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Statement of

David S. Fortney, Esq.
Fortney & Scott, LLC

Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

Hearing

"Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act"

November 3, 2011

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Good morning, Chairman Walberg, Ranking Member Woolsey, and distinguished members of the Subcommittee. My name is David Fortney, and I am pleased to provide this testimony to address the recent regulatory and enforcement actions by the Department of Labor under the Fair Labor Standards Act. I am a co-founder of Fortney & Scott, LLC, a Washington, DC-based law firm that counsels and advises employers on compliance with the wage and hour laws as well as on the full spectrum of workplace-related matters. We have advised numerous employers on wage and hour compliance issues, and we regularly represent companies facing wage and hour audits by the U.S. Department of Labor. We also have conducted a great many workplace pay practice and overtime exemption job classification compliance assessments for our clients.

Background and Experience

I have practiced in the areas of employment counseling and litigation defense for more than 31 years in Washington, DC and Philadelphia, Pennsylvania, and for the last twenty years a significant part of my practice has included wage and hour compliance matters. I am a member in good standing of both the Washington, DC and Commonwealth of Pennsylvania bars.

My firm, Fortney & Scott, LLC ("FortneyScott"), has been recognized as a leading management employment law firm, Tier 2, in the highly prestigious "Best Law Firms" survey for

2011 – 2012 by U.S. News & World Report and Best Lawyers for Washington, DC. One of FortneyScott's key practice areas focuses on wage and hour compliance matters.

Before co-founding FortneyScott, I served at the U.S. Department of Labor from 1989 to 1992 as the Deputy and Acting Solicitor of Labor. Today, a significant part of my practice includes counseling and representing employers on wage and hour compliance matters nationwide, including audits and enforcement matters by the U.S. Department of Labor's Wage and Hour Division.

I have represented a wide range of employers on wage and hour matters, ranging from large Fortune 50 companies to small employers and also a wide range of federal contractors subject to the prevailing wage laws. Additionally, I have served as an advisor to Workplace Flexibility 2010, which is a public policy initiative that is part of the Alfred P. Sloan Foundation's National Initiative on Workplace Flexibility and is based at Georgetown University Law Center. I also have worked closely with the Society for Human Resource Management on addressing workplace flexibility issues. Finally, I co-chair the Practicing Law Institute's annual seminar on managing wage and hour risks, at which updates are provided by the Solicitor of Labor and the leading wage and hour attorneys from across the country. This seminar is widely attended by counsel representing employees as well as counsel representing private and public sector employers.

DOL Wage and Hour Division's Recent Initiatives and Regulatory Changes – Introduction

The U.S. Department of Labor ("DOL)'s Wage and Hour Division has undertaken a number of changes in how the Fair Labor Standards Act ("FLSA") is enforced. These changes have resulted in increased uncertainty and difficulty for employers attempting to comply with the FLSA's minimum wage and overtime obligations. I will address the Wage and Hour Division's recent initiatives and regulatory reforms, and Ms. Tammy McCutchen's statement and testimony will focus on some of the major changes in DOL's FLSA investigations and compliance assistance efforts.

The central question for today's hearing is whether the Wage and Hour Division is enforcing the FLSA in a manner that is most effective in the 21st Century workplace. There was detailed testimony about the shortcomings of the FLSA in meeting the needs of employers *and* employees in the 21st Century business environment during this Subcommittee's recent hearing in July 2011, "The Fair Labor Standards Act: Is it Meeting he Needs of the Twenty-First

Century Workplace?"[1] Greater clarity on how the FLSA's requirements can be effectively employed today will result in increased opportunities for expanded employment and flexible work arrangements that meet the needs of employers and employees, while maintaining the FLSA's minimum wage and overtime protections.

The short answer, unfortunately, is that DOL is not striving to effectively implement the FLSA in today's workplaces. Indeed, just the opposite result is being achieved. The Wage and Hour Division has charted an FLSA enforcement course that fails to provide for the most positive outcome for employers and employees; instead the DOL focus has been on implementing changes that restrict flexible employment opportunities and that primarily focus on punishing employers.

