TOP FIVE DANGER AREAS IN WAGE AND HOUR LAW

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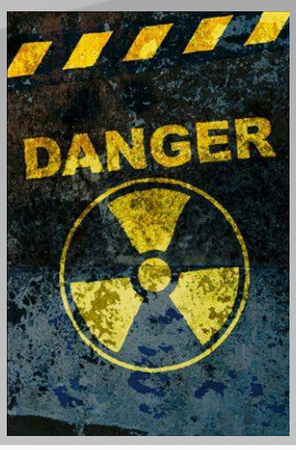


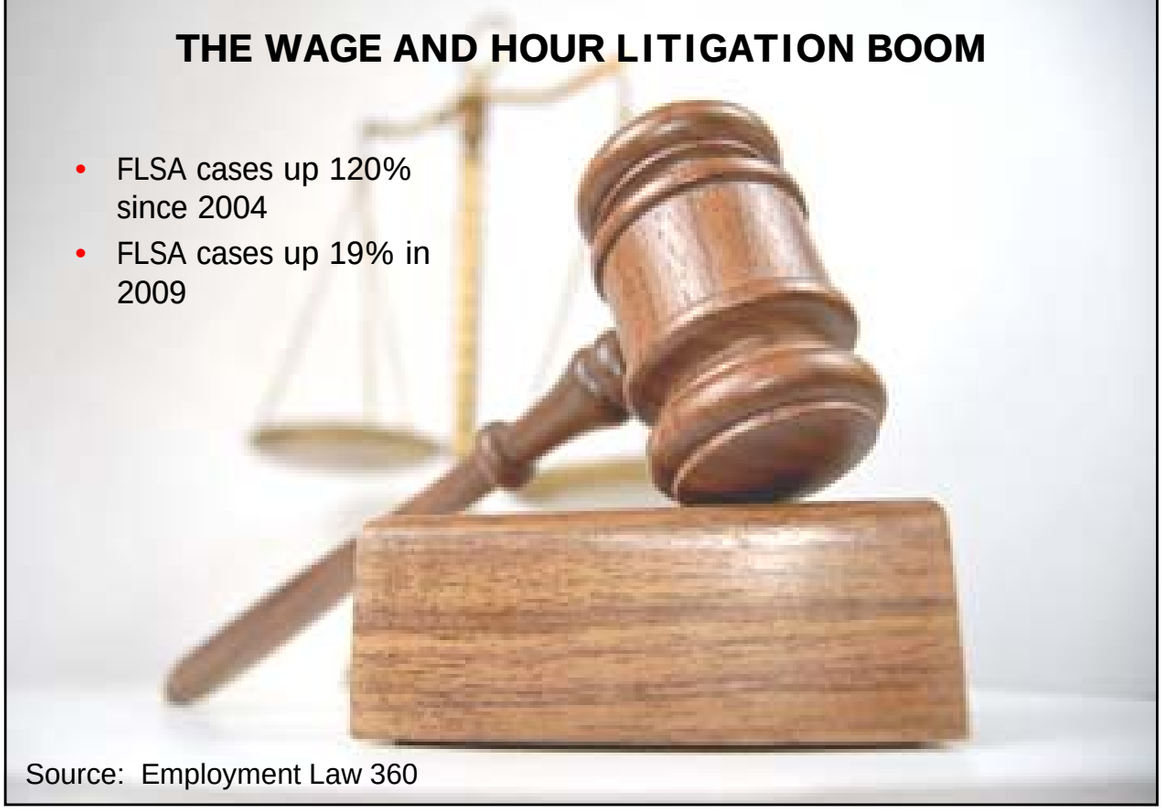
EXPAND YOUR EXPECTATIONS™

INCREASE IN DOL INVESTIGATIONS

- $30 million budget increase
- 150 new wage and hour investigators

THE WAGE AND HOUR LITIGATION BOOM

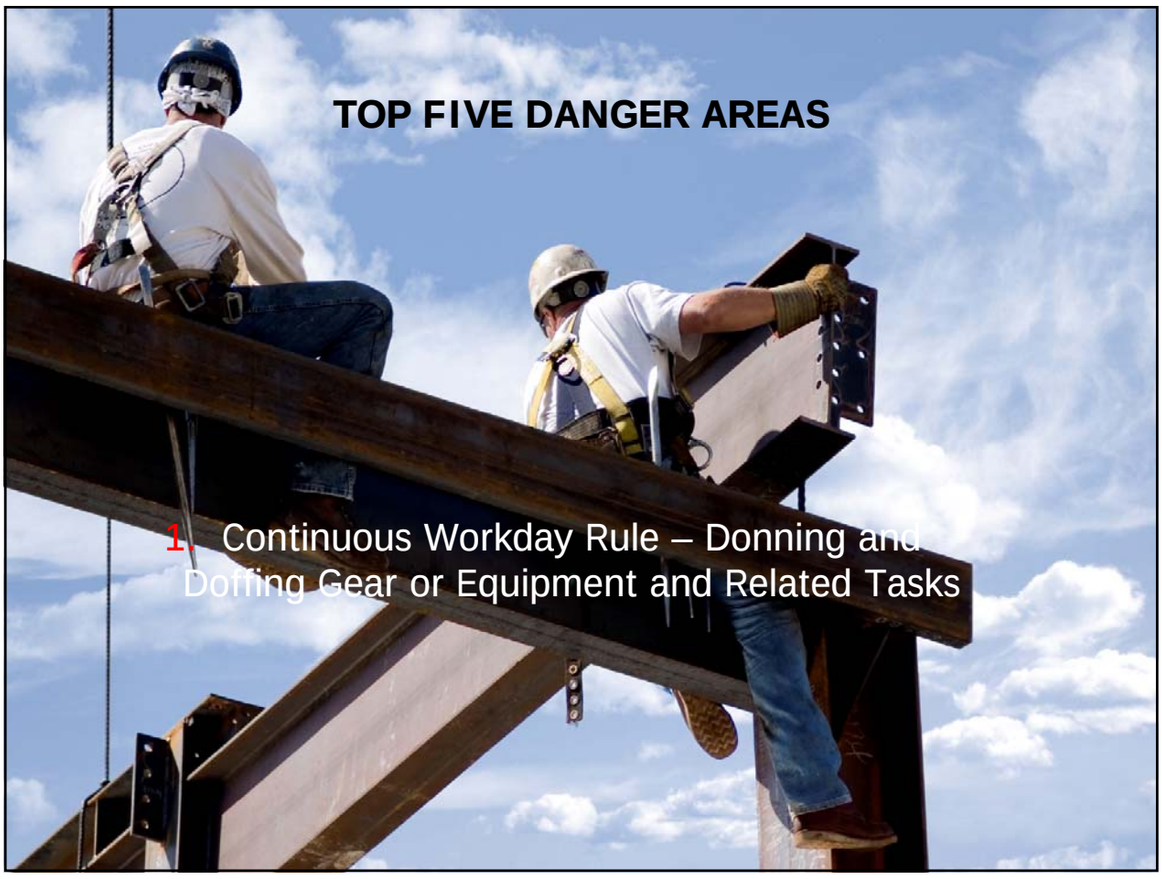
- FLSA cases up 120% since 2004
- FLSA cases up 19% in 2009



