Wage and Hour

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D.C. Regulations	7 DCMR § 901-999 (CDCR 7-901 *et seq.* in Lexis)
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Virginia Statutes	Va. Code § 40.1-28 *et seq.* (Virginia Minimum Wage Law) Va. Code § 40.1-29 (Virginia Wage Payment Law)
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Table: Statutes of Limitations for Wage and Hour Claims

* For quick reference. See relevant sections for details on accrual, tolling, exceptions, and means of enforcement other than court actions.

F.L.S.A.	2 years (3 years if willful) 29 U.S.C. § 255
D.C. Wage Payment and Collection	3 years (D.C. general statute of limitations)
D.C. Minimum Wage Revision Act	3 years D.C. Code § 32-1013
Davis Bacon Act	2 years (3 years for willful violations) 29 U.S.C. § 255 (no private cause of action)
Service Contract Act	6 years for Dep't of Labor enforcement 28 U.S.C. § 2415; 29 C.F.R. § 4.187 (no private cause of action)
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False Claims Act complaint alleging failure to pay prevailing wages on federal or D.C. government contracts	6 years after date of violation or 3 years after government knew or should have known of violation (whichever is later), but no action may be brought after 10 years 31 U.S.C. §3731(b).
Virginia suits by workers against employers for breach of contract	3 years (for oral contracts) and 5 years (for written contracts) Va. Code Ann. § 8.01-246

Federal Wage & Hour Laws – Fair Labor Standards Act

Minimum Wage & Overtime

Under the *Federal Fair Labor Standards Act* (*FLSA*), the current federal **minimum wage is $7.25 an hour**, and **employers are required to pay non-exempt employees overtime at a rate of time-and-a-half of an employee's regular rate of pay for hours worked in excess of 40 per week**. *See* 29 U.S.C. §§ 206(a)(1), 207(a)(1). Up-to-date information regarding the Fair Labor Standards Act can be found at http://www.dol.gov, a website of the U.S. Department of Labor (DOL).

Practice Tip: Because *FLSA* establishes only minimum standards that must be followed, the worker may be able to benefit from additional protections provided under state laws. Thus, in any court case, the worker should allege violations of *FLSA* **and** more expansive state laws, if such laws apply. *See* 29 C.F.R. § 541.4.

Exceptions to the Minimum Wage Requirement

Tipped Employees

Tipped employees may be paid as little as $2.13 per hour for regular hours worked under the FLSA, though local laws provide for a higher minimum cash wage in D.C. ($2.77) and Maryland ($3.63).

Tipped employees are those who customarily and regularly receive more than $30 per month in tips. Tips are the property of the employee. The employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum-wage obligation to the employee ("tip credit") or in furtherance of a valid tip pool. Only tips actually received by the employee may be counted in determining whether the employee is a tipped employee and in applying the tip credit.

Tip Credit: The FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13). The tip credit does not change for overtime hours. Thus, a tipped employee must be paid a cash wage of $7.25 X 1.5 = $10.88 - $5.12 = $5.76 for overtime hours. *See* 29 C.F.R. 531.

EJC Tip Credit Cheat Sheet					
	Minimum Regular Wage	Minimum OT Wage	Maximum Tip Credit	Minimum Regular Cash Wage	Minimum OT Cash Wage[1]
Federal	$7.25	$10.88	$5.12	$2.13	$5.76
D.C.	$9.50[3]	$12.38	$5.48	$2.77	$6.90[2]
Maryland	$7.25[4]	$10.88	$3.62	$3.63	$7.26
Virginia	$7.25	$10.88	$5.12	$2.13	$5.76

[1]Keep in mind that many tipped employees – and the establishments they work for – fall within certain federal and state law exemptions from coverage for overtime pay. For example, though the minimum overtime cash wage in Maryland may be, generally speaking, $7.26, many restaurant workers are exempt from Maryland state laws regarding overtime pay. Thus, the minimum overtime cash wage for a particular restaurant worker in Maryland may be $5.76 – the rate pursuant to the FLSA.

[2]The law and supporting regulations are unclear whether the minimum overtime cash wage in D.C. is $6.90 or $5.76. The D.C. Office of Wage and Hour Compliance takes the position that it is $6.90. D.C. Code § 32-1003(f).

[3]The D.C. minimum wage increased by statute to 9.50/hour in July 2014 and is scheduled to continue to increase incrementally until reaching $11.50/hour in 2016.

[4]The Maryland minimum wage is scheduled by statute to increase to $8.00/hour in January 2015, and then will increase incrementally until reaching $10.10/hour in July 2018.

Tip Pool: The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. A valid tip pool may not include employees who do not customarily and regularly received tips, such as dishwashers, cooks, chefs, and janitors.

Employer Requirements for Receiving the Tip Credit**:** The employer must provide the following information to a tipped employee before the employer may use the tip credit:

1. the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;
2. the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 per hour (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);
3. that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4. that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5. that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

Sub-minimum Wage for Persons with Disabilities

FLSA allows employers to pay sub-minimum wages to workers whose disabilities impair their productive capacity for the work they perform, but this is a limited exception. *See* U.S. DOL WHD, Fact Sheet # 39, "The Employment of Workers with Disabilities at Special Minimum Wages," http://wrmanual.dcejc.org/1. All rates must be approved by the Department of Labor and are subject to review by petitioning the Department of Labor. Petitions disputing the worker's wage rate should be mailed to: Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave. NW, Washington, DC 20210. No particular form is required, but the petition must be signed by the worker or his/her parent or guardian, and must contain the employer's address.

Unpaid Interns at For-Profit Employers

There are some narrow circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. The Supreme Court has held that the term "suffer or permit to work" cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. *See Walling v. Portland Terminal*, 330 U.S. 148 (1947). This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program. The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

For more information, *see* U.S. DOL WHD, "Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act," http://wrmanual.dcejc.org/2.

New Employees Younger than 20 Years Old

The minimum wage for employees younger than 20 years old for the first 90 days of employment is $4.25. *See* 29 U.S.C. § 206(g).

Issues in Calculating Overtime

Determining the Workweek

The workweek is a fixed period of 168 hours (seven consecutive 24-hour periods) that can begin at any time and that regularly repeats. It need not coincide with the calendar week. *See* 29 CFR § 778.105. Once established, the starting point of an employee's workweek can be changed only if the change is meant to be permanent and is not for the purpose of evading overtime wage laws. In the case of large plants, a workweek may be established for the entire plant rather than for individual workers. Workweeks stand alone for determining overtime hours and cannot be combined and averaged with other workweeks. *See* 29 CFR § 778.104. This means that a week of 30 hours cannot be combined with a week of 50 hours in order to have two weeks at 40 hours (and thus overtime-free).

Figuring out when an employee's workweek begins is important because it may determine whether, for example, seven consecutive days of work are part of the same or different workweeks. It is important to remain consistent with whatever starting point is established, so that each workweek is based on the same unit of time.

Flat or Fixed Rates for a Job

Employers and employees are allowed to agree on compensation in a flat or fixed amount for work done on a particular job or for a particular day or week of work. *See* 29 CFR § 778.112. In these scenarios, an employee's regular hourly wage equals the total amount s/he receives divided by the total number of hours worked in the day, the week, or on the job. To the extent that the actual hours worked by the employee exceeded 40 in a given workweek, an employer must pay 1.5 times the regular hourly rate for the excess hours. The employee is considered to have already received his or her regular (non-overtime) wage from the fixed salary.

Note: Although employers and employees can agree upon this type of arrangement, they cannot negotiate a fixed salary that would result in an hourly wage below the legally-mandated minimum wage.

In trying to determine the regular rate for an employee with a flat or fixed salary for a pre-determined number of hours per week, see 29 C.F.R. § 778.113. The key is to determine "the number of hours which the salary is **intended to compensate**." 29 C.F.R. § 778.113(a) (emphasis added). This section may apply whether the number of hours is greater or fewer than 40 per week. In either case, where the hours and salary remain fixed, the regular rate is determined by dividing the salary by the number of hours worked per week. All hours are considered to have been compensated for at the regular rate, so that only the overtime premium (*i.e.*, the one half extra for each overtime hour) is due.

Example 1: If an employee receives $500 per week for 55 hours of work, the regular rate is $500/55 hours = $9.09. The overtime premium of $4.55 ($9.09 x 50%) is due for hours worked in excess of 40. Here, in addition to the weekly salary of $500, the employee is owed $68.18 (15 hours x $4.55) as an overtime premium. In this example, the employer *intended* that the

employee would work 55 hours.

Example 2: If the employer and employee had an arrangement whereby the employee received a certain amount for 40 hours of work, and the employee worked more than 40 hours, the employee would be owed the overtime rate for all hours more than 40. The regular hourly rate would be calculated by dividing the salary into 40 hours, not the number of hours actually worked. In this example, the employer intended that the employee would work 40 hours.

Flat or Fixed Salaries for a Fluctuating Workweek

If an employer pays an employee a flat sum for a week, the employer is still liable for overtime for hours in excess of 40, but there may be a question as to how much overtime is owed. Ordinarily, an employee who works more than 40 hours per week will be entitled to overtime at a rate of one-and-a-half times the regular hourly rate for the hours more than 40. **This is based on the presumption that the regular weekly pay is for 40 hours per week**.

If the parties agree that the weekly rate is for all hours worked, regardless of how many, the employer may be able to pay the employee a flat sum per week, plus an additional amount for weeks in which the employee worked overtime. The additional overtime amount would be a ½ pay differential rather than time and a half. **The regular hourly rate will vary from week to week depending on how many hours the employee actually works each week.** For this reason, any hours worked over 40 have already been compensated as straight-time hours and the employer need only pay additional half-time pay to satisfy *FLSA.*

The requirements that an employer must meet in order to use the **fluctuating workweek method** are set forth in 29 CFR § 778.114. If the requirements are met, the employer can simply pay the half-time differential on top of the fixed weekly pay. In the regulation, the requirements are as follows: (1) there must be a "clear mutual understanding" between the employer and employee that the fluctuating workweek method of pay is being used; (2) "the employee's hours must fluctuate from week to week;" (3) the salary must be fixed even if hours change; (4) the salary must be enough such that the employee receives minimum wage; and (5) the employer must pay extra compensation (at a rate of half the hourly rate) for all overtime hours worked.