As a result of the increased risks employers face, many employers are restructuring their workforce to adopt the most restrictive working arrangements in order to minimize risks and costs resulting from DOL audits and litigation challenges. These changes diminish the ability to provide working arrangements that best meet the needs of the employees and employers. For example, a recent survey by HR Policy[2] found that:

- Over half the member companies face increased FLSA litigation, primarily over the vague and inconsistent rules and exemptions governing overtime coverage "that are increasingly out of step with the modern workplace."
- Nearly half the litigation claims involve higher paid employees earning more than $50,000, rather than the low-paid and low skill workers the FLSA was intended to protect.
- To minimize legal risks, employers are imposing restrictions on popular practices such as telecommuting, flexible working hours and use of state-of-the art information technology such as smartphones outside the workplace.

A review of DOL's new initiatives and regulations under the FLSA establishes a clear pattern of the Wage and Hour Division frustrating efforts to implement modern work practices that would benefit both employees and employers.

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[1] See the statements for the July 14, 2011, Subcommittee hearing submitted by (1) J. Randall MacDonald, Senior Vice President, Human Resources, IBM Corporation and Chairman, HR Policy Association; (2) Nobumichi Hara, Senior Vice President of Human Capital for Goodwill Industries of Central Arizona on behalf of the Society for Human Resource Management (SHRM); and (3) Richard L. Alfred, Esq., Seyfarth Shaw LLP. The statements and information from the July 14, 2011 hearing are available on the Subcommittee's website at http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=250290 (as of November 1, 2011).

[2] The HR Policy Association has just released a detailed survey showing that the industrial era wage and hour laws inhibit workplace flexibility policies. Information is available at www.hrpolicy.org.

DOL's New Initiatives

The DOL has introduced a number of new initiatives focusing solely on employer compliance, which seek to maximize the number of employers that are pursued for wage and hour violations. Certainly, we all recognize and agree that an important focus in promoting FLSA compliance and protecting workers' interests is enforcement. The question posed by the current program, however, is why the agency is not pursuing efforts to promote compliance through the issuing of clear rules and enforcement policies. Typically, effective compliance programs include clear guidance on what is expected of employers and takes into account the realities of the workplace and the statutory requirements. Enforcement then has an important role in reinforcing these clearly articulated compliance expectations.

In its current efforts, the Wage and Hour Division's focus is on maximizing the enforcement efforts without offering meaningful compliance guidance to employers. The Wage and Hour Division has introduced a number of initiatives that are designed to promote the reporting of potential violations to either DOL or to private attorneys for follow-up enforcement actions. The Wage and Hour Division's approach assumes that employers generally are deliberately violating the wage and hour laws, and that if DOL simply can catch more employers, the result will be greater compliance. In announcing the new shift in DOL's programs in 2010, Deputy Secretary of Labor Seth Harris said DOL wanted to foster a culture of compliance among employers to replace what he described as a "catch me if you can" system in which too many companies violated employment laws.[3] Although Mr. Harris acknowledged that many companies had a culture of compliance, he posited that too many others flouted wage and safety laws after weighing the costs of compliance against the benefits of breaking the law and the risks of getting caught. Thus, the resulting Wage and Hour Division programs have been cast under the presumption that many employers operate outside the law, with this "catch me if you can" attitude.

With due respect to DOL, my experience is that employers are eager to understand and to comply with the wage and hour laws, and seek greater clarity on how the antiquated FLSA requirements are to be applied in today's workplace. This attitude among employers reflects not only the fact that most employers seek to act ethically, but also the fact that it is good business to do so. The DOL's response of encouraging claims against employers is not effective.

[3] Quoted in New York Times article, *U.S. Outlines Plan to Curb Violations of Labor Law* (April 29, 2010) available at http://www.nytimes.com/2010/04/30/business/30comply.html.

The Bridge to Justice Program for Referral of Employees to Attorneys

The DOL announced in December 2010 the "Bridge to Justice" program under which the Wage and Hour Division connects workers to a new American Bar Association-approved attorney referral system.[4] In essence, the program effectively outsources to private attorneys one of the Wage and Hour Division's most important functions— to investigate and respond to complaints of employees who have had the courage to come to DOL. According to DOL's announcement, "… the Wage and Hour Division will now connect these workers [whose claims DOL did not investigate] to a local referral service that will, in turn, provide the workers with access to attorneys who may be able to help. This collaboration will both provide workers a better opportunity to seek redress for FLSA and FMLA violations and help level the playing field for employers who want to do the right thing."

