Zheng and made separate findings as to each factor. This analysis is summarized below as illustrative for cases of this type. As to the first factor (separate premises and equipment), the District Court found that the factor weighed against a joint employment determination because the work was mostly performed on the separate premises of the sewing contractor and that while the manufacturer provided all the materials including the cut garment, trimmings, hangers, labels, poly bags, and instructions (everything but the thread), it was undisputed that the contractors provided the equipment (presumably the sewing machines). As to the second factor (whether the work shifted as a unit), the District Court found there were disputed issues of fact. Here, the manufacturer used various contractors (non-exclusive contracting), but the plaintiffs argued that the contractor in question was "entirely dependent" on this manufacturer. As to the third factor (whether the work was integral to the manufacturer's process), the District Court held that this factor weighed in favor of finding joint employment. Here the piecework was a basic production line part of the garment manufacturing process. This basic fact appeared to out-weigh the expert testimony that was proffered by both parties as to whether such contracting in the garment industry in general was legitimate out-sourcing or endemic to the industry for the purpose of evading labor laws. As to the fourth factor (responsibility passing between contractors), the District Court found that this factor weighed in favor of finding joint employer liability. This factor relates to the "interchangeability of contractors," where such contractors could be changed at the whim of the putative joint employer. The court relied on the plaintiffs' evidence that they worked for a number of contractor entities but always were working on the manufacturer's garments (while the contracting entities came and went). This suggested that the workers "were tied to" the manufacturer rather than to the contractors that hired them. As to the fifth factor (degree of supervision), the District Court held that there were genuine issues of material fact on the issues of whether and to what extent the manufacturer supervised plaintiffs' work. This factor goes to whether the evidence demonstrates effective control of the terms and conditions of the employment in question and contemplates something more than mere quality control supervision over contract work. Here the evidence included testimony that the manufacturer had a quality control supervisor on site at all times who exercised significant control over the number of hours and working conditions of the employees. Finally, as to the sixth factor (exclusivity of work), the District Court held that there were genuine issues of material fact as to whether the plaintiffs worked predominantly for and were economically dependent on the manufacturer. Had the evidence conclusively shown that the plaintiffs performed all or nearly all their work for the manufacturer, this would have been an indicia of employment. However the evidence was disputed about the percentage of work that was done for the manufacturer here. Given the disputed facts as to several of the factors above, the district court denied summary judgment on the joint employment claims. However, this is a good case illustrating the application of Zheng

on a fairly well developed factual record and should suggest both discovery and briefing strategies in similar cases.

Vega v. Contract Cleaning Maintenance, Inc., 2004 WL 2358274 (N.D. Ill. 2004). In this case, plaintiffs were contract janitors working at UPS facilities who alleged overtime claims under both the FLSA and state law against UPS and other defendants. UPS moved to dismiss these claims under FRCP 12(b)(6) based on its assertion that it was not a joint employer. Significantly, the District Court explicitly adopted the Second Circuit's six part test from Zheng and proceeded to reject UPS's motion to dismiss on the basis that plaintiffs might be able to make out a case under this expansive economic realities test. Specifically, the District Court relied on allegations that indicated a joint employment relationship, including that the workers alleged they worked regularly on UPS's premises, that UPS set their schedules, that UPS gave them detailed work assignments, that UPS supervised their work, and that UPS maintained records of their hours of work. This was sufficient to defeat the employer's 12(b)(6) motion.

See also: Preston v. Settle Down Enterprises, Inc., 90 F.Supp.2d 1267 (N.D. Ga. 2000)(joint employment case in context of temporary labor agency); Lui v. Donna Karan International, Inc., 2001 WL 8595 (S.D.N.Y. 2001)(garment industry case similar to Zheng and Street Beat cases above); Bureerong v. Uvawas, 922 F.Supp. 1450 (C.D. Cal. 1996)(West Coast garment worker case); Gonzales-Sanchez v. International Paper Co., 346 F.2d 1017 (11th Cir. 2003)(no joint employment in context of tree farm labor); and Zhao v. Bebe Stores, Inc., 247 F.Supp.2d 1154 (C.D. Cal. 2003)(garment case in which District Court denied plaintiffs' summary judgment motion on joint employer issue).