If the fluctuating workweek method applies, the hourly rate upon which overtime compensation is based will vary from week to week depending on how many hours were worked that week. If these requirements are not met by the employer, the employer may be liable to the employee for payment of overtime as if the employee had never paid any wages to the employee for those overtime hours. *See Rainey v. Am. Forest and Paper Assn., Inc.*, 26 F.Supp.2d 82, 102 (D.D.C. 1998) (employer liable at a rate of one-and-a-half times the hourly rate because there was no clear mutual understanding between the parties and because it did not pay overtime at the half-time rate).

Example: Assume (1) the employee is paid $750 per week regardless of the number of hours worked and (2) the fluctuating workweek method applies. In week 1, the employee works 50 hours, and, in week 2, the employee works 75 hours. The week 1 hourly rate is $750/50 hours = $15, and the week 2 hourly rate is $750/75 hours = $10. For week 1, the employee must be

paid ½ time for the overtime premium, which is $7.50 X 10 hours, or $75. For week 2, the employee must be paid the overtime rate of $5 X 25 hours, or $125.

Waiting Time

The key issue here is whether the employee was "engaged to wait" or "waited to be engaged." *Skidmore v. Swift*, 323 U.S. 134, 137 (1944); 29 C.F.R. § 785.14. Whether waiting time is working time is a common-sense inquiry dependent upon the circumstances. *See* 29 C.F.R. § 785.14. Generally, if it benefits the employer to have the employee in a standby capacity, then the waiting time is compensable. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

The DOL regulations provide guidance about whether waiting time is compensable, and it gives the following examples and explanation:

> A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. . . . [The wait time is work time because] **the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.**

29 C.F.R. § 785.15 (emphasis added) (citations omitted). An employee is off-duty, that is, "waiting to be engaged," only where s/he is "completely relieved from duty" and where the time period is "long enough to enable him to use the time effectively for his own purposes." 29 C.F.R. § 785.16(a).

Break and Meal Time

Rest periods that are fewer than 20 minutes long constitute time worked under the regulations. *See* 29 C.F.R. § 785.18. Although meal periods of more than 30 minutes do not constitute work time, such periods might constitute work time if the employee is required to work during the meal period. *Id*. at § 785.19(a). There are, however, special rules for domestic workers that govern deductions from pay for meals and lodging. *Id.* at § 552.100.

Training Time

Under *FLSA*, workers must be compensated for time spent in training programs, lectures, or meetings unless the following four criteria are met:

1) Attendance is outside the employee's regular working hours;

2) Attendance is voluntary[1];

3) The training program, lecture, or meeting is not directly related to the employee's job[2]; and

4) The employee does not perform any productive work during the training program, lecture, or meeting.

See 29 C.F.R. § 785.27.

Exceptions

If the training program "corresponds to courses offered by independent bona fide institutions of learning," the time spent participating in the training program is not compensable even if the training is directly related to the employee's job as long as attendance is voluntary and the training is outside the employee's regular working hours. *See* 29 C.F.R. § 785.31.

Training time is not compensable if the employee is working under a "bona fide apprenticeship program" and the training program does not include "performance of the apprentice's regular duties." See *Wage and Hour Law: Compliance and Practice* § 6:23.[3] In *Ballou v. General Electric Co.*, the First Circuit held that employees engaged in an apprenticeship program were not entitled to compensation for time spent attending academic and theoretical classes conducted off the company's premises by independent educational institutions, even though the employees were required to attend these classes under their employment contracts. The apprenticeship program included direct job training on the employer's premises, for which the employees were compensated, in addition to the academic and theoretical classes for which the employer paid the employees' tuition fees but did not compensate the employees for time spent attending and preparing for classes. *See* 433 F.2d 109 (1st Cir. 1970).

There is a special rule for law enforcement officers and firefighters. Time spent in training programs is compensable unless the following criteria are met:

1) Attendance is outside regular working hours; and
2) The training is specialized or follow-up training; and
3) The training is required by a governmental organization.

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[1] Attendance is not voluntary when attendance is required by the employer, or when the employee "is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected" by his failure to attend the training program, lecture, or meeting. 29 C.F.R. § 785.28.

[2] The training program is directly related to the employee's job when "it is designed to make the employee handle his job more effectively." The training program is not directly related to the employee's job when the training is designed to train him for another job, or to develop a new or additional skill. The training program is not directly related to the employee's job when the training program is designed to prepare the employee for "advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job…even though the [training program] incidentally improves his skill in doing his regular work." 29 C.F.R. § 785.29

[3] The apprenticeship program must be a "written agreement or program which fundamentally meets the standards of the Bureau of Apprenticeship and Training of the United States Department of Labor." WHLCP § 6:23.

See 29 C.F.R. § 553.226.

Exemptions from FLSA Overtime Requirement

One of the main purposes of the FLSA was to guarantee overtime for "blue collar" workers. Thus, the act exempts from its overtime coverage workers who are paid on a **salary basis** AND who have certain **duties**. *See* 29 C.F.R. § 541.3. These exemptions are generally referred to as the **white collar exemptions**.

White Collar Exemptions

Salary Basis Test: A worker who is paid a salary (not an hourly wage) and earns at least $455 per week or $23,660 per year may be exempt from receiving overtime pay pursuant to a white collar exemption. *See* 29 C.F.R. §§ 541.100 *et seq*. Regardless of job duties, any worker earning less than this amount is automatically eligible for overtime.

Duties Test: In addition to being paid on a salary basis, the worker must have duties that qualify as **administrative, executive,** or **professional,** or the employee must be a qualifying **creative professional, computer professional, outside salesperson,** or **highly compensated employee**. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.[4]

Administrative Duties Test: The worker's primary duties must be the performance of non-manual work directly related to the management or general business operations of his or her employer, and the worker must exercise discretion and independent judgment on matters of significance.

Executive Duties Test: The worker must have the authority to hire and fire employees, or at least to make regular and generally relied upon recommendations regarding hiring, firing, or employee advancement. The worker's primary duties must be managing the employer's business or a department of the employer's business. Generally, the worker must supervise or direct the work of at least two or more subordinates. Equity owners of 20% or more are also considered executive employees.

Professional Duties Test: The worker must have engaged in a prolonged course of specialized instruction to work in his or her job, and the advanced instruction must be in a field of science or learning. The work must require the consistent exercise of discretion or judgment.

Creative Professionals: The worker's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized artistic or creative field.
Computer Employees: Computer employees may be paid on an hourly basis and still be exempted from the FLSA, so long as they are paid at least $27.63 an hour. The exemption generally applies to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers.

[4] The "duties" tests are laid out in 29 C.F.R. §§ 541.100(a), 541.200(a), and 541.300(a).

Outside Salespersons: The outside salesperson must be regularly performing sales work away from the employer's place of business and must be primarily working making sales for which a customer or client will pay.

Highly Compensated Employees: Workers who perform office or non-manual work and are paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on at least a salary or non-hourly basis) are exempt from the *FLSA* if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee, discussed above.

Note: The white collar exemptions do not apply to **police officers, firefighters, paramedics, park rangers, or hazardous materials workers**. In addition, no matter how highly paid these workers may be, these workers are entitled to overtime under the FLSA. *See* 29 C.F.R. 541.3(b).

Domestic Worker Exemption

Domestic workers who live in the household of their employers are exempt from the act's overtime requirements. *See* 29 U.S.C. § 213(b)(21). However, these workers are protected by the minimum wage and record-keeping requirements. *See* 29 U.S.C. § 206(F); 29 C.F.R. §§ 516.2, 516.5, 516.27.

Home Care Workers

Under what is commonly known as the "companionship exemption," home care workers who are employed to assist the elderly or infirm in their homes are generally exempt from the minimum wage and overtime provisions of the FLSA. See 29 U.S.C. § 213(a)(15). However, in September 2013, the U.S. Department of Labor issued regulations that extend the protections of the FLSA to home care workers, clarifying and narrowing this exemption. These regulations will go into effect in January 2015.

Perhaps most significantly, the new regulations provide that third-party employers such as home care agencies and state intermediaries may not claim the exemption for home care workers they employ, regardless of the breakdown of duties. Put simply, all home care workers who are employed by a third party to provide services to elderly or disabled persons are entitled to federal minimum wage and overtime.

For workers not employed by third-party employers, the final regulations narrow the definition of "companionship services," defining it as the provision of fellowship and protection. The regulations clarify that home care workers who spend more than 20% of their weekly work hours assisting an individual with "ADL"s (activities of daily living) and "IADL"s (instrumental activities of daily living) – including grooming, dressing, feeding, bathing, toileting, and transferring (ADLs); as well as meal preparation, driving, light housework, managing finances, and arranging medical care (IADLs) – are not exempt from minimum wage or overtime. Workers who are exempt may not provide medically-related services, nor are they allowed to perform domestic services primarily for the benefit of other household members.

Workers Under a Collective Bargaining Agreement

If a collective bargaining agreement negotiated by a certified bargaining representative provides for certain minimum and/or maximum hours and certain rates of pay, employers cannot be found to have violated *FLSA*. *See* 29 U.S.C. § 207(b). Practically speaking, the provisions of most collective bargaining agreements exceed the requirements of the FLSA with respect to wages and hours of work.

Employees of Recreational, Religious, or Non-Profit Educational Centers

Workers employed in a recreational, religious, or non-profit educational center may not be entitled to minimum wage or overtime if the facility operates for no more than seven months per year or if its revenue from one six-month period in the previous year is not more than one-third of its revenue during the other six months of that year. *See* 29 U.S.C. § 213(a)(3).

Employees of State and Local Governments

State and local government employees are generally covered under the FLSA, with the exception of elected officials, their staffs and advisors, and employees of state and local legislative bodies. *See* 29 C.F.R. § 553.3(a); *see also*, 29 C.F.R. § 553.11 & 553.12. For other exemptions for employees of public agencies, see 29 C.F.R. § 553.32.