One of the significant deficiencies with the Bridge to Justice program is that it fails to include the employers—there is no notification of employee complaints or opportunity for employers to be involved, nor is the employer afforded notice when complaining employees are referred to private attorneys. As a result, common situations in which an employee's complaint is in error or simply based on a mistaken time entry by the employee or a payroll entry mistake by the employer's payroll department are not promptly identified with an opportunity for a prompt and efficient resolution. Instead, the complaint—whether bona fide or mistaken—simply is turned over to private attorneys, who typically pursue the claims through litigation and related processes. The outcome inevitably is that the payment of any additional wages that might be owed to employees is delayed, and the employer then faces the additional—and typically significant—costs of having also to pay attorneys' fees for the employee and the company, as well as litigation costs.

The Bridge to Justice program has turned compliance upside down, because the referral by DOL to private attorneys for enforcement follow-up should be a last resort—*after* an employer has had an opportunity to respond and to undertake any necessary corrective actions. The Bridge to Justice is a "gotcha" program that mistakenly presumes that employers, on a widespread basis are flouting the wage and hour laws and actively embracing a "catch me if you can" business model. In my experience, that simply is not how the vast majority of employers operate. Instead of focusing on affording prompt remedial actions and compliance, the Bridge to Justice program—which more aptly should be designated as the Reward to Lawyers program—

[4] See DOL's announcement and Frequently Asked Questions describing the Bridge to Justice program posted on DOL's website at http://www.dol.gov/whd/resources/ABAReferralPolicy.htm.

outsources DOL's responsibilities to investigate complaints and primarily benefits the lawyers, delays any wages that might be owed to employees, and increases employers' costs. None of these results promote expanded employment opportunities or the implementation of efficient work opportunities that employers and employees desire.

DOL's New "Apps" Result in Increased Economic Pressures on Employers

The Wage and Hour Division has introduced two new applications ("apps") to be loaded onto smart devices (iPhones, iPads, etc.) to encourage employees and the general public to file complaints with DOL about alleged wage and hour violations. Again, these programs leave out the employers and fail to provide an employer with any notice or opportunity to respond if there are complaints and to effect prompt remedial actions, if appropriate.

The Eat Shop and Sleep App

The DOL announced last week that the "informAction app" challenge had resulted in a new app called Eat Shop Sleep, which is designed to "empower consumer choices about the hotel, motel, restaurant and retail industries."[5] The app combines enforcement data from the Wage and Hour Division and the Occupational Safety and Health Administration with consumer ratings websites, such as Yelp and other tools, such as Google Maps.

When one of our attorneys downloaded Eat Shop Sleep on her iPhone and then did a search in our local area, she got a map of Washington, DC that pinpointed various establishments. When she clicked on one of the points, she learned that, for example, according to DOL, BLT Steak is "in violation." When she clicked further, she was shown 161 reviews of the restaurant on Yelp (overall rating of 4 out of 5 stars), but was also told that according to the Wage and Hour Division of DOL, the restaurant has "27 Fair Labor violations" and that "26 employees are due $6647.41 in back wages." The entry also asks the question, "Not a Fair or Safe Business?" and invites users to submit information to the Labor Department. It also provides contact information for DOL and a notification of worker rights.[6]

It is important to note what is *not* provided in this newest app—there is neither notification to the employer nor an opportunity for the employer to respond and to address the

[5] See DOL's press release issued October 27, 2011, posted on DOL's website at http://www.dol.gov/opa/media/press/opa/OPA20111568.htm.

[6] For a report on the experience using the Eat Shop Sleep app, see the Workplace FYI blog, at http://www.workplacefyi.com/dol/new-dol-app-dishes-information-about-violations-by-restaurants-hotels-and-motels/.

claims. The app gives the appearance that the violations exist, that the violations have been investigated, and that the employer is actually guilty of these violations. The app does not indicate whether these alleged violations and alleged resulting back wages are the result of a final adjudication or are they simply the results of an initial investigation or, even worse, are they simply that an employee has filed a complaint against the employer? Again, the DOL's focus here is to encourage employee litigation and other complaints based on information that may not be accurate or complete.