IV. DOL OPINION LETTERS

Now that the DOL has completed its work on the white collar exemption regulations (effective August 23, 2004), it has ramped up its efforts in regard to providing opinion letters on wage and hour issues. Many of the opinion letters are made available to the public on the DOL website at www.dol.gov/esa/whd/opinion/flsa_content.htm.[10] The BNA Workplace Law Report also publishes the text of these letters as they are released by the DOL. Because the letters are not the product of adjudicatory or formal regulatory procedures, they are generally not accorded "Chevron" deference by the courts. However, they are offered as part of the DOL's "compliance assistance" efforts to make its interpretation of the FLSA and the regulations more transparent. They may also be presented to courts in litigated matters and may be entitled to "Skidmore" deference depending on how persuasive they are and how consistent DOL policy has been on any given issue.

The opinion letters to date take the position that, in large part, the new white collar regulations do not constitute a substantive change in law as to the duties tests. There are,

[10] This website makes the FLSA opinion letters available in PDF formats. At the date this paper was written, the website provided access to opinion letters from February 14, 2001 through August 26, 2005. There are other opinion letters issued which have not been posted. For this paper, only those letters posted on the DOL website two calendar year (2005) will be discussed.

however, two interesting opinion letters dealing with the claims adjuster job. The letters issued in the past year (since last year's Aspen CLE conference) are digested below.

No exemption when pay is docked for hours below required work time -- January 7, 2005 (FLSA2005-1)

Two managers, a Project manager and a Business Development and Marketing Manager, worked 37.5 hours per week. While the employer claimed that they were paid by salary, their salary was reduced whenever they did not work the full 37.5 hours; the calculation used to determine this reduction was not provided. The issue was whether the managers would qualify for an executive, administrative, or professional exemption under the new regulations. These exemptions require that the employee be "paid on a salary basis," and since the pay of the two managers in question was docked when they worked fewer than 37.5 hours, regardless of the reason, the Wage and Hour Division determined that the two managers were not "paid on a salary basis" and, thus, would be ineligible for any such exemption, even if all other criteria were met.

No administrative exemption: Junior-level claims adjusters -- January 7, 2005 (FLSA2005-2)

A private employer inquired as to whether junior-level claims adjusters qualified for the administrative exemption under the new DOL regulations. The new regulation provides for the exemption for an employee who is: 1) compensated on a salary or fee basis at a rate of at least $455 per week; 2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 CFR § 541.200. The Wage and Hour Division advises that the junior-level claims adjusters did not qualify for the administrative exemption. They did not make determinations as to questions of coverage or liability, nor did they have authority to negotiate or make settlements of disputed claims. They conducted their telephone interviews based on a list of standardized questions and simply entered responses onto forms, with standard formulas used to make payment determinations. Moreover, the junior-level claims adjusters were required to obtain higher level approval for all but the most minor payouts. Thus, they performed duties involving applying their particular skills and knowledge rather than exercising "discretion and independent judgment with respect to matters of significance," precluding administrative exemption status.

Pre-payment plan to provide a "more stable wage" -- January 7, 2005 (FLSA2005-3)

In this Opinion Letter, the Wage and Hour Division voices its approval for a pre-payment plan regarding overtime compensation. The employer's workforce would work many overtime hours some weeks, and far fewer than 40 hours in others. Thus, a pre-payment plan was implemented to provide a "more stable wage" by paying hourly employees for 40 hours each week. When employees did not work 40 hours, the excess pay was considered an advance against hours that would subsequently be worked. When overtime was worked, the advance offset would be computed at time and one-half the rate then in effect. If the employee worked more overtime hours than had been advanced, the employer would pay time and one-half in cash on the next payday. The Division found such a pre-payment plan to be entirely acceptable, so

long as the employer never owed the employee overtime compensation. In other words, for any workweek in which the pre-payment credits were not sufficient to equal the additional overtime compensation due to the employee, the difference had to be paid on the next payday.