Other Exemptions from Minimum Wage and Overtime Requirements

The following is a list of other types of employees who are exempted from the FLSA's minimum wage and overtime requirements:

- Certain workers in the fishing and seafood processing industries (29 U.S.C. § 213(a)(5))
- Certain agricultural workers (29 U.S.C. § 213(a)(6))
- Local delivery drivers paid by "trip rates" (29 C.F.R. § 551)
- Employees of small, local newspapers (29 U.S.C. § 213(a)(8))
- Seamen employed on vessels other than American vessels (29 U.S.C. § 213(12))
- Casual babysitters and domestic workers, caregivers, and companions for the aged and infirm (29 U.S.C. § 213(a)(15))
- State government employees may be paid with compensatory time instead of overtime in certain circumstances (29 U.S.C. § 207(o))
- Commissioned employees: Retail or service industry employees need not be paid the overtime rate if (1) the regular rate of pay of such an employee is in excess of 1.5 times the minimum wage; and (2) more than half the employee's compensation for a representative period (not less than one month) represents commissions on goods or services (29 U.S.C. § 207(i))

For additional exemptions from overtime requirements only, see 29 U.S.C. § 213(b).

In general, exemptions from *FLSA* are narrowly construed. The act, as remedial social legislation, should be construed in favor of the workers it was designed to protect. *See Arnold v.*

Kanowsky, Inc., 361 U.S. 388, 392 (1960).

It is an employer's burden to show that a worker is exempt from the overtime provisions in FLSA. *See Jones and Assoc., Inc. v. District of Columbia*, 642 A.2d 130, 133 (D.C. 1994).

Losing the Exemption – Improper Deductions from Pay

As a general principle, exempt employees should always receive a predetermined amount of pay for each pay period, with no deductions for the quality or quantity of work performed. In addition, the **employer should not make any full day or less than full day deductions from an exempt employee's pay** for employer-necessitated absences, jury, witness, or military duty (although taking an offset for any fees paid for service is allowed). Less than full day or full day deductions due to FMLA leave, however, are permissible. Full-day deductions can be made for full-day absences due to personal reasons, sickness, or disability, so long as the deductions are in conformity with other laws, and for days not worked during the first or last week of employment.

Improper deductions from an otherwise exempt employee's pay can result in a loss of the exemption for the entire class of employees, not just that employee. The U.S. Department of Labor, however, issued regulations in 2004 allowing employers a **safe harbor**. The safe harbor provision is designed to protect employers who make one-time, inadvertent errors. In these cases, the exemption is lost only for employees in the same job class who work for the same manager who made the improper deduction. The safe harbor provision does not apply when there is a pattern and practice of improper deductions. To qualify for safe harbor, an employer must have a written policy against improper deductions, employees must be notified about the policy, and employees must be reimbursed for improper deductions. In addition, the regulations allow an employer to make disciplinary deductions for one day in response to safety violations of major significance.

<u>Motor Carrier Act</u>

The FLSA provides an overtime exemption at 29 U.S.C. § 213(b)(1) for employees "who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to [Section 204 of the Motor Carrier Act of 1935]," except those employees covered by the "small vehicle exception."

The rules are somewhat complicated, but generally speaking, an employee who is a: a) driver, b) driver's helper, c) loader or d) mechanic affecting the safety of operation of motor vehicles may be within this exemption if his or her duties involved motor vehicles that fit into one the following categories:

1) Vehicles that weigh 10,001 pounds or more; or
2) Vehicles that are designed or used to transport more than eight passengers, including the driver, for compensation; or
3) Vehicles that are designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or
4) Vehicles that are used in transporting hazardous material.

For more information, see "Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA)," http://wrmanual.dcejc.org/3.

Miscellaneous Liability Issues

Temporary or Contingent Workers – Joint Liability

When employees are working for an employer through a temporary agency, both the employer and the agency may be liable for violations of FLSA if the retaining employer is not acting independently from the staffing agency. *See* 29 C.F.R. § 791.2(a). For more on joint employers, see Employee vs. Independent Contractor.

Individual Liability

Individual owners, managers, directors, shareholders, or officers can be personally liable for violations of FLSA in certain circumstances. *See Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) ("Where an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability"); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66-77 (2d Cir. 2003) (discussing two formulations of the **economic reality test** to determine whether one is an "employer" and thus liable under FLSA).

Wage Payment under FLSA

Technically, the FLSA does not have a wage payment component. Thus, although an employee may bring a claim under the FLSA for unpaid minimum or overtime wages, there is no cause of action available under the FLSA for workers who have simply not been paid their regular rate for hours worked (apart from a cause of action for the minimum wage portion of their regular rate). Generally, the failure to pay wages must be enforced under D.C. or state law. Some courts, however, have recognized a cause of action under FLSA for late payment of wages, called the **prompt payment requirement**. This cause of action has not been explicitly accepted or rejected in the District of Columbia or by the 4th Circuit. The leading case is *Biggs v. Wilson,* 1 F.3d 1537 (9th Cir. 1993). In *Biggs*, the 9th Circuit found the State of California liable for prejudgment interest and liquidated damages when it failed to pay some employees until two weeks after the regular payday (because no state budget had been passed appropriating the funds).

Penalties and Enforcement of FLSA

Liquidated Damages, Attorneys' Fees & Criminal Sanctions

An employer who violates the act is liable to the employee for the unpaid wages and an additional equal amount as liquidated damages. *See* 29 U.S.C. § 216(b). The employer, however, may not be liable for liquidated damages if it demonstrates that its actions were in good faith and that it had reasonable grounds for believing its actions or omissions did not violate the law. *Id*. at

§ 260.[5]

A prevailing plaintiff/worker in court must be awarded reasonable attorneys' fees and costs to be paid by the defendant. *See* 29 U.S.C. § 216(b). A worker cannot, however, recover prejudgment interest. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715 (1945).

FLSA also provides for both civil and criminal penalties. Civil penalties can amount to $1,000 per violation. *See* 29 U.S.C. § 216(e). Criminal penalties for willful violations can be up to six months in jail and up to a $10,000 fine. *Id*. at § 216(a).

Enforcement

Workers can pursue claims through the U.S. Department of Labor, *see* 29 U.S.C. § 216(c), or by proceeding directly to state or federal court, *see* 29 U.S.C. § 216(b).[6][7] In certain cases, however, a worker's right to sue ends if the Secretary of Labor brings an action in court on the worker's behalf. *See* 29 U.S.C. § 216(b).

The Wage & Hour Division of the Department of Labor has offices at the following locations:

U.S. Department of Labor, Wage & Hour Division (District Office)
2 Hopkins Plaza, Room 601
Baltimore, MD 21201
Phone: 410-962-6211
1-866-4-US-WAGE (1-866-487-9243)

U.S. Department of Labor, Wage & Hour Division (Area Office)
2300 Clarendon Blvd., Suite 503
Arlington, VA 22201
Phone: 703-235-1182

U.S. Department of Labor, Wage & Hour Division (Area Office)
6525 Belcrest Road, Suite 250
Hyattsville, MD 20782
Phone: 301-436-6767

U.S. Department of Labor, Wage & Hour Division (Field Office)
Post Office Bldg. Suite 114
129 Main St.

[5] In a lawsuit for the violation of the anti-retaliation provisions, a prevailing plaintiff/worker can recover any amount of damages deemed equitable by the court. *See* 29 U.S.C. § 215(a)(3); *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219 (7th Cir. 1995); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543 (7th Cir. 1991); *Bogacki v. Buccaneers Ltd. Partnership*, 370 F.Supp.2d 1201 (M.D. Fla. 2002).

[6] Although the FLSA does not preclude bringing an action in state court, an additional inquiry is whether the state court will have jurisdiction over the claim.

Box 627
Salisbury, MD 21803

In a suit by the Secretary, the Secretary can seek injunctive relief in addition to damages. *See* 29 U.S.C. § 217. Such an injunction could prohibit the employer from shipping goods across state lines if the goods were produced by workers who were not paid the appropriate minimum wage and/or overtime. *See* 29 U.S.C. § 215(a)(1).29 U.S.C. § 216(b). 29 U.S.C. § 216(b). 29 U.S.C. § 216(b). 29 U.S.C. § 216(b). 29 U.S.C. § 216(b). 29 U.S.C. § 216(b). 29 U.S.C. § 216(c)

Statute of Limitations

The statute of limitations for filing a lawsuit under FLSA is **two years** (**three years for willful violations**). *See* 29 U.S.C. § 255(a). Each workweek is treated separately for purposes of the statute of limitations. The standard for determining willfulness is whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe,* 486 U.S. 128, 133 (1988). Courts have found willful violations of FLSA where the employer had notice of the law through earlier violations, but kept perpetrating the illegal scheme, *see Dole v. Elliott Travel*, 942 F.2d 962, 966-67 (6th Cir. 1991), and where, even after a DOL investigation confirmed the violations, the employer still continued the illegal practices, *see Reich v. Monfort*, 144 F.3d 1329, 1334-35 (10th Cir. 1998).

Equitable Tolling of the Statute of Limitations

One court has held that the statute of limitations should be equitably tolled for any applicable limitations period because the employer failed to post the statutorily required notice of FLSA rights at the worksite. *See Kamens v. Summit Stainless, Inc.*, 586 F.Supp. 324, 328 (E.D. Pa. 1984) (citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)). *But see Claeys v. Gandalf, Ltd*., 303 F.Supp.2d 890 (S.D. Ohio 2004) (rejecting equitable tolling based on employer's failure to post notice, based on unpublished Sixth Circuit precedent); *Patraker v. Council of Env't of N.Y.*, No. 02 Civ. 7382 (LAK), 2003 WL 22336829, at *2 (S.D.N.Y. Oct. 14, 2003) (holding that once plaintiff has retained an attorney, failure to post notice becomes immaterial); *Antenor v. D&S Farms*, 39 F.Supp.2d 1372, 1379-80 (S.D. Fla. 1999) (citing *McClinton v. Ala. By-Products Corp.*, 743 F.2d 1483 (11th Cir. 1984) (rejecting equitable tolling for failure to post FLSA-required notice)).

Retaliation

Under FLSA, an employer may not "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding… or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). In order to succeed on a retaliation claim under this section, the plaintiff/worker must prove the following:

(1) The worker engaged in **protected activity**;
(2) The employer took an **adverse action** against him or her; and

(3) **Causation** (the employer took the adverse action *because* the worker engaged in protected activity).

See Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1394 (10th Cir. 1997); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Saffels v. Rice*, 40 F.3d 1546 (8th Cir. 1994).

Protected Activity

FLSA complaints made to the U.S. Department of Labor and filed as lawsuits in court are clearly protected activity; however, it is unclear whether informal complaints made to the worker's employer constitute protected activity.