The DOL-Timesheet App

In May 2011, DOL announced the launch of its first application for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed.[7] Available in English and Spanish, users can track regular work hours, break time and any overtime hours for one or more employers.

The free app initially was compatible with the iPhone and iPod Touch. The Labor Department stated that it was exploring updates that could enable similar versions for other smartphone platforms, such as Android and BlackBerry. It also announced that it was exploring updates that would include the ability to track other pay features not currently provided for, such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.

According to DOL's announcement "[t]his new technology is significant because, instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." The app allows employees to submit the information directly to DOL for investigation, if the employee suspects violations.[8]

Again, what is missing from DOL's Timesheet app is any notice to the employer. Also, the app fails to recognize that, in the first instance, both employees and employers would be best served by having employees first raise their concerns directly with their employers, in an effort to resolve potential issues in a timely and effective fashion without costly litigation and the inevitable delay in remediation.

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[7] The DOL's announcement of the smartphone Time Sheet app issued May 9, 2011 is available at http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20110509_1.xml.

[8] More information about the time sheet app is available at the Workplace FYI blog, at http://www.workplacefyi.com/dol/wage-hour-compliance/.

The Timesheet app, combined with the Eat Shop and Sleep app, will clearly result in additional referrals for private attorneys under the Bridge to Justice program. These new DOL programs are providing an integrated system that promotes a "gotcha" approach that fosters litigation, but that does not benefit employees or employers who are interested in prompt compliance.

Targeting Worker Misclassification—the Misuse of Independent Contractors

Recently, on September 19, 2011, the DOL announced a Memorandum of Understanding ("MOU") with the Internal Revenue Service ("IRS").[9] Under the MOU, DOL and the IRS will coordinate efforts to address the misclassification of workers as independent contractors. Also, seven state agencies have already signed onto the MOU:[10] The MOU will enable "the DOL to share information and coordinate law enforcement with the IRS and participating states in order to level the playing field for law-abiding employers and ensure that employees receive the protections to which they are entitled under federal and state law." Additionally, DOL agencies now will share information.[11]

Following the DOL-IRS MOU, the IRS announced its Voluntary Classification Settlement Program ("VCSP"), which is a new program that will allow employers to resolve prior misclassification issues by voluntarily reclassifying workers as employees for future tax periods and paying a reduced amount in employment taxes.[12] To be eligible to participate in the VCSP, the employer must: 1) consistently have classified the workers as independent contractors or non-employees; 2) have filed all required Form 1099s for the prior three years; and 3) not currently be under an audit by the DOL, IRS or a state agency concerning the classification of the workers at issue.

In exchange for agreeing to re-classify its workers, the employer will: 1) pay a reduced amount that effectively equals just over one percent of the wages paid to the workers for the most recent tax year (instead of the typical 10 percent tax due on wages); 2) not be liable for any interest and/or penalties on that amount; and 3) not be subject to an audit by the IRS as to the

[9] DOL's press announcement is available at http://www.dol.gov/opa/media/press/whd/WHD20111373.htm.
[10] The seven states which, as of the date of the MOU announcement have agreements with DOL, are Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington. The Wage and Hour Division also announced it will enter into memorandums of understanding with the state labor agencies of Hawaii, Illinois and Montana, as well as with New York's attorney general.
[11] DOL's Wage and Hour Division and, in some cases, its Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs and Office of the Solicitor may share information with states that have agreements in place.
[12] The IRS description of the VCSP is available at http://www.irs.gov/pub/irs-drop/a-11-64.pdf.

previous misclassification for the workers being reclassified under the VCSP. Employers are not required to reclassify all workers—they may choose those to reclassify under the program.

Employers who wish to participate in the program must submit a VCSP application at least 60 days before it reclassifies the workers[13]. The IRS will then review the application and determine whether to accept the employer into the VCSP.

The IRS offers guidance on the factors it applies to determine worker status.[14] Additionally, the IRS will provide either workers or employers with a determination for tax withholding purposes of whether a worker can be classified as in independent contractor.[15]

In stark contrast to the IRS procedures to review and to advise on whether an employment relationship properly is classified as an independent contractor, DOL does not provide any comparable services. Previously, the Wage and Hour Division issued Opinion Letters by the Administrator that provided guidance on compliance matters, but the current administration has refused to issue Opinion Letters.