National and Community Service Act – January 7, 2005 (FLSA2005-4)

This letter merely confirms that the revised white collar regulations do not impact the analysis in a prior letter dated November 18, 1998, regarding the above statute.

Timekeeping system and 29 CFR 541.602 – January 7, 2005 (FLSA2005-5)

This letter confirms that a proposed timekeeping system for exempt employees that requires employees to record when they arrived late and the reasons for full days of absence for illness, vacation, jury duty, or compensatory time off, did not conflict with the salary basis of payment of these employees. The reporting did not tie wage payments to hours actually worked and the new regulations specifically contemplate exempt employees reporting hours, working specified schedules, and being subject to deductions from accrued leave accounts without impacting their exempt status.

Retail or service establishment exemption -- January 7, 2005 (FLSA2005-6)

An employer's enterprise consisted of three establishments that were separate and distinct from one another within the meaning of the DOL regulations. Establishment "A" was not a retail or service establishment for purposes of FLSA overtime exemptions. Establishments "B" and "C" were retail or service establishments. However, for business-record purposes, most of the sales made by Establishment "A" were recorded on the books of Establishments "B" and "C" as if those locations had made them. If the establishment "A" sales were considered actually to be sales of Establishment "B" and "C," then their status as retail or service establishments would be nullified, as more than 25% of their sales would be for resale and/or would not be recognized as retail; the retail or service establishment criteria would not be fulfilled. The Wage and Hour Division opines that the employer's recordkeeping system would not be viewed as converting the Establishment "A" sales into sales supposedly made by Establishments "B" and "C." In other words, the latter two establishments would be able to maintain their status as retail and service establishments for exemption purposes.

Paid time off and 29 CFR 541.602 – January 7, 2005 (FLSA2005-7)

This letter confirms that partial day deductions may be made from paid time off (PTO) leave accounts without adversely impacting the salary basis so long as deductions from salary are only made in full day increments.

No administrative exemption: Data entry/receptionist positions -- January 7, 2005 (FSLA2005-8)

This is another Opinion Letter regarding whether a particular job description for an employee met the criteria for the administrative exemption under the new DOL regulations. The job description included data entry, accounting, word processing, communication with subcontractors regarding workers' compensation/liability insurance, receptionist duties, and routine office supply ordering. Applying the updated regulations regarding the administrative exemption, the Wage and Hour Division found that employees in this job position did not engage in office or non-manual work "directly related to management or general business operations," nor did they exercise "discretion and independent judgment." 29 CFR § 541.201(a). The Division reiterated the factors to consider when determining whether an employee exercises discretion and independent judgment "with respect to matters of significance." 29 CFR § 541.202(b). Ultimately, the employees in question did not qualify for the administrative exemption under the updated regulations and were therefore covered by the minimum wage and overtime provisions of the FLSA.

No professional exemption: Paralegals -- January 7, 2005 (FLSA 2005-9)

The professional exemption applies only to an employee: (1) who is compensated on a salary or fee basis at a rate of at least $455 per week; and (2) whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 CFR § 541.300. This "primary duty" includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 29 CFR § 541.301(a). As the regulation provides, "paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field are in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption." § 541.301(e)(7). With this in mind, the Division reaffirmed its longstanding position that paralegals and legal assistants do not qualify for the learned professional exemption.

Motor Carrier Act Exemption – January 11, 2005 (FLSA 2005-10)

This opinion formally adopts the applicable Department of Transportation (DOT) regulation dated May 8, 1998, for the purpose of defining the interstate commerce character of shipments which pass through and warehouse/storage facility before a final in-state delivery, and withdraws earlier DOL opinion letters to the extent that they are contrary. It appears to expand the traditional “fixed and persistent intent” test to permit inclusion (as interstate commerce) of

shipments that stop at a storage facility and are sold based on demand projections. Detailed analysis of multi-factor test is presented.

Brush eradication – January 11, 2005 (FLSA2005-11)

This letter opines that employees of a rural brush eradication contracting company which performs services for landowners such as grubbing, clearing, raking, aerating, roller chopping, and reseeding were not eligible for the agricultural employee exemption.