The U.S. Supreme Court recently held that oral complaints constitute protected activity under FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). The Court in *Kasten* noted, and the Fourth Circuit later stressed, that even in cases of oral complaints, however, employers must still receive "fair notice as to when a complaint ha[s] been filed." *Minor v. Bostwick Labs, Inc.*, 669 F.3d 428, 432 (4th Cir. 2012).

In an unpublished decision, the U.S. District Court for the District of Maryland also relied on *Kasten* in holding that when an employee submits supporting documentation in a complaint to a state agency, the documentation itself constitutes a "complaint" for FLSA purposes – even if such documentation contains confidential information. *Randolph v. ADT Sec. Servs.*, 2011 U.S. Dist. LEXIS 87464 (D. Md. Aug. 8, 2011).

Causation

With regard to the element of causation, the worker must show that the protected activity was a substantial factor in the adverse action, meaning that "but for" the protected activity, the adverse action would not have occurred. *See Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1994); *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996); *Reich v. Davis*, 50 F.3d 962 (11th Cir. 1995). It is an employer's burden to negate or disprove the "but for" causation, that is, to show that it would have taken the adverse action regardless of the worker's protected activity. *See Conner*, 121 F.3d at 1394; *Knickerbocker*, 81 F.3d at 911.

Damages

If an employer violates FLSA's anti-retaliation provision, the plaintiff may recover "such legal or equitable relief as may be appropriate." 29 U.S.C. § 216(b). Courts are divided, however, as to whether this includes punitive damages. *Compare Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000) *and Johnston v. Davis Sec., Inc.*, 217 F.Supp.2d 1224 (D. Utah 2002) (punitive damages not available under anti-retaliation provision) *with Travis v. Gary Co. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1991) *and Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F.Supp.2d 838 (E.D. Pa. 2001) (punitive damages available for violation of anti-retaliation provision).

Retaliation Against Two or More Workers

In addition to those protections, when two or more workers complain about wages and are terminated or punished because of the complaint, it may be appropriate for the workers to file a charge under the *National Labor Relations Act*, which protects "concerted activity." *See* **Labor Unions and Labor Law**.

Retaliation Against Undocumented Workers

Several federal courts have held that it is illegal under FLSA to report a worker to the Immigration and Naturalization Service (INS) as retaliation for a wage-hour complaint. *See Zirintusa v. Whitaker*, 2007 U.S. Dist. D.C. (Jan. 3, 2007) (No. 05-1738) at *15; *Singh v. Jutla & C.C.&R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

Miscellaneous Issues

11th Amendment Immunity Issues

In the case of *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that state employees may not sue the state for FLSA violations because states are immune from such suits under the 11th Amendment to the U.S. Constitution. Puerto Rico, a territory, enjoys similar immunity from FLSA suits. *See Rodriguez v. Puerto Rico Federal Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006), *cert. denied by Rodriguez v. Puerto Rico Federal Affairs Admin*., 549 U.S. 812 (Oct. 2, 2006) (No. 05-1410).

This immunity might not apply to D.C. government workers for two reasons. First, D.C. is not a state but is a federal district created and overseen solely by Congress; therefore the language of the 11th Amendment does not apply. *See* U.S. Const. Art I, Sec 8. (2), which explicitly gave Congress the power to regulate D.C.'s affairs. Second, D.C. is more like a municipality than a state, and municipalities are liable under FLSA. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978) (holding a municipality can be sued under the Civil Rights Act of 1871 and is not entitled to absolute immunity). There is some case law supporting the assertion that the District of Columbia alone is a municipality. *O'Callaghan v. D.C.*, 741 F. Supp. 273, 276 (D.D.C. 1990) (holding D.C. a municipality, not a state; applying *Monell* and citing Congress' intent to subject D.C. to § 1983 liability by amending § 1983 to specifically include it); *see also Morgan v. Dist. of Columbia*, 824 F.2d 1049, 1056-58 (D.C. Cir. 1987) (allowing a § 1983 claim against D.C. because, as a municipality, it may be liable if "its official policy or custom is responsible for the deprivation of constitutional rights").

On the other hand, the tri-state agency WMATA (Metro) has been held, by both the D.C. and the Fourth Circuits, to be a state agency and to enjoy sovereign immunity. *See Lizzi v. Alexander*, 255 F.3d 128, 132-34 (4th Cir. 2001) (holding WMATA did not waive 11th Amendment immunity except for certain tort and contract actions; concluding that hiring, training, and supervision are governmental functions, for which WMATA retains sovereign

immunity); *Morris v. WMATA*, 781 F.2d 218, 220 (D.C. Cir. 1986) *overruled on other grounds by Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (recognizing WMATA's sovereign immunity; holding it waived for certain tort and contract actions but not for "any torts occurring in the performance of a governmental function").

Class Action Issues

Unfortunately, class actions under Federal Rule of Civil Procedure 23 are not allowed under FLSA. Each worker with a claim must **opt in** to what is called a "collective action." *See* 29 U.S.C. § 216(b). However, counsel may wish to file a so-called "Hybrid Action," with both class action state law claims *and* FLSA claims.

Prevailing Federal Wage Laws

Practice Tip: ***The Wage Theft Prevention Amendment Act of 2013*** may have dramatically changed how the prevailing wage laws may be enforced in D.C. The act broadened the definition of "wages" in the D.C. Wage Payment and Collection Law to include: "Other remuneration promised or owed…[p]ursuant to a contract between an employer and another person or entity; or [p]ursuant to District or federal law." D.C. Code § 32-1301(3). The new law also amended the D.C. Wage Payment and Collection Law to state that "[i]n enforcing the provisions of this chapter, the remuneration promised by an employer to an employee shall be presumed to be at least the amount required by federal law, including federal law requiring the payment of prevailing wages, or by District law." D.C. Code § 32-1305(b). These changes were intended by proponents of the bill to secure a private right of action – under the D.C. Wage Payment and Collection Law – for employees who have not been paid wages mandated by prevailing wage laws such as the Davis-Bacon Act. However, this application of the Wage Theft Prevention Act of 2013 has not yet been tested against federal preclusion defenses.[8]

These laws set prevailing wage and fringe benefit rates in federal and D.C. government contracts. They apply to both prime contractors and subcontractors working on federal government or D.C. government contracts. These laws cover government contractors and do not apply to private commercial business not engaged in performing government contracts. They provide an important source for higher wages and benefits for workers in the District of Columbia. The prevailing wage is usually an average of all the wages paid for the same type of work in a geographic area. But for some trades or contracts, the prevailing wage and fringe benefits may be derived from union collective bargaining agreements.

In February 2014, President Obama signed an Executive Order setting a minimum wage of $10.10 for federal government contract workers and $4.90 for tipped federal government

[8] A renewed Wage Theft Prevention Act was voted for on its first reading on June 3, 2014. It must be voted on once more by the Council before becoming law. The bill establishes formal procedures to enable victims of wage theft to recover unpaid wages and damages, increases the penalties for those responsible for committing wage theft, provides greater protection for workers who stand up for their rights, and makes it easier for wage theft victims to get legal representation.

contract workers. The law goes into effect on January 1, 2015 and applies to all new or amended federal contracts. Regulations are scheduled to be published in October 2014.

Davis-Bacon Act: Construction Contracts

The *Davis-Bacon Act* applies to contracts in excess of $2,000 for the construction, alteration, or repair of federal or D.C. public buildings or other public works. *See* 40 U.S.C. § 3142. This includes painting, renovation, and other work that involves discrete line items of construction work. The work must be performed on the site of the public work and by laborers or mechanics. The act covers both federal government contracts and federally assisted construction (i.e., state, local, or grantee construction financed in part by the federal government). Under the act, workers must be paid the prevailing wage and given prevailing fringe benefits. The Secretary of Labor is charged with setting prevailing wage levels. *Id.* at § 3142(b). Pursuant to that authority, the U.S. Department of Labor (DOL) has issued wage determinations covering the District of Columbia. These are schedules that set the prevailing wages and fringe benefits. Copies of those wage determination can be found at www.wdol.gov. These wage determinations, along with standard contract clauses, are supposed to be inserted into the prime contract and made applicable to subcontractors as well. *Please see* How to Find a Wage Rate.

Enforcement of the Davis-Bacon Act

There is no federal private right of action to enforce the Davis-Bacon Act. Historically, this meant that an employee could not sue to enforce the act and instead had to file a complaint with DOL (***But see* "Practice Tip: *The Wage Theft Prevention Amendment Act of 2013,*" above.**) Complaints are filed at the same DOL offices that take FLSA complaints. The District Wage and Hour Office usually cannot enforce the Davis-Bacon Act unless it relates to a city government contract. Otherwise, for purely federal contracts, enforcement rests exclusively with DOL. If a prime or subcontractor contractor is found to be paying insufficient wages under the act, the federal government may withhold monies from the prime contractor, sue to recover monies, institute debarment for aggravated or willful violations, or move to cancel (i.e., terminate for default) all or part of the contract and recover from the contractor the cost of completing the job with a different contractor. *See* 40 U.S.C. §§ 3143, 3144(a)(1). Under the Davis-Bacon Act, the statute of limitations is ostensibly two years for ordinary violations and three years for willful violations. *See* 29 U.S.C. § 255(a). However, DOL says that it has a contractual right of withholding and offset against any government contract even beyond the limitations period.

While there is generally no private right of action under the Davis-Bacon Act, there may be rights under the surety bonds that construction contractors are required to post as security for performance. Those bonds may also guarantee the payment of all wages due the workers. *See* the Miller Act discussion below. There are strict notice and time limits for such actions.

In addition, under the Davis-Bacon Act, contractors must pay employees weekly and must provide so-called "certified payrolls" to the government. These report wages, fringe benefits, deductions, rebates, and overtime paid to the workers. If the contractors submit false payroll, they may commit false claims or even criminal acts. Workers may be able to bring (in

the name of the United States) *qui tam* actions to enforce the False Claims Act and collect a percentage of the treble damages and $10,000 per false invoice that constitute the damage remedy for the fraud. For further information, *see* the False Claims Act discussion below.

Practice Tip: Many times, employers place workers in the wrong prevailing class in order to pay a lower wage. For example, they will classify electrician helpers as laborers rather than electricians. Make sure that the worker is classified in the appropriate class.