In the context of determining whether the independent contractor requirements are met, employers face complex legal questions that often pose legal uncertainties. For tax purposes, the IRS applies a 20-factor test, whereas for determining whether the FLSA is applicable based on an employee relationship, DOL assesses the "economic realities."[16] DOL has recognized that "[t]he plethora of tests defining independent contractor status applied across federal and state laws makes it possible for a worker to be classified as an *independent contractor under one law, but as an employee under another*."[17] These differing worker classification criteria present a major compliance challenge for employers.

The MOU between DOL and the IRS does not address the differing criteri, nor afford employers clear guidance by DOL. As a result, if a worker is found by the IRS to be properly

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[13] The VCSP application known as IRS Form 8952 (rev. September 2011) is available at http://www.irs.gov/pub/irs-pdf/f8952.pdf.

[14] The IRS guidance is available at http://www.irs.gov/businesses/small/article/0,,id=99921,00.html.

[15] Employers or employees can submit Form SS-8 (rev. August 2011) for the determination of worker status for purposes of federal employment taxes and income tax withholding. Form SS-8 is available on the IRS website at http://www.irs.gov/pub/irs-pdf/fss8.pdf.

[16] The economic realities test focuses on five factors to assess whether the worker's relationship with the employer is that of an independent contractor or employee, including degree of control, opportunity for profit or loss, investment in facilities, permanency of the relationship, and required skill. *See* generally *Goldberg v. Whitaker House Cooperative,* 366 U.S. 28 (1966); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), *United States v. Silk*, 331 U.S. 704 (1947) and their progeny.

[17] DOL's report on Flexible Staffing Arrangements (August 1999) available on DOL's website at http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm noting "Whether or not a worker is covered by a particular employment, labor, or tax law hinges on the definition of an employee. Yet, statutes usually fail to clearly define the term 'employee', and no single standard to distinguish between employee and independent contractor has emerged."

classified as an independent contractor for tax purposes, an employer still may face a challenge by DOL based on the economic realities test. Alternatively, if a worker is reclassified as an employee under the IRS program, there remains legal uncertainty as to whether DOL will agree with the amount of back pay and whether DOL will claim that additional liquidated damages must be paid under the FLSA. Because of these uncertainties and the lack of transparency on the part of DOL's Wage and Hour Division as compared to the clear guidance and procedures offered by the IRS, voluntary compliance under the DOL-IRS MOU remains another example of the "gotcha" approach that DOL has adopted in addressing employer compliance concerns.

Enforcement Directed at Independent Contractor Compliance

In implementing its independent contractor enforcement strategies, DOL is focusing on specific industries, including home building, hospitality, janitorial services, agriculture, day care, health care and restaurants. Published reports describe the recent enforcement efforts targeting the five largest builders in the home building industry unfocused and overly broad, as the DOL seeks pay and employment records and the names of all contractors hired in the past year on a nationwide basis. The Wage and Hour Department does not allege any specific violations of laws. Instead, DOL has explained that, "We are actively looking at those industries that employ the most vulnerable workers and that engage in business practices—such as misclassifying employees as independent contractors—that result in violations of minimum wage and overtime laws."[18]

It appears that industry sweeps addressing worker classification issues are not calibrated or focused on employers that are most likely to have potential misclassification issues. Instead, Wage and Hour has launched a broadside attack against an entire industry, irrespective of the compliance efforts and success of specific employers. Builder advocates have responded that the probe represents another example of "regulatory intrusion" by the Labor Department, at a time when unwarranted investigation is particularly challenging, given the current economic climate and the economically hobbled residential construction industry. Typically, in my experience, when the Wage and Hour Division or other DOL enforcement agencies focus on an industry, such as agriculture or the garment industry for FLSA compliance, the agency will randomly select employers and then use enforcement data to further refine and sharpen the focused

[18] As quoted in the article in the Wall Street Journal, *States, IRS to Join Probe of Home-Builder Pay Practices*, Business Section (September 17, 2011), available on line at http://online.wsj.com/article/SB10001424053111903927204576574892314453196.html.

compliance. This type of focused approach has not been followed by Wage and Hour for the home building industry; instead, all of the largest employers have been targeted on a corporate-wide basis.