Companionship service employees are still exempt -- March 17, 2005 (FLSA2005-12)

The Wage and Hour Division affirmed that employees engaged in companionship services who are employed by a third party are exempt from the FLSA minimum wage and overtime requirements. 29 C.F.R. § 552.6. The Division maintained this position in spite of the Second Circuit's recent decision in Coke v. Long Island Care at Home, 376 F.3d 118 (2nd Cir. 2004), which conflicts with this DOL interpretation. While courts in the Second Circuit may feel bound by the Coke decision, employers outside of the Second Circuit's jurisdiction are encouraged to rely upon the Division's enunciated opinion.

The "domestic service" exemption -- March 17, 2005 (FLSA2005-13)

In this Opinion Letter, the Wage and Hour Division examines the application of the "domestic service" exemption for a licensed practical nurse (LPN) or registered nurse (RN) employed to live with a special needs youth in his apartment on a 24-hour basis. The Division reiterated its position that nurses, certified nurse aides, home health aides, and other individuals providing home health care services fall within the "domestic service" category when they provide services in or about a private household. 29 C.F.R. § 552.3. Thus, an LPN or RN employed to live with this special needs individual would qualify for the FLSA "domestic service" exemption. Further, an RN likely would qualify under the professional exemption, so long as the "pertinent tests" (including payment on a salary basis) are met. See 29 C.F.R. § 541.300.

Nonexempt Office Assistant – March 17, 2005 (FLSA2005-14)

This query involved a nonexempt office assistant who wanted to take on the additional duties of an exempt supervisor in the evening hours after completion of her nonexempt duties. The DOL opined that a “primary duty” determination would have to be made to determine what the primary duty was in this context. If the exempt supervisory duties were “primary” then no additional compensation would be owed for overtime work. If the nonexempt work remained primary then the employer had to pay overtime either at the weighted average regular rate or at the bona fide rate applicable to the work being performed during the overtime hours.

Joint employment – April 11, 2005 (FLSA2005-15)

See discussion in section herein re Joint Employment.

Partial-day salary docking -- April 11, 2005 (FLSA2005-16)

The Opinion Letter addresses an employer's ability to dock the salary of exempt employees, including in-house attorneys, who are absent for reasons not covered by the Family Medical Leave Act and who have exhausted paid leave. The Wage and Hour Division opines that FLSA overtime exemption is not lost by requiring partial docking of salary for otherwise exempt employees when they have exhausted their paid leave and are absent for non-FMLA-qualifying reasons. Additionally, the DOL reiterates that employers are specifically prohibited from discriminating against employees who have used paid or unpaid FMLA leave by applying such use as a negative factor in any employment action, including hiring, promotions, or disciplinary actions. Similarly, using it against an employee in a performance evaluation would be considered discrimination. In contrast, non-FMLA leave is not protected by the statute and DOL regulations.

Shifts overlapping workweeks – May 27, 2005 (FLSA2005-17)

The issue in this letter involved the schedule of employees whose shifts overlapped the established workweek so that in a two week cycle, such employees worked 32 hours in one week and 48 in the next week. The DOL opined that the employer could pre-pay the eight hours for the ten hour shift that bridged the two weeks so that overtime would not be due unless additional hours were worked. Such a system cannot be established to avoid paying overtime wages.

Reimbursement for Police Training Costs -- May 31, 2004 (FLSA2005-18)

A police officer attended a required basic training course, for which he was paid about $3,000. He subsequently left that job to take a similar position in a different city. Pursuant to the state's law, if a person within one year after certification resigns and is hired by another law enforcement agency in the same state, the second employing agency or the person who received the training must reimburse the original employment agency for the salary paid during completion of the course. The Wage and Hour Division asserts that "wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" The FLSA prohibits required employee "kicks-back" related to wages previously paid. Thus, any reimbursement paid by the individual officer would violate the "free and clear" provisions of the FLSA. In the alternative, the second employing agency could be required to reimburse the first employer. The FLSA regulates only employee wages and does not control any arrangement between two cities (or public employers) under state law.