Service Contract Act

As amended, the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 6702 et seq., 29 C.F.R. § 4-8, requires certain government service contractors to pay their employees the prevailing wage, including fringe benefits such as health and welfare sums, holiday and vacation pay, and life insurance. The act applies to contracts primarily for services "through the use of service employees" with the federal or D.C. government, in excess of $2,500, except for the following:

- contracts for the construction, alteration, and repair, including painting and decorating of public buildings or public works (See Davis-Bacon Act, above);
- contracts for supply of good or manufacturing governed by the Walsh-Healy Public Contract Act, see below;
- contracts for the carriage of freight where published tariff rates are in effect;
- contracts for services by radio, telephone, telegraph, or cable companies (See Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*);
- public utility contracts, including electric, power, water, steam, and gas;
- employment contracts for direct services to a Federal agency by an individual or individuals;
- contracts with the U.S. Postal Service for operation of postal contract stations;
- prime or subcontractor contracts for certain enumerated commercial services where the work force spends less than 20% of its time performing services for the government;
- contracts for medical services related to Medicare or Medicaid;
- contracts for commercial services involving automatic data processing or other high-tech equipment where the work is done by the original equipment manufacturer or supplier;
- contracts involving disabled workers, apprentices, student learners, under government-approved programs;
- workers who are exempt as executive, administrative, or professional employees or computer employees as defined in Part 541 of the Code of Federal Regulations. [This is the most important exemption];
- certain National Park Service concessionaires who service the public; and
- certain prime contractor employees of government-owned and contractor-operated nuclear energy facilities.

This law applies to the District of Columbia government for "the contracts of all agencies and instrumentalities which procure contract services for or on behalf of the District or under the authority of the District Government." 29 C.F.R. § 4.108. Workers on these contracts must be

paid the "prevailing wage" and given prevailing benefits. 41 U.S.C. § 6703. Prevailing wage determinations can be found at www.wdol.gov. *Please see* How to Find a Wage Rate. The SCA wage determination and contract clauses should be inserted into the prime contract and made applicable to all service subcontractors who are working on the contract.

The wage determinations under the Service Contract Act in D.C. range from a low of from near the District's minimum wage to more than $48 an hour for highly skilled registered nurse level IVs. The wage rates and health and welfare fringes change once a year, generally in June. The current health and welfare (H&W) benefits in the D.C. metropolitan area are $3.81; holiday benefits include 10 named holidays. Vacation benefits are based on length of service with the employer or the predecessor contractor and are at least two weeks. Part-time and temporary employees are covered by the act and entitled to pro rata fringe benefits. Wage determinations are updated from time to time, and the prevailing wage a worker is due may depend on whether the services were previously performed in the area under an SCA-covered contract, whether the worker has a collective bargaining agreement, and other factors.

The prevailing wage in the District of Columbia also includes fringe benefits at an amount of $3.81 per hour, as of June 19, 2013. *See All Agency Memorandum No. 214*, at http://www.wdol.gov/aam/aam214.pdf. Again, this changes annually. The wage determination also includes 10 holidays and vacation benefits according to length of employment (two weeks after one year; three weeks after five years; four weeks after 15 years). *See, e.g.,* Wage Determination No.: 2005-2103, Revision 12 (June 13, 2012). However, fringe benefits are not part of the base rate used to calculate overtime pay. There are two types of SCA wage determination. The even-number wage determinations allow for H&W benefits to be paid on average to workers for every hour worked, including overtime hours. Since this is an average calculation, some workers may get more benefits; other workers (like temporary or part-time employees) get little or no benefits. Most wage determinations, however, are based on individual fringe benefits and are odd numbered – they require each worker to be paid their H&W benefit for all hours paid (including holidays and vacations) up to 40 hours per week.

Enforcement of Service Contract Act

Like the Davis-Bacon Act, there is no private right of action under the Service Contract Act. The Secretary of Labor has the exclusive right to enforce the act. *See United States v. Double Day Office Servs.*, 121 F.3d 531, 533 (9th Cir. 1997). Thus, employees must complain to DOL, which has the exclusive enforcement authority. When a violation of the act is established, the DOL may order the government agency to withhold the amount due from further payments from the contractor and pay it directly to the worker. *See* 41 U.S.C. § 6705; 29 C.F.R. § 4.187. Contractors found to have violated the act absent "unusual circumstances" are placed on a debarment list, which means they cannot get any federal or D.C. contracts for three years. *See* 41 U.S.C. § 6706; 29 C.F.R. § 4.188. If an employee thinks a violation has occurred, s/he should contact the agency overseeing the contract's performance or the Wage and Hour Division of the United States Department of Labor at 1-866-487-9243. The statute of limitations for government actions has been interpreted to be six years. *See* 28 U.S.C. § 2415; 29 C.F.R. § 4.187. However, DOL general enforcement policy is to just go back two years absent willful or repeated violations.

Walsh-Healy Public Contracts Act

Davis-Bacon covers construction contracts; the Service Contract Act covers service contracts; and the *Walsh*-Healy Public Contracts Act (Walsh-Healy, WHPCA, or PCA), 41 U.S.C. § 35-45, covers supply contracts with the U.S. Government. The WHPCA originally established basic labor standards, such as wages, hours, and conditions, for work done on U.S. government and D.C. government contracts, in excess of $10,000 in value, for the manufacture or furnishing of materials, supplies, articles, and equipment. All workers engaged in the manufacturing or furnishing of contracted items are covered, *except* those in executive, administrative, or professional positions, or those performing office, custodial, or maintenance work. The act also is not applicable to contracts for the purchase of materials, supplies, articles, or equipment that can usually be bought in the open market. *See* 41 U.S.C. § 43. Contractors subject to the Public Contracts Act originally had to certify that they satisfy the following conditions:

- pay prevailing wages (as determined by the Secretary of Labor);
- limit workweeks to 40 hours (unless specifically authorized by FLSA);
- do not employ any males under 16 or any females under 18;
- do not use convict labor unless they satisfy federal convict labor restrictions;
- do not maintain conditions that are unsanitary, hazardous, or dangerous to the health and safety of employees.

Enforcement of the Walsh-Healy Public Contracts Act

The WHPCA is now largely a dead letter. In 1962, the DOL stopped issuing new WHPCA wage determinations. All the WHPCA wage determinations were exceeded long ago by the minimum wage. So, all that has to be paid on U.S. government supply contracts is the FLSA and D.C. minimum wages. There is no fringe benefit requirement. The WHPCA does give the DOL some extra tools to assure compliance with the FLSA minimum wage, but not much more. There is no private right of action under the WHPCA. Only the Secretary of Labor is authorized to enforce its provisions. *See* 41 U.S.C. § 39. The statute of limitations for enforcement actions under the WHPCA is two years for ordinary violations and three years for willful violations. *See* 29 U.S.C. § 255(a).

How to Find a Wage Rate and File a Complaint

To find out the prevailing wage for a particular job classification, generally called a **wage determination**, or to enforce a wage determination, contact the U.S. Department of Labor. The DOL now has a website where the most up-to-date wage determinations for the Davis-Bacon Act and the Service Contract Act can be found. Visit the Wage Determination Online site at www.wdol.gov. A library of resources is also available electronically at that website. The DOL website has descriptions of different job classifications, which also are available on the site.

To start an investigation, a D.C. worker may call the Baltimore District Office of the

DOL or write a letter of complaint. To reach any DOL district office, call 1-866-4-USWAGE (1-866-487-9243). The Regional Administrator of the Wage and Hour Division can be contacted at the U.S. Department of Labor, Wage and Hour Division, 6525 Belcrest Road, Suite 250, Hyattsville, MD 20782. The Director of Wage Determinations can be reached at (301) 436-6767.

Other Federal Wage-Related Statutes

Miller Act: Construction Bonds

The Miller Act of 1935, 40 U.S.C. § 3131 *et seq*., requires that before any contract is awarded for the construction, alteration, or repair of any public building or public work of the United States (not the District of Columbia), the construction contractor must furnish a payment bond to protect wages of employees. *See* 40 U.S.C. § 3131(b)(2). The act applies to contracts over $100,000 awarded by the U.S. government only. *Id*. at § 3131(b); *but see id.* at § 3132(a) (stating that contractors with contracts greater than $25,000 but less than $100,000 may be allowed an alternative to payment bonds). Employees who are owed wages under the act must send a notice to the surety (insurance company usually) generally within 90 days of stopping work and must file suit within one year of the violation in federal court. *See* 40 U.S.C. § 1332. These time limits are strictly construed. D.C. often requires its own performance bonds.

Contract Work Hours and Safety Standards Act

The Contract Work Hours and Safety Standards Act (40 U.S.C. § 3701 *et seq.*) applies to any laborers, mechanics, and night watchmen (*i.e.*, guards), who work on federal government or D.C. contracts. It applies to both prime and subcontractors. It covers blue collar SCA-covered workers, and it covers federally assisted construction contracts, *i.e.*, those financed in whole or in part by loans or grants from the United States. *See* 40 U.S.C. § 3701(b)(1). It also applies to contracts financed by federal loan guarantees, as long as the assistance of the federal agency extends beyond merely guaranteeing the loan. *Id.* Finally, it applies to any worker "performing services in connection with dredging or rock excavation in any river or harbor…of the District of Columbia." 40 U.S.C. § 3701(b)(2)(A). The act only applies to contracts that are for more than $100,000. *Id.* at § 3701(b)(3)(iii).

While CWHSSA once had an eight-hour day overtime requirement, that was abolished in 1985 in the DOD Authorization Act of that year. Now, **CWHSSA only requires time and one-half premium overtime be paid for all hours worked in excess of 40 hours per week**. In this sense it requires no more than the FLSA or existing D.C. wage laws. The regular rate of pay calculation for the FLSA is the same calculation that is done for CWHSSA.

In addition to the health and safety rules in §§ 3704 and 3705, this act enforces the 40-hour week and overtime compensation, and allows liquidated damages of $10 per each workday that an employer violates those rules. The liquidated damages are payable to the U.S. government but not to the employee. *See* 40 U.S.C. § 3702. In addition, the agency authorizing

and paying for the contracted work is authorized to withhold from its payment the full amount for which it believes the employer is liable. *Id.* at §§ 3702(d); 3703. The U.S. Comptroller General is authorized to pay the aggrieved worker directly. *Id.* at § 3703. The act provides for criminal penalties: up to $1,000 fine and 6 months' imprisonment for willful violations of the safety requirement. *Id.* at § 3708. Willful wage and hour violations can lead to debarment.