In published reports,[19] the Labor Department said it was looking at industries in addition to home building, including hospitality, janitorial services, agriculture, day care, health care and restaurants. It remains to be seen whether the approach followed in the home building industry will be repeated.

Let me now turn to the Wage and Hour Division's significant regulatory changes, and the impact those changes are having:

Regulations

On April 5, 2011, the Department of Labor issued final regulations interpreting a number of provisions of the FLSA.[20] The proposed regulations were issued in the waning days of the Administration of President George W. Bush. The regulatory changes, as well as upcoming regulations, impose significant burdens on employers and inhibit job growth. In addition, they are significantly impeding the implementation of flexible work arrangements that are highly desired by both employers and employees.

Fluctuating Workweek Changes

In a fluctuating workweek, an employee works fluctuating hours from week-to-week and receives, pursuant to an understanding with the employer, a fixed salary as straight-time compensation for whatever hours the employee is called upon to work. The employee's regular rate of pay is determined by dividing the fixed salary by the number of hours worked in each workweek.

Thus, in those weeks in which the employee works many hours, his or her regular rate is lower than in those weeks in which the employee works fewer hours. In such cases, the employer satisfies the overtime pay requirements of the FLSA if it compensates the employee, in addition to the salary amount, by paying at least one-half of the regular rate of pay for the hours worked in excess of 40 hours in each workweek. The half-time method of calculating overtime recognizes the fact that the employee has already been compensated at the straight-time regular rate for all hours, including those over 40.

[19] *See*, Wall Street Journal article, cited in preceding footnote.
[20] *See*, 76 F.R. 18832-18860 (April 5, 2011).

In the notice of proposed rulemaking issued on July 28, 2008, DOL stated, "The payment of additional bonus supplements and premium payments to employees compensated under the fluctuating workweek method has presented challenges to both employers and the courts in applying the current regulations."[21] The Department proposed to clarify the regulation at 29 C.F.R. § 778.114 to permit employers to pay bonuses and other incentives without jeopardizing the employer's ability to use a half-time method of overtime calculation for employees working a fluctuating workweek. As the proposal recognized, "Paying employees bonus or premium payments for certain activities such as working undesirable hours is a *common and beneficial practice for employees*." *Id.* (emphasis added.) Under the proposal, such payments would be included in the calculation of the regular rate, unless they were explicitly excluded under the FLSA.

In a surprising development, DOL ultimately decided to reject its own proposed clarification. The Labor Department stated in the preamble to the final regulation that "the proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked. It is just this type of wide disparity in weekly pay that the fluctuating workweek method was intended to avoid by requiring the payment of a fixed amount as straight time pay for all hours in the workweek, whether few or many."[22]

In adopting the final regulation, DOL has undermined what the Department had earlier recognized as a "common and beneficial practice for employees." This is a clear about-face by DOL, and the final regulation discourages employers from either (1) offering flexible workweek arrangements for employees that receive bonuses and premium payments or (2) paying employees bonuses if they are on a flexible workweeks. Neither result is a positive outcome or justified by FLSA compliance.

Comp Time Changes

In the same rulemaking, DOL also announced an interpretation of the rules governing the use of compensatory time off ("comp time") in lieu of overtime pay for public-sector employees. These new regulations significantly reduce the flexibility for public sector employers to offer

[21] 73 F.R. 43654, 43662 (July 28, 2008).
[22] 76 F.R. 18850 (April 5, 2011).

comp time in a cost-effective manner, and increase these costs at a time when public sector budgets are severely strained.

The FLSA permits states, local governments and interstate agencies to grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with the employees or their representatives, and the law provides a detailed scheme for the accrual and use of compensatory time off. The law provides that a public-sector employee must be permitted by the employer to use accrued compensatory time "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."

DOL had always taken the position that an employee's request to use compensatory time on a specific date must be granted unless doing so would unduly disrupt the agency's operations. The Courts of Appeals for the Fifth and Ninth Circuits, however, both declined to defer to DOL's regulations because they found the plain language of the statute to require only that an employee be allowed to use compensatory time off within a reasonable period of the date requested unless doing so would unduly disrupt the agency.