Source: Employment Law 360

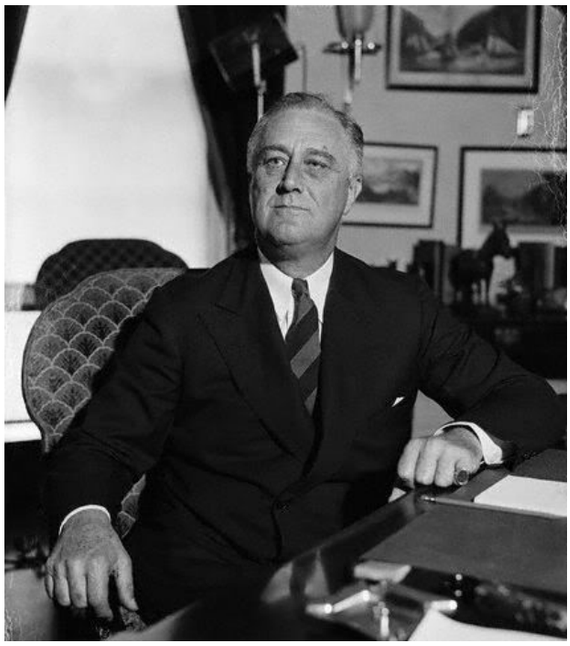
COMPANIES EXPERIENCING WAGE AND HOUR ACTIONS OR INVESTIGATIONS

Abercrombie & Fitch
Wal-Mart
Blockbuster
Cingular Wireless
Merrill Lynch
Albertsons
Big Lots!
UBS
Pizza Hut
Starbucks Coffee
Honda
The Power of Dreams
at&t
Tyson
Staples
that was easy.
Allstate
You're in good hands.
Office Depot
Taking Care of Business
GAP
Morgan Stanley
Smith Barney


TOP FIVE DANGER AREAS
1. Continuous Workday Rule – Donning and Doffing Gear or Equipment and Related Tasks


HISTORY 101

THE FAIR LABOR STANDARDS ACT



CONGRESS RESPONDS: THE PORTAL-TO-PORTAL ACT

PORTAL-TO-PORTAL ACT

- Walking time not compensable
- Preliminary and postliminary activities not compensable
- Union exclusion: changing clothes and washing before and after shift not compensable

WHAT ARE PRELIMINARY AND POSTLIMINARY ACTIVITIES?

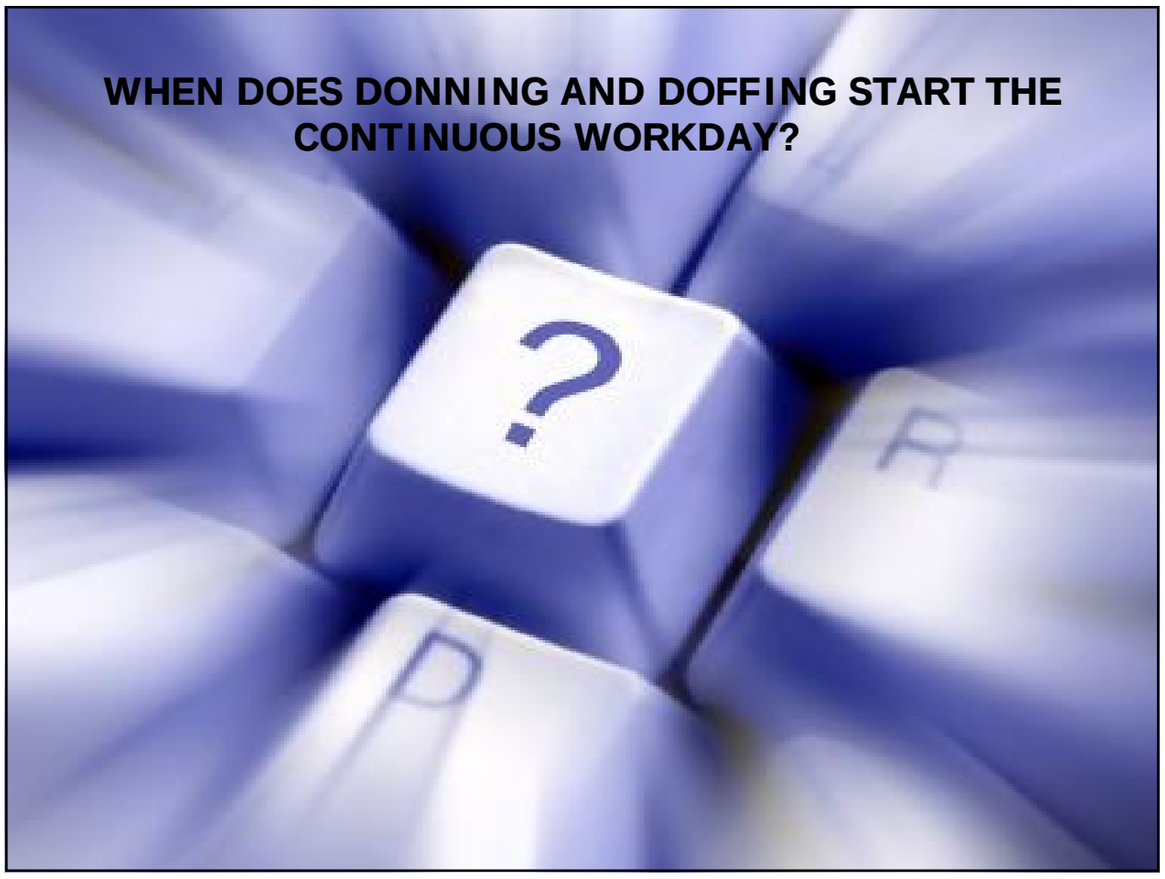
- *Steiner v. Mitchell*
- Not integral and indispensable to principal activities

WHY THE DONNING AND DOFFING LITIGATION BOOM TODAY?

THE CULMINATION: *IBP v. Alvarez*

- The Continuous Workday Rule
- Waiting for first principal activity not compensable

WHEN DOES DONNING AND DOFFING START THE CONTINUOUS WORKDAY?



IS DONNING AND DOFFING "INTEGRAL AND INDISPENSABLE?"

- Consider:
  - Required to be worn?
  - Primarily benefit the employer?
  - Necessary for work?