Workers aggrieved under this act should file a complaint with the contracting agency or the U.S. DOL. *See* 40 U.S.C. § 3703(a). Generally there is no private right of action. The DOL and the contracting agencies are the exclusive enforcement mechanism. The statute's wage and overtime requirements apply regardless of any less generous terms the employee or contractor agreed to or contracted for. *Id.* at § 3703(c); § 3702; *see also National Electro-Coatings, Inc. v. Brock*, 28 Wage & Hour Cas. (BNA) 1289 (1988), No. C86-2188, 1988 WL 125784 (N.D. Ohio July 13, 1988) (holding that the contract between the employer and the government need not contain provisions requiring payment for overtime in order to enforce the overtime provisions of CWHSSA). That case also held that the statute of limitations for CWHSSA is six years.

False Claims Act

Except in the limited circumstances noted above, there is generally no private right of enforcement under the various prevailing wage laws. The worker can ask for an investigation, future payments can be withheld from the contractor, and the contractor can be debarred from receiving government contracts in the future. Some courts, however, allow ***qui tam*** (*i.e.*, whistleblower) actions under the False Claims Act.

The False Claims Act (FCA) prohibits contractors from making false claims for payment from the government and applies in cases where workers are not being paid the correct wages under the prevailing wage laws, the contractor is accepting payments from the government, and the contractor is falsely claiming that it is complying with these laws. In FCA cases, any person who knows about the fraud can sue the company on behalf of the United States. This person is called a ***qui tam* relator** and s/he can recover civil penalties, plus a percentage of what the government recovers from the contractor. *See* 31 U.S.C. § 3730. If the FCA action is for violation of a statute without a private right of action, however, the *qui tam* relator may not sue on his or her own behalf or recover damages for his or her own unpaid wages. *See, e.g., United States v. Double Day Office Servs., Inc.*, 121 F.3d 531 (9th Cir. 1997) (FCA/Service Contract claim OK); *but see United States ex. rel Windsor v. DynCorp, Inc.*, 895 F. Supp 844 (E.D. Va. 1995) (misclassifying employees under the Davis-Bacon Act is exclusive province of Secretary of Labor, late filing of wage records is not a false claim).

Statute of Limitations

The *qui tam* complaint must be filed no more than six years after the date of the violation or no more than three years after the government knew or should have known of the violation, whichever is longer. The claim, however, can never be filed more than 10 years after the violation occurred. *See* 31 U.S.C. § 3731.

Procedure

Qui tam complaints must be filed under seal with a copy of the complaint served on the Attorney General and the U.S. Attorney who has jurisdiction – not on the defendant. *See* 31 U.S.C. § 3730(b)(2). This allows the United States to determine whether it wants to prosecute the case. It is preferable to have the U.S. Department of Justice (DOJ) try the case, as it will incur all the expense of researching the case. The complaint must remain under seal for 60 days, but the United States may request extensions. *Id.* at § 3730(c). It is not uncommon for complaints to be kept under seal for as many as two years.

If the DOJ does not want to try the case, the *qui tam* relator may prosecute the case privately. If the relator wins the case, s/he will be given a larger percentage of the money recovered on behalf of the government than s/he would receive had the DOJ successfully prosecuted the case after s/he initiated it. *See* 31 U.S.C. § 3730(c)(3) & (d).

Note: It is very important to include every claim in the original complaint, as *qui tam* claims must be plead with particularity, just like all other fraud claims. *See* Fed. R. Civ. P. 9(b).

Retaliation Claims

If a worker suffers adverse employment actions because of contemplating or actually filing a *qui tam* claim, the worker is protected. *See* 31 U.S.C. § 3730 (h). The worker does not have to actually file a claim to be protected; even triggering an investigation or simply providing information to the government will entitle her to protection from retaliation. *See Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994). If the worker prevails, s/he can receive double back pay with interest, reinstatement, special damages, and attorney's fees. *See* 31 U.S.C. § 3730 (h). If a worker sues her employer for retaliation as authorized in subsection (h), the most closely analogous state statute of limitations applies instead of the six-year statute of limitations for other FCA actions. *See Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409 (2005).

Note: This is a very complex law and seeking specialized legal assistance is recommended. For more information, contact the National Whistleblower Center (www.whistleblowers.org), P.O. Box 3768, Washington, DC 20027, (202) 342-1902; or Taxpayers Against Fraud's False Claims Act Legal Center. (www.taf.org) (202) 296-4826.

D.C. Wage & Hour Law

The D.C. wage and hour laws are generally more expansive than *FLSA* and should always be consulted when representing a D.C. worker in a wage and hour case. [7]

[7]The employer must follow whichever law is more beneficial to the worker. *See* 29 U.S.C. § 218 (a), 29 C.F.R. § 541.4.

The two main D.C. wage and hour laws are the D.C. Wage Payment and Collection Act, D. C. Code § 32-1301, *et seq.*, which requires that wages be paid in a timely manner, and the D.C. Minimum Wage Revision Act, D.C. Code § 32-1001, *et seq.*, which governs the payment of minimum wages and overtime. There are also Wage and Hour Rules within the D.C. Municipal Regulations. *See* 7 DCMRA § 900.1 *et seq.* The FLSA and the D.C. Minimum Wage Revision Act are to be interpreted similarly unless there are explicit differences. *See Villar v. Flynn Architectural Finishes, Inc.*, 664 F. Supp. 2d 94, 96 (D.D.C. 2009). Thus, it is appropriate to use federal case law and the FLSA regulations at 29 C.F.R. §§ 510-794 to interpret the D.C. Minimum Wage Revision Act, noting the exceptions spelled out there and in the D.C. Wage and Hour Rules.

Minimum Wage & Overtime

General Overview

Currently, the **minimum wage for private employers in D.C. is $8.25 an hour**. Under the D.C. Minimum Wage Revision Act, the D.C. minimum wage is set at the federal minimum hourly wage plus $1. *See* D.C. Code § 32-1003 (a). Pursuant to the Minimum Wage Amendment Act of 2013, the D.C. minimum wage will increase to **$9.50** as of July 1, 2014; to **$10.50** as of July 1, 2015; and to **$11.50** as of July 1, 2016. As of July 1, 2017, and on July 1 of every successive year, the minimum wage in D.C. will increase in proportion with the Consumer Price Index over the preceding 12 months.

In 2006, the Living Wage Act became law in the District of Columbia. D.C. Code §§ 2-220.01 – 220.11. The Living Wage Act currently requires employers that receive government contracts or government assistance in excess of $100,000 (including subcontractors receiving $15,000 or more of the funds received by the contractor or $50,000 or more of the funds received by the recipient of government assistance) to pay workers a living wage of **$13.40** per hour.[9] On March 1 of each year, the D.C. Department of Employment Services will announce that year's living wage. D.C. Code § 2-220.03. There are exceptions throughout the act and specifically at D.C. Code § 2-220.05.

As under the FLSA, non-exempt employees in D.C. are entitled to receive **overtime** at a rate of one and one-half times the employee's regular rate of pay for hours worked in excess of 40 per week. *See* D.C. Code § 32-1003(c). The D.C. Municipal Regulations further provide that overtime under the act must be **paid in the same manner as under the federal statute and regulations**, *see* 29 C.F.R. 778, with some exceptions (*i.e.*, the exception of Subpart A (General Considerations), Subpart E (Exceptions from the Regular Rate Principles), Subpart G (Miscellaneous), and Section 778.101 (Maximum Non-overtime Hours)). *See* 7 DCMR § 902.6.

[9] The law defines "government assistance" as "a grant, loan, or tax increment financing that results in a financial benefit from an agency, commission, instrumentality, or other entity of the District government." D.C. Code §220.02(3).

Record-keeping Requirements

Employers must keep for three years wage records that include the full names, Social Security numbers, addresses, occupations, and dates of birth of each worker; regular hourly rates of pay; the total number of hours worked each day and each workweek by each worker; the time of day and day of week each workweek begins for each worker; the basis on which wages are paid; a daily record of hours, total straight time, and overtime earnings; their gross and net wages including deductions or additions to wages; dates of payment; and the pay periods covered by the payments. *See* D.C. Code § 32-1008 (a)(1); 7 DCMR § 911. These records must be made available to the mayor for inspection upon request. *See* D.C. Code § 32-1008 (a)(2). Evidence that the employer failed to adhere to these requirements may be evidence that defendants' records are inadequate. *U.S. Dep't of Labor v. Cole Enterprises*, 62 F.3d 775, 779 (1995) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

In accordance with the Minimum Wage Amendment Act of 2013, employers of tipped workers will be required to submit quarterly wage reports to the Department of Employment Services, certifying that all tipped employees were paid a minimum wage. However, this provision of the act was passed subject to appropriation and will go into effect only after the implementation costs to create the certification software and staff enforcement are included in D.C.'s budget. It is expected that this will occur in time for this provision to go into effect on Oct. 1, 2014.

Itemized Statements Must be Provided to Employees

An employer must furnish to each worker at the time of payment an itemized statement showing the date of wage payment, gross wages paid (showing separately the earnings for overtime and non-overtime hours worked), an itemization of deductions and additions to wages, net wages paid, and hours worked during each pay period. *See* D.C. Code § 32-1008(b); 7 DCMR § 911.2. Employers must also post a summary of wage and hour law in a "conspicuous and accessible place." D.C. Code § 32-1009(a); 7 DCMR § 912. Minimum wage posters are available from the Office of Wage-Hour.

Coverage and Definitions

Employer: The term "employer" is broadly defined in the act. For example, it includes individuals as employers. In some cases, individual owners, managers, officers, or directors may be liable as employers even though there is also a corporate entity that is also liable.[10] It does not include, however, the D.C. or federal governments. *See* D.C. Code § 32-1002(3).

Practice Tip: Whenever possible, name individuals as defendants in addition to the corporate entity. Establishing the liability of both the entity and individuals increases the chances of collecting on a judgment and also increases the pressure on the defendants to settle the case.

[10] For a discussion of individual liability, please see the section on Wage and Hour Related Issues.