New Regulations Interpreting White Collar Exemption – August 2, 2005 (FLSA2005-19)

This letter states the DOL's position that, in general, the new 541 regulations effective on August 23, 2004 do not constitute a change with regard to the duties test of the white collar exemptions. In specific, the addition of the terms "planning and controlling the budget" and "monitoring legal compliance measures", while new to the list of management duties, was a "clarification" and not a change from the old regulations. Similarly, the new regulation stating the rules as to "concurrent duties" was also a clarification and not a change in policy. Finally,

the "directly and closely related" standard is intended to be the same in the new regulations as before.

Nurse compensation – August 19, 2005 (FLSA2005-20)

The DOL confirmed that an employer may pay some nurse practitioners on a salary basis and treat them as exempt while also employing other nurse practitioners on an hourly basis and treat those as nonexempt. In addition, the employer may pay the exempt salaried nurse practitioners a premium for certain night hours without compromising the salary basis.

Background investigators – August 19, 2005 (FLSA2005-21)

This is a fairly extensive discussion applying the new administrative exemption regulation to a company that, under a contract with the Defense Security Service (DSS), employed investigators to obtain information about job applicants under consideration for sensitive government employment. The investigators were determined not to be exempt as administrative employees. Their work did not directly relate to the management or general business operations of their employer and they did not exercise discretion and independent judgment.

Incentive Bonus Plan – August 26, 2005 (FLSA2005-22)

The DOL confirms that, pursuant to 29 CFR 778.210, when an employer pays an annual non-discretionary bonus using a percentage of total earnings method, it must be based on the earnings for the base year and need not include bonus income paid in the base year from the prior year's bonus program.

Court Reporters and Court Coordinators – August 26, 2005 (FLSA2005-23)

The DOL confirms its prior advice that court reporters are not exempt under the personal staff exemption of the FLSA (Section 3(e)(2)(C)(i)(II)), but that court coordinators who perform duties similar to a judge's administrative assistant would likely be exempt under this provision.

Professional Accountants Paid on a Fee Basis – August 26, 2005 (FLSA2005-24)

This is a good discussion of the DOL's analysis of the fee basis rules. The employer paid outsourced accountants based on a percentage of transaction fees to clients and also a percentage of flat rates for other services. The DOL provided a summary of its fee basis rules and determined that these kinds of recurrent fees did not pass the "unique" services requirement and more resembled a piece rate pay system. The plan in question also ran afoul of the test that precludes payment on a partial hourly basis, following Elwell v. University Hospitals Home Care Services, 276 F.3d 832 (6th Cir. 2002).

Claims adjusters – August 26, 2005 (FLSA-25)

In yet another analysis of the claims adjuster position, the DOL advised that lower level Claims Specialist I claims adjusters were nonexempt but that higher level claims personnel in Claims Specialist II and Senior Claims Specialist positions were exempt as administrative

employees. Critical to the determination here is that the employer provided the claims adjusting service as a third party to insurers and to self-insured companies. In this regard, the work was then characterized – after a discussion of the staff-production dichotomy – as work directly related to the business operations/management of the employer's customers (exempt work). Additionally, the lower level adjusters were found not to exercise discretion and independent judgment but the more responsible higher level personnel were found to do so and were therefore found to be exempt.

Creative Professionals – August 26, 2005 (FLSA2005-26)

The employer here requested an opinion as to whether certain employees who applied graphic art wraps in the field qualified as exempt creative professionals under 29 CFR 541.300. The employer manufactured and installed graphic arts wraps which were advertisements printed on large sheets of flexible vinyl with an adhesive back. The employees in question travel to jobsites and apply the wraps. Apparently, some other employee(s) designed the wraps themselves. In these circumstances, the employees in question were not "artists" but skilled employees who performed manual work installing an artistic product created by someone else and therefore not qualified for the exemption.

V. CONCLUSION

The DOL continues to provide guidance to employer and employee advocates by means of opinion letters that are being posted to its website. This is a valuable resource for counsel. In addition, counsel must be alert to news from the Supreme Court on the decision in the consolidated compensable time cases Tum and Alvarez. Finally, counsel should be alert to the extension of the joint employer doctrine since the Second Circuit's Zheng opinion.