DOL POSITION:

If required to be put on at facility, putting it on is integral and indispensable

EXAMPLES OF GEAR:

- Safety Glasses
- Gloves
- Aprons
- Coveralls
- Hardhats
- Hairnets
- Earplugs
- Pants
- Shirts
- Boots
- Special Shoes
- Wetsuit

DE MINIMIS DOCTRINE

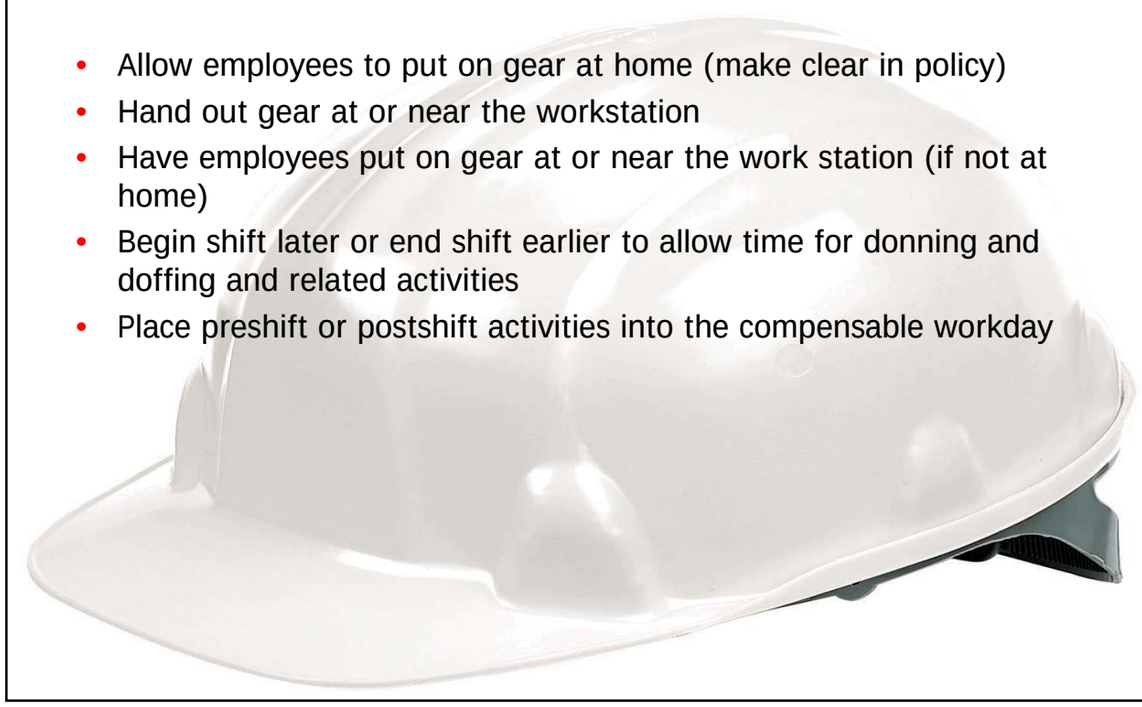
- Consider:
  - If administratively difficult to track the time
  - Amount of unpaid time in the aggregate
  - Regularity of activity

Related Activities

- Cleaning up work area
- Picking up gear
- Picking up and dropping off tools (specialized versus nonspecialized tools)
- Preparing tools
- Passing through security

Tips for Avoiding or Reducing Liability for Donning and Doffing and Related Activities

- Allow employees to put on gear at home (make clear in policy)
- Hand out gear at or near the workstation
- Have employees put on gear at or near the work station (if not at home)
- Begin shift later or end shift earlier to allow time for donning and doffing and related activities
- Place preshift or postshift activities into the compensable workday



2. Continuous Workday Rule – Administrative Tasks

Are certain preshift or postshift administrative activities compensable?

Consider:

- Integral and indispensable?
- *De minimis*?

Examples of Tasks at Issue

- Logging into computer
- Booting up various programs
- Reading instructions or work orders
- Reviewing log books or summary of activities
- Exchanging information with other employees
- Waiting to relieve other employees
- Pre-shift meetings
- Turning on machines (e.g., printers, medical equipment)
- Pulling files
- Preparing the office for customers, other employees, or other persons or activities
- Checking work-related emails
- Cleaning work area

Tips for Avoiding or Reducing Liability for Preshift and Postshift Administrative Tasks

- Examine employee's preshift and postshift activities
- Place activities within the compensable workday
- Set and enforce rules as to when work can begin and must end
- Ensure supervisors know the rules as to when work can begin and must end

3. Continuous Workday Rule – Work at Home

The Problem

- Unpaid activities at home
- Converting the commute to a compensable commute

Case Study: Insurance Damage Appraiser

- Paid from time reaching the job site for the assessment
- Ending time is when leaving the last assessment worksite
- Receives assignments at home from a dispatcher
- Boots up computer at home
- Opens software
- Checks voice mails
- Checks emails
- Responds to messages
- Sets a new voice mail greeting on his phone

Case Study: Insurance Damage Appraiser (Cont'd)

- Reviews the assignments for the day
- Maps the assignments
- Loads computer, printer, docking stating, digital camera, and other supplies into the vehicle
- Makes post-assessment calls to body shops, employees, parts suppliers, claimants, and insureds
- Completes estimates or appraisals
- Faxes paperwork to insurance company
- Electronically sends claims and photos

Considerations

- Are the unpaid activities integral and indispensable?
- Are they *de minimis*?

THE COMMUTE

- Employee Commuter Flexibility Act –
  - Use of employer vehicle for commute and activities performed incidental to such use not compensable if:
    - Travel is within normal commuting area of the business or establishment
    - Use of the vehicle is subject to an agreement between the employer and employee

THE COMMUTE (Cont'd)

- Continuous Workday Rule
- Transporting of tools and supplies (light versus heavy)
- Taking calls
- Generally must perform some "legally cognizable work" for the commute to be compensable unless part of continuous workday

TIPS FOR AVOIDING OR REDUCING LIABILITY ASSOCIATED WITH HOMEWORK

- Shift or permit duties to occur at the first worksite (e.g. paperwork)
- Determine if at-home tasks are *de minimis*
- Pay for tasks at home
- Make flexible when the tasks at home can be completed (move them away from the commute)
- Consider the types of equipment and tools being carried during the commute and remove the transportation of heavy equipment or heavy tools from the commute