D.C.-based employee: A person is considered to be employed in the District of Columbia if that worker (a) regularly spends more than 50% of his or her working time in D.C.; or (b) is based in D.C. *and* regularly spends a substantial amount of his or her working time in D.C. and not more than 50% of his or her working time in another state. *See* D.C. Code § 32-1003(b).

Working time: The term "working time" is defined to include all of the time the employee: "(A) is required to be on the employer's premises, on duty, or at a prescribed place: (B) Is permitted to work; (C) Is required to travel in connection with the business of the employer; or (D) Waits on the employer's premises for work." D.C. Code § 32-1002(10). Examples of what constitutes working time can be found at 29 C.F.R. § 785.[11]

Regular rate: The term "regular rate" is defined to include all remuneration to the employee except for the items set forth in 29 U.S.C. §§ 207 (e)(1)-(7). Extra compensation described in 29 U.S.C. §§ 207 (e)(5)-(7) is creditable toward overtime compensation. *See* D.C. Code § 32-1002 (7). Reviewing the FLSA regulations is necessary when calculating the regular rate of pay for a worker who is paid a flat sum per week or other period; for workers who receive commissions; or for other special circumstances. *See* 29 C.F.R. §§ 778.0-778.603 – Overtime Regulations.[12]

Specific Minimum Wage Issues

Minimum Wage – Exemptions from Coverage

The act exempts the following categories of workers from the minimum wage provisions:

- Federal and D.C. government employees (D.C. Code § 32-1002(3))
- Executive, administrative, and professional employees (as defined by the Fair Labor Standards Act) (D.C. Code § 32-1004 (a)(1)).[13]
- Volunteers at educational, charitable, religious, or non-profit organizations (D.C. Code § 32-1002 (2)(A))
- Lay members "elected or appointed to office within the discipline of any religious organization and engaged in religious functions" (D.C. Code § 32-1002 (2)(B))
- Casual baby-sitters, meaning those who do so on an intermittent basis and whose vocation is not babysitting (D.C. Code § 32-1002 (2)(C))
- Outside salespersons, meaning (1) an employee who works regularly away from the employer's place of business selling or obtaining contracts; and (2) "hours of work not related to his or her outside sales do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer" (7 DCMR §§ 902.3, 999.2)

[11] However, references to the Portal-to-Portal Act have no force and effect. D.C. Code 32-1002 (10).

[12] But note that 7 DCMR § 902.6 states that subparts A, E, G and § 778.101of the FLSA regulations "shall have no force and effect."

[13] 7 DCMR § 999.1 defines "administrative," "executive," and "professional" capacity but also states that interpretations of these terms shall be made in accordance with 29 C.F.R. § 541. *See also Jones & Assocs. v. District of Columbia*, 642 A.2d 130 (D.C. 1994) (a worker without authority to hire, fire, or discipline employees, who did not have as his primary duty management of the company was not employed in a "bona fide executive or administrative capacity").

- Home newspaper deliverymen (D.C. Code § 32-1004 (a)(2))
- Laundry and dry cleaning occupation employees as set forth in Wage Order Number 5 issued by the former Wage-Hour Board (7 DCMR § 902.1)[14]

The minimum wage provision does not apply in instances where other laws or regulations establish minimum rates for the following:

- Disabled employees not covered by FLSA because the employer has a valid certificate issued by the U.S. Department of Labor authorizing payment less than the minimum wage (D.C. Code § 32-1003 (d))
- Job Training Partnership Act participants (7 DCMR § 902.4 (b))
- Individuals employed under the Older Americans Act of 1965, 42 U.S.C. § 3001 *et seq.* (7 DCMR § 902.4 (c))
- Individuals employed under the Youth Employment Services Initiative Amendment Act (7 DCMR § 902.4 (d))
- Adult learners, who are defined as "newly hired persons 18 years of age or older," and who can be paid the federal minimum wage for a period not to exceed 90 days (7 DCMR § 902.4 (e))
- Students employed at higher education institutions (*e.g.*, college, university, junior college, or professional school) may be paid the federal minimum wage (7 DCMR §§ 902.4, 999.2)
- Minors (younger than 18) may be paid the federal minimum wage (7 DCMR § 902.4)

Minimum Daily Wage

In D.C., there is also a minimum daily wage. A worker must be paid for at least four hours on each day s/he reports to work, unless the worker is regularly scheduled for fewer than four hours. The payment is the regular rate for hours worked plus the minimum wage for the hours not worked. *See* 7 DCMR § 907.1.

Split Shifts

In addition to the wages required by the wage and hour rules, the employer must pay one additional hour of wages at the minimum wage for each day that a split shift is worked. 7 DCMR § 906.1. A "split shift" is a schedule of daily hours where the hours are not consecutive and the total time out for meals exceeds one hour. 7 DCMR § 999.2. This rule, however, is not applicable to an employee living on the employer's premises. 7 DCMR § 906.1.

Employer Deductions and/or Charges

Housing & Meals

In limited circumstances, the employer may pay part of a worker's wages in something other than money. **Housing** costs may be deducted from a paycheck at no more than 80% of the

[14] Currently, Wage Order No. 5 does not appear to exist. Thus, it is likely that this exemption is no longer applicable.

rental value of the housing provided, as determined by "a comparison with the value of similar accommodations in the vicinity of those furnished." 7 DCMR § 904.1.

Practice Tip: A good way to check the value of a particular apartment is to check the rent control files at the D.C. Consumer and Regulatory Agency, Rental Accommodations and Conversion Division. You can request the file for an entire apartment building and check the rent ceiling and actual rent charged for all apartments in the building, then take an average to determine the rental value.

Allowances for **meals** may be deducted at not more than $2.12 per meal. 7 DCMR § 904.2. If an employee works fewer than four hours, only one meal allowance may be deducted; if the employee works more than four hours, only two meal allowances may be deducted. *Id.* Allowances may not exceed $6.36 per day for an employee who lives at his or her place of employment. *Id.*

Employers are required to maintain records of these allowances and must furnish workers with an itemized statement showing all deductions or additions. *See* 7 DCMR § 911.1 (j) & § 911.2.

For Certain Deductions – No Deductions that Reduce Wages Below Minimum Wage

An employer may not deduct or require the employee to pay the employer for "breakages, walkouts, mistakes on customer checks and similar charges, or to pay fines, assessments or charges" if such deductions reduce wages below the minimum wage. *See* 7 DCMR § 915.

Employers Must Pay Extra if Employees Buy or Care for Uniforms

It is the employer's responsibility to provide, maintain and clean any required uniforms or protective clothing. However, in lieu of purchasing, maintaining, and cleaning uniforms, the employer may pay the worker an additional 15 cents per hour beyond the prevailing minimum wage, up to $6 a week. 7 DCMR § 908.1. If the employer purchases but the employee maintains and cleans the uniform, the employer must pay an additional 10 cents per hour. 7 DCMR § 908.2. If the employee purchases and the employer cleans and maintains the uniform, the employer must pay an additional eight cents per hour. 7 DCMR § 908.3. This payment only applies to uniforms that are plain and washable and *does not* apply to protective clothing.

Employer is Responsible for Travel, Tools, and Other Work-Related Expenses

Employers are responsible for travel expenses and the purchase or maintenance of any tools required "in performance of the business of the employer." 7 DCMR §§ 909.1 & 909.2.

Workers Who Receive Tips

The minimum wage required to be paid by any employer in the District of Columbia to any employee who receives gratuities shall be $ 2.77 an hour, provided that the employee

actually receives gratuities in an amount at least equal to the difference between the hourly wage paid and the D.C. minimum wage (currently $5.48). D.C. Code § 32-1003(f). The employee must be informed about these provisions and all tips must have been retained by the employee (although pooling by employees who receive tips is allowed). *See* D.C. Code § 32-1003(g). The employer has the burden to prove the employee received at least as much tips as the amount of the allowance taken. 7 DCMR § 903.1.

Specific Overtime Issues

Overtime – Exemptions from Coverage

In addition to those employees exempt from the minimum wage provisions listed above, the act also exempts the following categories of workers from the overtime provisions:

- Seamen (D.C. Code § 32-1004 (b)(1))
- Railroad employees (D.C. Code § 32-1004 (b)(2))
- Car salesmen and mechanics – salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, if employed by a non-manufacturing establishment primarily engaged in the business of selling these vehicles to ultimate purchasers (D.C. Code § 32-1004 (b)(3))
- Car wash employees when 50% of the employer's business is from washing cars, and the worker receives overtime pay for hours worked more than 160 during a four-week period (D.C. Code § 32-1004 (b)(4))
- Parking lot/garage attendants (D.C. Code § 32-1004 (b)(5))[15]
- Airline employees who voluntarily exchange workdays to use air travel benefits (D.C. Code § 32-1004 (b)(6))
- Private household workers who live on the premises of their employer (7 DCMR § 902.5 (a))
- Companions for the aged or infirm (7 DCMR § 902.5 (b))[16]

Salaried Workers

An employer may wrongly assume that paying a worker who does not fit into one or more of the above exemptions a weekly or monthly salary exempts the employer from overtime liability, but this is not the case. Even if a worker is salaried, the employee may still be entitled to overtime pay. To determine the amount of overtime that may be owed, the worker's regular rate can be calculated by dividing the worker's *weekly* salary by the number of hours the salary was intended to compensate per week. 29 C.F.R. § 778.113. To determine the regular rate for workers with fixed salaries who work fluctuating numbers of hours per week, see 29 C.F.R. § 778.114.

[15] This exemption is contrary to federal law, which pre-empts local wage and hour laws, and most garages and parking lots do not try to take advantage of it. Parking lot or garage attendants who are denied overtime should file suit under the federal Fair Labor Standards Act. Note: A person employed as a cashier, guard, or maintenance person is not a parking lot or garage attendant. *See* 7 D.C.M.R. § 999.2.

[16] Persons who spend more than 20 percent of their time on household work not directly related to caring for the aged or infirm are not deemed a "companion for the aged or infirm." 7 D.C.M.R. § 999.2.

Commissioned Workers in Retail or Service Jobs

Overtime is not required for retail or service employees if the regular rate of pay exceeds 1½ times the minimum wage and more than ½ of the employee's compensation for a representative period (at least one month) represents commissions on goods or services. *See* D.C. Code § 32-1003(e); 7 DCMR § 905.