The proposed regulation would have stated that the law does not require a public agency to allow the use of compensatory time off on the day specifically requested, but instead only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations. Many comments were received on both sides of the issue. After the publication of the proposal, the Court of Appeals for the Seventh Circuit disagreed with the Fifth and Ninth Circuit decisions, ruling that the FLSA was not clear on the issue, since "reasonable" and "undue" are very open-ended terms, and the Seventh Circuit held that DOL's interpretation was reasonable and entitled to deference.

In light of the split among the courts, DOL again decided to reject its own proposed revision to the regulation, and instead to maintain the more restrictive regulation that requires public sector employers to allow employees to use compensatory time off on the date requested absent undue disruption to the agency. DOL also stated that the fact that overtime may be required of one employee in order to permit another employee to use compensatory time off is not a sufficient reason for the employer to claim that the compensatory time off request is unduly disruptive.

Tip Credit Changes and Notification Requirements

The FLSA provides that an employer may utilize a limited amount of its employees' tips as a credit against the employer's minimum wage obligations. An employer can take a tip credit if the employee has been informed of the provisions of the law and if all tips received by the employee have been retained by the employee, although the employer is permitted to have a tip pooling arrangement among employees who customarily and regularly receive tips.

In 2008, DOL had proposed an interpretation of the FLSA that did not impose a maximum tip pool contribution percentage, but that stated that an employer must notify its tipped employees of any required tip pool contribution amount. In response to comments received on both sides of the issue, DOL's final regulation provides that the statutes do not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, under the new regulations an employer now must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

DOL reviewed comments regarding the ownership of employee tips, and concluded that tips are the property of the employee and that the only permitted uses of an employee's tips is through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips. DOL rejected a recent decision from the Court of appeals for the Ninth Circuit in *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010). In that case, tipped employees were required to turn over the majority of their tips to a tip pool that included employees, such as cooks and dishwashers, who are not customarily and regularly tipped employees. The court held that the limitation on mandatory tip pools to those employees who customarily and regularly receive tips does not apply when the employer does not claim a tip credit toward the payment of the minimum wage.

DOL also addressed the issue of whether there was a limitation of the amount of tips that an employee could be required to contribute to a tip pool. In opinion letters and in litigation, DOL had stated that a tip pooling arrangement cannot require employees to contribute more than 15 percent of the employee's tips or two per cent of daily gross sales. Several courts have rejected the agency's maximum contribution percentages, however because neither the statute nor the regulations mentioned this requirement and because the opinion letters did not explain the statutory source for the limitation.

Right to Know – New Regulations

In the Labor Department's Spring 2011 regulatory agenda, the Department announced its intention to issue new regulations that will expand employer's record keeping obligations under 29 CFR §516, and significantly increase the costs for compliance and the risks of non-compliance. The pending "Right to Know" regulations are described in the regulatory agenda at DOL proposing to "to update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed." The notice of proposed regulations was due to be published in October 2011, but has not yet issued.

The proposed regulation poses significant concerns for employers. Employers apparently will be required to identify and to provide the reasons why a worker is classified as an independent contractor which, as described above, often is a legally complex determination under the FLSA's economic realties. To comply, employers necessarily will have to incur the costs of retaining experienced employment counsel to advise on these determinations. Additionally, employers will be required to justify why an employee may be classified as exempt from overtime, which again often requires the assessment of how to properly apply the antiquated FLSA requirements to today's workplace. And what are the consequences if an employer's efforts are second guessed by DOL and deemed to be in error? The potential is that in addition to the record keeping violations, the DOL may cite the improper classification or notification of workers as evidence of a willful violation of the FLSA, which increases the back pay limitation period from two to three years, and correspondingly increases the resulting liquidated damages. Although styled as a "record keeping" change, this proposed rule will provide another "gotcha" requirement that DOL, in turn, can use to impose greater sanctions against employers. Based on the recent regulatory changes and positions adopted by DOL in the most recent rulemakings, the business community should be very concerned about how its interests may be adversely affected by the pending Right to Know regulations.

Chairman Walberg, Ranking Member Woolsey, I thank you again for inviting me to testify. I am happy to answer any questions you may have.

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