4. IMPROPER PAY PRACTICES FOR MEAL PERIODS

Required Meal or Break Period in Tennessee

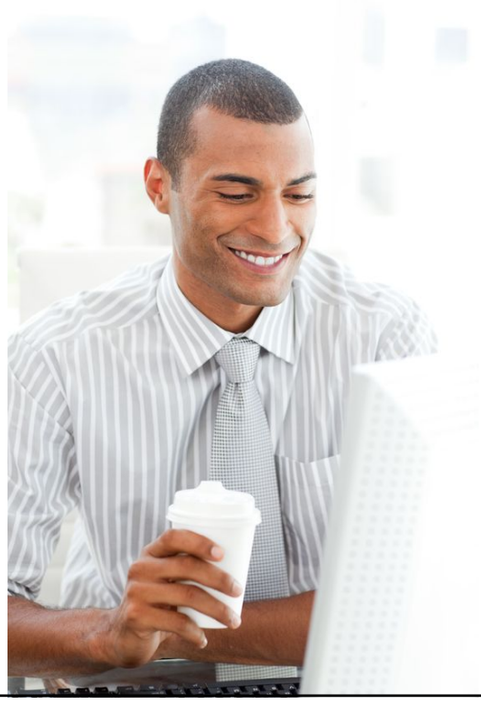
- Employees scheduled for six or more consecutive hours are entitled to an unpaid 30-minute break
- The break cannot be scheduled during or before first hour of the work schedule

FEDERAL LAW

No need to pay for a “bona fide meal period”

BONA FIDE MEAL PERIOD

- Not a short break for coffee or snacks
- Ordinarily must be 30 minutes or longer



INTERRUPTIONS TO THE MEAL PERIOD

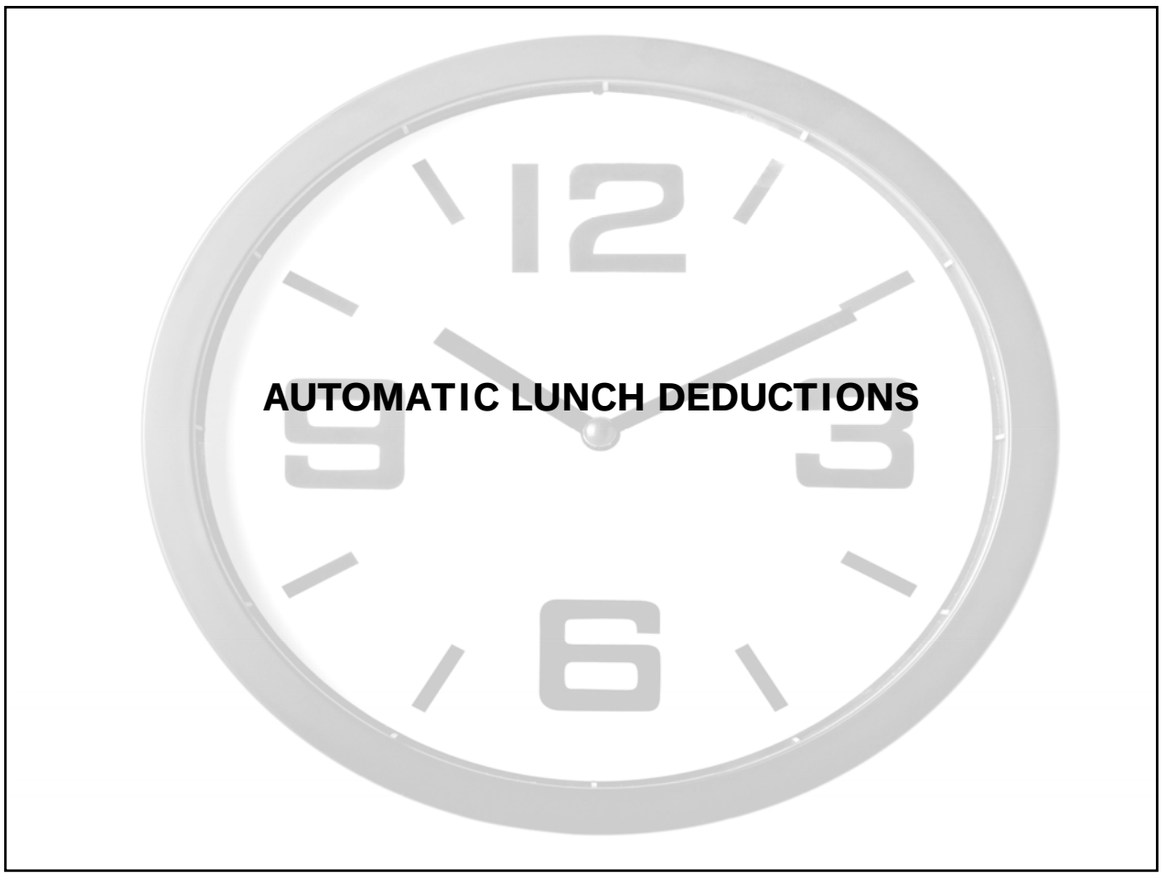
- At beginning and end of the period
- During the period

MUST PAY FOR THE WHOLE MEAL PERIOD IF

- Employee not " completely relieved from duty" (rule of DOL and some courts
- Employee
  - not "substantially relieved" of duties; and
  - spends meal period "predominantly" for employer's benefit (rule of other courts

INTERRUPTIONS TO THE MEAL PERIOD

- At beginning and end of the period
- During the period



TIPS FOR AVOIDING OR REDUCING LIABILITY FOR PAYING EMPLOYEES FOR THEIR MEAL PERIODS

- Ensure the meal period is at least 30 minutes
- Ensure that employees are completely relieved of duty
- If interruptions occur, pay the employee for the entire period
- If using an automatic deduction (especially) ensure:
  - Form exists to document exceptions
  - Supervisors are trained on using the form
  - Employees are trained on using the form
  - Meal period practices are explained clearly in a distributed policy
  - Compliance is monitored closely

5. IMPROPER CLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTOR

THE NEW (AND INCORRECT) AGE OF THE "1099 EMPLOYEE"

FOCUS OF DOL AND IRS

TYPES OF JOBS OFTEN MISCLASSIFIED

- Security
- Maintenance
- Janitorial
- Programming
- Nursing
- Certain construction workers

THE "ECONOMIC REALITIES TEST"

Factors:

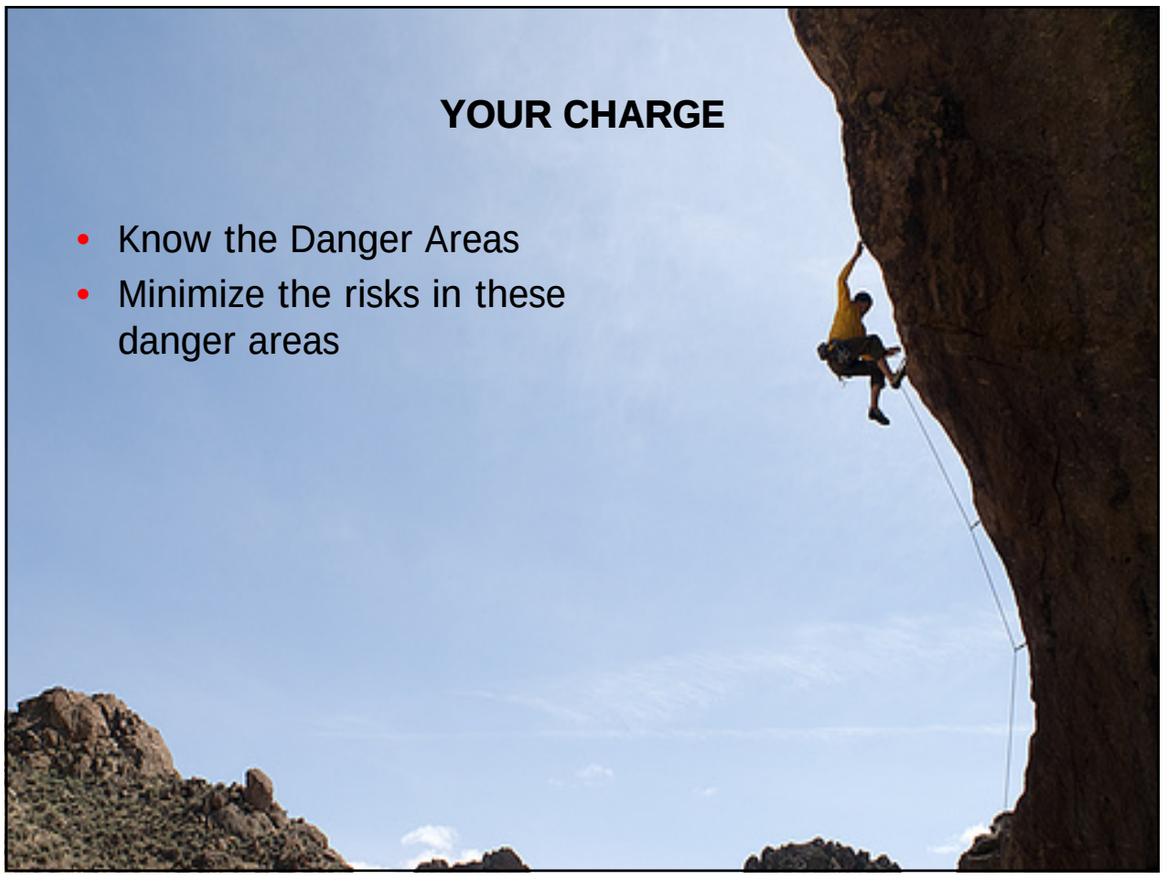
- Permanency of relationship
- Degree of skill required for services
- Worker's investment in equipment or materials
- Worker's opportunity for profit or loss
- Degree of hiring entity's right to control manner of work
- Whether performed service is integral part of hiring entity's business

REPERCUSSIONS FOR MISCLASSIFICATION:

- Liability for unpaid overtime
- Liability for unpaid back taxes and FICA
- Issues with immigration law compliance
- Liability for unpaid benefits
- Liability arising from lack of compliance with other employment laws

TIPS FOR AVOIDING OR REDUCING LIABILITY FOR MISCLASSIFIED WORKERS

- Take inventory of and review contract workers
- Avoid providing supplies and equipment to contractors
- Avoid training contractors
- Avoid supervising and controlling the work of contractors
- Allow contractors to work for others
- Avoid or minimize long-term working relations with contractors
- Proceed with caution in changing the status of a worker


YOUR CHARGE
• Know the Danger Areas
• Minimize the risks in these danger areas

Top Five Danger Areas in Wage and Hour Law

By

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I. Introduction

Wage and hour lawsuits continue to be pervasive. The number of wage and hour suits since 2004 have increased 120%. (Employment Law 360.) They increased by 19% in 2009 alone. *(Id.)* Moreover, the U.S. Department of Labor ("DOL") has hired an additional 288 investigators, 150 of whom will be dedicated to the Wage and Hour Division of the DOL. The DOL plans to substantially increase the number of worksite wage and hour audits.

What can an employer do to reduce its wage and hour risks? What areas of wage and hour law present particular risks for employers? The purpose of this presentation is to focus on five particular danger areas in wage and hour law. Those five danger areas are as follows:

1. Failing to follow the continuous workday rule with respect to preshift and postshift donning and doffing of gear or related tasks

2. Failing to follow the continuous workday rule with respect to preshift and postshift administrative tasks

3. Failing to follow the continuous workday rule with respect to various tasks performed at home.

4. Failing to pay for all or part of compensable meal periods.

5. Misclassifying workers as independent contractors rather than employees.

Many more very substantial danger areas exist. For example, properly classifying employees as exempt or nonexempt and properly calculating overtime are two more obvious

danger areas. This presentation, however, will focus on the above-described danger areas. These areas are, at present, the subject of much litigation or are expected to grow in litigation. These areas also have broad application to nearly every employer and, when violated, may generate large damages awards for plaintiffs.

To understand these danger areas, it is helpful to have a basic understanding of the legal principles behind them. Those principles are discussed below.

II. The Continuous Workday Rule and Preliminary and Postliminary Activities

The DOL has adopted what is known as the "continuous workday rule." That rule provides that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). In accordance with that rule, but subject to exceptions such as permissible unpaid breaks, time spent after the employee engages in the first principal activity and before the employee finishes his or her last principal activity is part of the continuous workday and generally is compensable under the Fair Labor Standards Act ("FLSA"). See *IBP v. Alavrez*, 546 U.S. 21, 28-29 (2005).

Key questions therefore become which activities are "principal activities" and which ones are only preliminary or postliminary to such activities. The Portal-to-Portal Act (the "Portal Act") specifically excludes from the FLSA's mandatory compensation requirements both:

> (1) ***walking***, riding, or traveling ***to and from the actual place of performance of the principal activity*** or activities which such employee is employed to perform, and
>
> (2) activities which are ***preliminary*** to or ***postliminary*** to said principal activities[.]

29 U.S.C. § 254(a) (emphasis added). A preliminary or postliminary activity, however, does not fit within this exclusion if it is an "integral and indispensable part" of the principal activity. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

To be integral and indispensable, and thus not be excluded from compensability under the Portal Act, an activity must be "performed as part of the regular work of the employees in the ordinary course of business." *Duchon v. Cajon Co.*, No. 86-4009, 1988 WL 12800, *4 (6th Cir. Feb. 22, 1988). Factors relevant for a court to consider in this regard are (1) whether the employer requires the activity, (2) whether it is necessary to the employee's principal activities, and (3) whether it primarily benefits the employer. *Bonilla v. Baker Concrete Constr. Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007).

In an advisory memorandum dated, May 31, 2006, the DOL took the position that an employer is required to pay for time an employee spends changing clothes on the employer's premises where such changing is required by law, the employer, or the nature of the work. The DOL, however, recognized its "long standing position" that changing into gear is not a compensable principal activity if the employee has the option and ability to change into the gear at home, even when the employee chooses to change into the gear at the worksite.

A. The *De Minimis* Doctrine

Even if an activity constitutes "work" and falls outside the protection of the Portal Act, it is not necessarily compensable. The *de minimis* doctrine allows work that is theoretically compensable to be treated as noncompensable "when the amount of such work is negligible." *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). In determining if work is *de minimis*, courts must evaluate the amount of time at issue. *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1319 (N.D. Ala. 2008). That evaluation includes consideration of three factors, generally referred to as the

Lindow factors: (1) the "practical administrative difficulty of recording the additional time"; (2) the "size of the claim in the aggregate"; and (3) whether "'the claimants performed the work on a regular basis.'" *Brock*, 236 F.3d at 804 (quoting *Lindow v. United States*, 738 F.2d 1057, 1062-63 (9th Cir. 1984)). No "rigid rule" exists to identify with "mathematical certainty" whether time spent is *de minimis*. *Lindow*, 738 F.2d at 1062.

B. Examples of Cases Examining Preshift and Postshift Donning and Doffing of Gear or Gathering of Equipment

- *Von Friewalde v. Boeing*, 339 Fed. Appx. 448 (5th Cir. 2009). Aircraft mechanics and inspectors sought compensation under the FLSA for several categories of activities, including donning and doffing safety gear such as safety glasses and hearing protection. The court, however, found that such activities were non-compensable preliminary tasks under the Portal Act. *Id*. at 454. The court also held that time spent walking to and from lockers at the beginning and end of the shift was non-compensable under the Act. *Id*.

- *Franklin v. Kellogg Co.*, 2009 WL 6093442 (W.D. Tenn. 20009). Employees sought compensation for time spent donning and doffing company uniforms, hair nets, safety glasses, ear plugs and slip-resistant shoes. The Court found that the aggregate amount of time spent on donning and doffing such equipment exceeded the de minimis standard. *Id*. at *7. The Court, however, concluded that the uniform and equipment constituted "clothes" under 29 U.S.C. § 203(o) (a section providing that time spent changing clothes at the beginning and end of a shift may not be compensable if such changing is not compensable pursuant to the terms of a bona fide collective bargaining agreement or a custom or practice under such agreement). *Id*. at *10. The court also concluded that a custom or practice pursuant to a collective bargaining agreement existed at the facility under which the time spent donning and doffing such equipment/uniform was non-compensable. *Id*. at *12. The court also found that the defendant acted in good faith by relying on opinion letters from the DOL in implementing its policy of non-compensation for such activities. *Id*. at *13-14. For all of these reasons, the court granted the employer's motion for summary judgment.

- *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (see below for more information about this case on appeal to the U.S. Supreme Court), *aff'd on other grounds*, 546 U.S. 21 (2005). Employees' donning and doffing of all protective gear, including nonunique protective gear, was integral and indispensable to their principal activity. *Id*. at 903. However, the time it took to don and doff the nonunique protective gear was de minimis and therefore was noncompensable, unlike the other time spent donning and doffing specialized protective gear. *Id*. at 904. The court also concluded that the workday commenced with the performance of a preliminary activity (i.e., donning/doffing specialized protective gear) that was

integral and indispensable to the work and that, therefore, time spent walking to and from the work station *after* performing such activity was compensable. *Id*. at 906-7.

- *IBP v. Alvarez*, 546 U.S. 21 (2005). On appeal, the U.S. Supreme Court reviewed the issue of whether the lower court had correctly held the walking time to be compensable. *Id*. at 523. The employer argued that an activity (such as donning specialized protective gear) could be (a) integral and indispensable to a principal activity, (b) compensable, and (c) yet not start the workday and thus not result in the walks being compensable. *Id*. The Supreme Court, however, rejected this theory, concluding that walking time occurring after the performance of activities that are integral and indispensable is compensable as part of the continuous workday.

C. Examples of Cases Examining Preshift and Postshift Administrative Tasks in the Workplace

- In *Boeing*, the court found that activities such as checking work-related emails; conducting research; checking tools out of the tool crib; putting tools up at the end of the shift; and cleaning work stations could be compensable if proven to involve more than a *de minimis* amount of time. *Boeing*, 339 Fed. Appx. at 454. The court found that such tasks were necessary to the employees' principal duties and were thus integral and indispensable. *Id*. at 455.

- *Gorman v. Consol. Edison Corp*., 488 F.3d 586, 593 (2d. Cir. 2007). Time spent by nuclear plant workers clearing security checkpoints on their way into plant was not compensable because it was part of employees' travel to the work site, which "while arguably indispensable, is not integral to their principal activities."

- *Kosakow v. New Rochelle Radiology Assoc., P.C.*, 274 F.3d 706, 718 (2d Cir. 2001). A lab technician arriving early to turn on x-ray machines was entitled to compensation because it benefited the radiological lab, which was able to serve customers who arrived right when the lab opened.

- *Lindow v. U.S.*, 738 F.2d 1057, 1061 (9th Cir. 1984). Power plant operators arriving early for a shift for their own convenience to do work they could have performed during regular hours were not entitled to compensation. Here the employees' practice was to leave their shift five minutes early which was only possible because the replacement shift's practice was to arrive five minutes early. Moreover, the court concluded that there was evidence that the employees drank coffee and engaged in social conversation during the time before the start of their shift.

- *Sharpe v. APAC Customer Services, Inc.*, 2010 WL 135168 (W.D. Wisc. 2010). Call-center employees sought compensation for, among other things, booting up their computers; logging into the company network; opening relevant computer

programs; reviewing company notices; and completing customer credits and other orders. *Id*. at *4. The court conditionally certified the class.

D. Examples of Cases Examining Preshift and Postshift Tasks at Home

- *Clarke v. City of New York*, 2008 WL 3398474 (S.D.N.Y. 2008). Plaintiffs were employed as city health inspectors. They sought compensation for two categories of time: (1) the time spent commuting during which they were required to carry their inspection equipment, and (2) time spent at home charging computers, printers, phones and batteries and plotting their routes for the inspection sites. *Id*. at *2. The City argued that both categories of time/work fell within the ambit of the Portal Act. Both parties moved for summary judgment. *Id*.

  - **Commuting time**: in determining the compensability of this time, the court focused on the weight of the equipment. "The clear implication is that carrying heavy equipment during one's commute is work, while carrying light equipment is not." *Id*. at 5. The rationale is that, while the Portal Act precludes FLSA coverage for commuting time, it does not do so when the employee commutes "while performing active duties." *Id*. (citing 29 C.F.R. § 790.7(d)). When the equipment is lightweight, the commuting time still predominantly benefits the employee but if the equipment is heavy, then the time primarily benefits the employer. The court granted summary judgment to the City as to the plaintiffs who drove to work because those plaintiffs offered no evidence that loading the equipment in their car and driving with the equipment in the car made their drive more onerous than the typical commute. *Id*. at *7. With respect to public transit, the court denied summary judgment because a genuine issue of fact existed as to how burdensome the equipment it was to carry. *Id*.

  - **At-home tasks**: the employees also sought compensation for time spent charging batteries. *Id*. The court examined six factors. The six factors included: (1) the degree to which the activity is undertaken for the employer's benefit; (2) the degree to which the activity is indispensable to the primary goal of the employee's work; (3) the degree to which the employee lacks choice in whether to perform the activity; (4) whether the activity involves something other than traveling to and from work; (5) the ease with which the employer could maintain records of the time expended on the activity; and (6) whether the amount of work involved is something more than truly minimal. *Id*. at *7. In *Clarke*, the court found that the following factors weighed in favor of compensating for the at-home tasks: (1) plaintiffs used the laptops extensively in their jobs and thus the laptops were integral to their duties; (2) plaintiffs were required to appear at work with their equipment fully charged; and (3) it did not appear that compensating plaintiffs for this time would present record-keeping challenges. The court, however, said it was less clear as to whether this time was *de minimis* and therefore declined to grant summary judgment as to time spent charging batteries. *Id*. at *9. With regard to the time spent plotting the

next day's route, the court denied summary judgment to both parties because genuine issues of fact existed. *Id*.

- *Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234 (D. Mass. 2004). Plaintiffs were auto damage appraisers. They frequently performed work-related activities at the beginning of the day at home (such as checking email, voicemails and preparing computer for use) before driving to their first appraisal site. *Id*. at 241. They also performed similar activities at home at the end of the day. The court concluded that such activities were "principal activities" under the FLSA and therefore compensable. *Id*. at 242. The court then found that the employees' drive to the appraisal site, which occurred after the principal activities at home, was compensable under the FLSA and outside the ambit of the Portal Act. *Id*. at 243.

- *Kuebel v. Black & Decker, Inc.*, 2009 WL 1401694 (W.D.N.Y.). Plaintiffs were employed as retail and sales marketing specialists. *Id*. at *1. They sought compensation for time spent commuting to their first store visit on the theory that their workday began when they performed tasks at home such as synching PDAs, loading cars, and reviewing email. *Id*. The court found that, as a general matter, the commute time was not compensable. *Id*. at *8. The court cited a 1999 DOL Opinion letter in which the department noted that an employer's policy that paid home-based employees for all but one hour of travel time from home was acceptable. *Id*. at *7. Accordingly, plaintiffs' claim for commute time that was less than 60 minutes failed as a matter of law. *Id*. at *8. The court also rejected the claim that activities performed at home were integral and indispensable to their principal job duties of making sure that stores were properly stocked, priced and displayed. *Id*. at *10.

- DOL Opinion letter from 1999. 1999 WL 1002360. The fact that employees received equipment at home and checked voicemail and email did not make the home a job site for purposes of counting work or travel. Performing such work at home did not affect the compensability of travel time to different job locations.

- *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010). Plaintiffs were employed as technicians who install and repair vehicle recovery systems. They sought compensation for activities performed before leaving for the first job in the morning, such as logging on to hand-held communication devices and completion of paperwork. *Id*. at 1049. The court found that plaintiffs' morning activities did not appear to be integral to their principal activities. *Id*. at 1057. The court also found the morning activities to be *de minimis*. The court, however, reversed the grant of summary judgment to the employer on plaintiffs' claim for compensation for portable data terminal transmissions to the employer at the end of day. *Id*. at 1060. The court opined that such activities might be an integral part of the employees' principal activities and remanded for determination of whether such transmissions were de minimis. *Id*.

III. Meal Periods

A. FLSA

The DOL has issued an interpretative bulletin regarding the compensability of "bona fide meal periods." That interpretative bulletin, which is set forth at 29 C.F.R. § 785.19, generally provides that bona fide meal periods are not compensable. The bulletin provides more specifically as follows:

> (a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

29 C.F.R. § 785.19.

In *Hill v. United States*, 751 F.2d 810 (6th Cir. 1984), the U.S. Court of Appeals for the Sixth Circuit considered the standard for determining whether a meal period is compensable under the FLSA. According to the court:

> As long as the employee can pursue his or her meal time adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominately for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA.

Hill, 751 F.2d at 814. Thus, according to the U.S. Court of Appeals for the Sixth Circuit, for plaintiffs to prevail on a claim that they are entitled to compensation for a meal period, they must establish that (1) they are not "substantially relieved" of their duties; and (2) that they spend their meal period "predominantly" for the employer's benefit. *Myracle v. General Elec. Co.*, 33 F.3d 55, 1994 WL 456769, *4 (6th Cir. Aug. 23, 1994).

The Sixth Circuit's interpretation and application of the legal standards applicable in determining whether a meal period constitutes a noncompensable bona fide meal period is consistent with that set forth by some other courts. Other courts, like the Sixth Circuit, have concluded that, whether a meal period is compensable depends in part on whether the employee "predominately benefits" from the meal period, not on whether an employee is "completely relieved" of duties during a meal period. *See, e.g., McKnight v. Kimberly Clark Corp.,* 149 F.3d 1125 (10th Cir. 1998) (ruling that lunch break was primarily for the benefit of the employee and therefore not compensable); *Roy v. County of Lexington,* 141 F.3d 533 (4th Cir. 1998) (applying predominant benefit test and affirming trial court's ruling that plaintiffs' meal periods were not compensable); *Barefield v. Village of Winnetaka,* 81 F.3d 704 (7th Cir. 1996) (finding the meal period was not work under the FLSA because plaintiffs failed to show that meal period was predominantly for the benefit of the employer); *Henson v. Pulaski County Sheriff Dep't,* 6 F.3d 531 (8th Cir. 1993) (concluding that "predominately for the benefit of the employer" is the appropriate test for determining compensability of a meal period and ruling that meal period in the case was not compensable).

Some courts, however, have concluded that whether a meal period is compensable depends in part on whether the employee is "completely relieved" of duties during a meal period. *See, e.g., Chao v. Tyson Foods, Inc.,* 568 F.Supp.2d 1300, 1310 (N.D. Ala. 2008) (concluding that employees had been completely relieved from duty as to meal break that had been scheduled 2.5 to 3 hours apart from other break, precluding meal break claims); *Maus v. City of Towanda,* 165 F.Supp.2d 1223, 1229 (D. Kan. 2001) (ruling that police officer had been completely relieved of duties during meal period despite city's requirement that he remain within city limits during break and that he listen to citizen complaints during break); *Bridges v. Amoco Polymers,*

Inc., 19 F.Supp.2d 1375, 1379 (S.D. Ga. 1997) (holding that employee was completely relieved of duties during meal period even though she was subject to recall).

As the Sixth Circuit has recognized, the DOL interpretive bulletin does *not say* that an employee is required ***at all times*** to have at least thirty minutes for a meal period. *See Myracle*, 1994 WL 456769 at *9 (noting that no shift in the burden of proof exists under § 785.19 when a meal period is less than thirty minutes). The bulletin instead provides that thirty minutes "***ordinarily***" is long enough. Indeed, even the DOL does not interpret its own bulletin to mean that any period of less than thirty minutes fails to constitute a bona fide meal period. The DOL has recognized that meal periods of even less than twenty minutes may constitute a bona fide meal period. *See* Hours Worked/Deductions for Meal Periods, FLSA2007-1NA, WHM 99:8695 (DOL Op. Ltr. May 14, 2007; *see also* Working Time—Compensability of Rest Periods—Collective Bargaining, Opinion Letter No. 303, October 13, 1964 CCH-WH ¶30,906. The Sixth Circuit has also found a meal period of twenty minutes to be noncompensable. *See Myracle,* 1994 WL 456769 at *9 (upholding decision of U.S. District Court for the Western District of Tennessee that meal period of twenty minutes at General Electric plant was not compensable). Similarly, pursuant to the interpretative bulletins of the DOL, breaks of about twenty minutes or more generally do not constitute compensable work time. *See* 29 C.F.R. § 778.18 (providing that short breaks of less than about twenty minutes are generally compensable).

B. Tennessee Law

Apart from the requirements of the FLSA, Tennessee law requires than an employer provide a meal or rest period in certain circumstances. Tennessee Code Annotated § 50-2-103(d) provides in pertinent part:

> Each employee must have a thirty (30) minute unpaid rest break or meal period if scheduled to work six (6) hours consecutively, except in workplace environments that by their nature of business provide for ample opportunity to rest or take an appropriate break. Such break shall not be scheduled during or before the first hour of scheduled work activity.

Tenn. Code Ann. § 50-2-103(d). Under this statute, an employer must generally provide its employees with at least a 30-minute break, which in all likelihood would be a meal break, if the employee is scheduled to work six consecutive hours. An exception to this requirement exists where the nature of the employer's business provides ample opportunity for employees to rest or take a break.

C. Examples of Cases Addressing Various Meal Period Issues

- *Kimball v. Dynamic Strategy, Inc.*, 2009 WL 1651431 (M.D. Tenn. 2009). Employee claimed that employer's policy of automatically deducting time for hourly employee's lunch breaks, whether or not the employee took lunch, violated the FLSA and sought conditional certification. Employer contended that employees were compensated for missed meal breaks through handwritten corrections to printed timesheets. *Id*. at *5. The court noted that although employer had such a policy, the record indicated that such policy was often ignored. *Id*. Accordingly, the court conditionally certified the class.

- *Laplante v. Terraces of Lake Worth Rehab. and Health Center*, 2010 WL 1462276 (S.D. Fla. 2010). Plaintiff nurse complained that employer automatically deducted a 30-minute lunch break even though she rarely actually took a lunch break. Employer had a policy permitting an employee who missed lunch to complete a "Missed Lunch Form" which would result in employee's time being adjusted and employee paid accordingly. *Id*. at *3. Plaintiff, however, never submitted such forms, and court found that such failure supported a finding that employer had no knowledge that employee worked through lunch. *Id*. at *5. The court also observed that the automatic deduction policy was not violative of the FLSA on its face.

- *Frye v. Baptist Memorial Hosp*., 2008 WL 665362 (W.D. Tenn. 2008). Hospital employees complained that employer automatically deducted a 30-minute lunch break regardless of whether employees took a lunch break and moved for conditional certification. By finding that a majority of plaintiffs were subject to the employer's policy of automatically deducting meal periods from the employees' paychecks, the Court determined that the potential plaintiffs were similarly situated and therefore conditionally certified the class. *Id*. at *7.

- *Berger v. Cleveland Clinic Foundation*, 2007 WL 2902907 (N.D. Ohio 2007). Employee alleged that employer forced him to work through meal period without compensation on the basis of an automatic deduction. Employer argued that its policy was to inform employees to indicate in logbook when they did not get to take lunch. Id. at *3. The court granted the employer's motion for summary judgment where the employee stopped marking missed lunches in the logbook, noting that an "employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid." *Id*. at *13. The court denied the employer's motion for summary judgment as to whether employee should be compensated for "interrupted lunches." *Id*. at *14. The employee had argued that the employer failed to train employees how to account for "interrupted lunches" as opposed to missed lunches. *Id*.

IV. Employee Versus Independent Contractor

The protections of the FLSA apply to a covered "employee." The FLSA applies only in the context of the employer-employee relationship. It does not apply in the context of an independent contractor.

Issues often arise as to whether a worker is an employee or independent contractor. In making that determination, courts generally look to the following factors:

(1) the degree of control exercised by the alleged employer;

(2) the extent of the relative investments of the putative employee and employer;

(3) the degree to which the "employee's" opportunity for profit or loss is determined by the "employer";

(4) the skill and initiative required in performing the job; and

(5) the permanency of the relationship

See United States v. Silk, 331 U.S. 704 (1947); *Brock v. Mr. W. Fireworks*, 814 F.2d 1042 (5th Cir. 1987). Some courts have also considered as a sixth factor whether the service rendered is an integral part of the alleged employer's business. *See Donovan v. DialAmerica Mktg*, 757 F.2d 1376 (3d Cir. 1987); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

A. Examples of Cases Examining Whether Worker Was Employee or Independent Contractor

- *Wilson v. Guardian Angel Nursing, Inc.*, 2008 WL 2944661 (M.D. Tenn. 2008). Court found that plaintiff LPNs were employees after applying the economic realities test. Id. at *17. Plaintiffs were reliant on employer for placements and scheduling, and their skill set did not permit them to make decisions about the care to be given to clients. Plaintiffs did not make any significant investment in equipment or materials, and they had no opportunity for profit or loss in the course of their work for employer. Employer maintained a high degree of control over plaintiffs, monitoring their work for purposes of State regulations, the wishes of contractual partners, and for their own business goodwill. *Id.*

- *Lemaster v. Alternative Healthcare Solutions, Inc.*, 2010 WL 2570533 (M.D. Tenn. 2010). After applying the economic realities test, the court found that plaintiff LPNs were employees, not independent contractors, under the FLSA. Id. at *7.

- *Baker v. Flint Engineering & Constr. Co.*, 137 F.3d 1436 (10th Cir. 1998). Rig welders in natural gas pipeline industry brought FLSA claims against general contractor. The court concluded that such workers were employees and not independent contractors due to their lack of independence in setting work hours, work crews and other details of welding work. *Id*. at 1441. Although workers were the most skilled workers on the job site, they were not asked to exercise their discretion in applying their skill; they were told what to do and when to do it. *Id*. at 1444.

- *Richardson v. Genesee County Community Mental Health Serv.*, 45 F.Supp.2d 610 (E.D. Mich. 1999). Court finds that plaintiffs were employees after applying economic realities test. *Id*. at 615. The court, however, concluded that nurses fell into the professional exemption and therefore were exempt from the FLSA.