D.C. Wage Payment and Collection Law

The D.C. Wage Payment and Collection Law was passed in 1956, and is codified at D.C. Code §§ 32-1301 through 32-1310. The law requires employers to pay wages within certain time limits and provides remedies for violations.

Definitions & Coverage

The law applies to all employers "employing any person in the District of Columbia." D.C. Code § 32-1301(1). It does not specifically address workers who work in more than one jurisdiction, but like all remedial legislation, it should be liberally interpreted to find the broadest possible coverage.

Definitions

Employer: The term "employer" is broadly defined in the law. *See* D.C. Code § 32-1301 (1). Of particular importance, the term explicitly includes individuals as employers. In some cases, individual officers or owners may be liable as employers even though there is also a corporate entity that is liable. For a discussion of individual liability, see "Wage and Hour Related Issues" at the end of this chapter.

Employee: The law broadly defines "employee" to include "any person suffered or permitted to work by an employer except any person employed in a bona fide executive, administrative, or professional capacity." D.C. Code § 32-1301(2). The act specifically refers to the D.C. regulations for the definition of "executive, administrative and professional capacity." 7 DCMR § 999.1.

Wages: The Wage Theft Prevention Amendment Act of 2013 substantially broadened the act's definition of wages by explicitly including a number of types of compensation. "Wages" means all monetary compensation after lawful deductions, owed by an employer, whether the amount owed is determined on a time, task, piece, commission, or other basis of calculation. D.C. Code §13-1301(3). The definition of "wages" now explicitly includes:

(A) Bonus;
(B) Commission;
(C) Fringe benefits paid in cash;
(D) Overtime premium; and
(E) Other remuneration promised or owed:
    (i) Pursuant to a contract for employment, whether written or oral;

(ii) Pursuant to a contract between an employer and another person or entity; or
(iii) Pursuant to District or federal law.

Id.

Working day: The act states that working days are any days other than Saturdays, Sundays or legal holidays. D.C. Code § 1301 (5). Keep this in mind when determining what day wages are due to the employee.

Employees Exempt from Coverage

The following types of workers are not covered under the Wage Payment and Collection law:

- U.S. government or agency workers (D.C. Code § 32-1301(1))
- D.C. government or agency workers (D.C. Code § 32-1301(1))
- Workers subject to the Railway Labor Act[17] (D.C. Code § 32-1301(1))
- "Bona fide executive, administrative, or professional" workers as defined by the D.C. Regulations. (D.C. Code §32-1301 (2); 7 DCMR § 999.1)[18]

Wage Payment and Collection Rules

Wages for Non-Exempt Workers Must Be Paid At Least Twice a Month

Wages for non-exempt workers must be paid at least twice each calendar month on regular paydays designated in advance by the employer. *See* D.C. Code § 32-1302. Wages must be paid with "lawful money of the United States, or checks on banks payable on demand." *Id.*

Wages Must be Paid Within 10 Working Days of the Close of the Pay Period

There cannot be more than 10 "working days" between the close of a pay period and the payment of wages from that pay period. *See* D.C. Code § 32-1302. There are two exceptions to this requirement: (1) when a different period is specified in a collective bargaining agreement between an employer and a bona fide labor organization; or (2) when the employer, by contract or custom, paid wages at least once each calendar month prior to the law's 1956 enactment and has continued to do so since that time. *Id.*

Pay Stub Requirement

Every time wages are paid, employers must provide workers itemized statements of hours worked; gross and net pay, with the portions of wages from overtime hours or commission specified; and any deductions or additions to pay. *See* D.C. Code § 32-1008(b); 7 DCMR §

[17] This law applies generally to railroad and airline employees and provides a separate mechanism for wage and hour complaints. *See* 45 U.S.C. § 151 *et seq*.

[18] Although the D.C. Minimum Wage Revision Act refers to the FLSA and its regulations to determine who are "bona fide executive, administrative, or professional employees," the Wage Payment and Collection Law instead refers to the D.C. Regulations to determine whether an employee is exempt.

911.2. For more on employers' record-keeping requirements, see the discussion on "Overtime Rules" below.

Wages Must Be Paid Quickly After Termination of Employment

Unless otherwise specified in a collective bargaining agreement between an employer and a bona fide union, employers must meet the following requirements upon the termination of employment:

If a worker is discharged, wages must be paid the next "working day" following the discharge, except that when the worker "is responsible for monies belonging to the employer," the employer is allowed a period of four days from the date of discharge to determine the amount owed and pay wages. *See* D.C. Code § 32-1303(1). If a worker quits, wages must be paid on the next regular payday or within seven days (not working days), whichever is earlier. *See* D.C. Code § 32-1303(2). If an employee is suspended as a result of a labor dispute, the employer must pay wages earned by the next regular payday. D.C. Code §32-1303 (3).

Vacation Time When Workers Leave Employment

Workers are entitled to accumulated vacation pay when they leave employment, unless there is an agreement to the contrary. An employee may establish a right to monetary compensation for accrued but unused leave by showing that (1) prior to performance of the work, there was an agreement entitling the employee to accumulate leave, and (2) as of the termination date he or she had accumulated the claimed number of days. Any qualification on that right is in the nature of an affirmative defense that must be pleaded and proved by the employer. *See National Rifle Association v. Ailes,* 428 A.2d 816 (D.C. 1981).

Written Notice of a Bona Fide Dispute

If there is a bona fide dispute as to the amount of wages due, the employer must give written notice to the employee of the amount of wages conceded to be due, and must pay such amount without condition within the time limits set forth in Sections 32-1302 and 32-1303. D.C. Code §32-1304. Acceptance of payment by an employee under this provision does not constitute a release as to the balance of the claim for wages. *Id.*

Employee Misclassification – D.C. Workplace Fraud Amendment Act

Scope and Application

The District of Columbia City Council recently adopted the Workplace Fraud Amendment Act of 2012. The act applies only to the construction industry, with "construction" defined broadly to include "all building or work on buildings, structures, and improvements of all types," and including "moving construction-related materials on the jobsite." D.C. Council Bill 19-0169 (2012).

The act creates a presumption of an employment relationship in the construction industry

to prevent misclassification of employees as independent contractors. The act states that an employee-employer relationship will be presumed "when work is performed by an individual for remuneration paid by an employer." *Id.* Employers can rebut this presumption by demonstrating, to the satisfaction of the D.C. Mayor's Office, that one of two exemptions applies and the worker is therefore an independent contractor under the act. *Id.*

Exemptions

The act gives employers two ways to rebut the employee-employer presumption. First, an employer can satisfy the requirements to show that the worker is an "exempt person." The employer must show that the worker:

1. "Performs services in a personal capacity and employs no individuals other than a spouse, child, or immediate family member of the individual"; or
2. "Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result"; and
3. "Furnishes the tools and equipment necessary to provide the service"; and
4. "Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities, in which the individual exercises complete control over the management and operations of the business."

Id. Second, if the employer cannot demonstrate that the worker is an "exempt person," the employer can also rebut the presumption of an employer-employee relationship by proving the following three elements:

1. That the individual performing the work is free from control and direction over the performance of services;
2. The individual is customarily engaged in an independent trade, occupation, profession, or business; and
3. The work is outside the normal course of business of the employer for whom the work is performed.

Id.

Remedies and Enforcement

Employers found to have violated the act may be fined between $1,000 and $5,000 per employee misclassification. Employees misclassified can collect "any wages, employment benefits, or other compensation denied or lost as a result of the violation, plus an additional amount in liquidated damages." *Id.* All forms of appropriate equitable relief, including reinstatement and seniority rights, are available to those harmed by misclassification. Reasonable attorneys' fees and costs are also permitted. *Id.*

The act also allows for the assessment of penalties between $5,000 and $20,000 against any individual who knowingly aids or abets others in violating the act, or who knowingly forms a corporation or other entity for the purpose of evading the act or facilitating a violation of the act. "Knowingly" is defined as having "actual knowledge of, or acting with deliberate ignorance, or reckless disregard for the prohibition involved." *Id.*

The Workplace Fraud Amendment Act assigns the D.C. Mayor's Office as the primary enforcer of the act. The Mayor's Office is charged with investigating employee classifications that may violate the act, and has the authority to inspect business premises and payroll records and question and take statements from individuals. *Id.*

Misclassified construction workers may pursue their claims through the D.C. Office of Wage-Hour or bring a private action in court against their employer under the act.

The act also permits an interested party to file a private lawsuit. Although an "interested party" is defined broadly as any "person with an interest in compliance with this act," the party must also be "aggrieved by a violation of this act…by an employer or entity." *Id.* As the act was only enacted recently, the relevant terms – "interest" or "aggrieved," for example – have yet to be interpreted by courts. The action must be filed with the D.C. Superior Court within three years of the date of the alleged violation. *Id.*

Remedies in Wage Payment & Collection, Minimum Wage, and Overtime Cases

No Waiver of Rights by Agreement

A worker may not waive his or her rights under these acts, and any agreement by the employee and employer shall not be a defense to a claim for either unpaid wages or liquidated damages. *See* D.C. Code §§ 32-1012(d), 32-1305.

Types of Damages Available

Wage Payment and Collection – Liquidated and Consequential Damages Available

If an employer fails to pay a worker upon termination in accordance with the requirements of Section 1303(1), (2) or (3), the employer shall be liable to the employee for not only the wages due but also liquidated damages in the amount of 10% of the unpaid wages per working day after the day that wages were due or an amount equal to **three times the amount of the unpaid wages**, whichever is smaller. *See* D.C. Code § 32-1303(4). If the employer files a petition in bankruptcy, the liquidated damages will not accrue after the date of that filing if the employer is found to be bankrupt. *See* D.C. Code § 32-1303(4). The language of the act mandates an award of liquidated damages for violations of the act – *i.e.*, such an award is not at the discretion of the court as it is under the *D.C. Minimum Wage Revision Act*. *See Klingaman v. Holiday Tours, Inc.*, 309 A.2d 54 (D.C. 1973).

Minimum Wage and Overtime – Liquidated Damages Available

If an employer pays an employee less than s/he is due under the minimum wage and overtime provisions, that employer is liable for the unpaid wages plus an "additional amount" as liquidated damages. D.C. Code § 32-1012 (a). A court may decline to award liquidated damages if the employer demonstrates that "the act or omission that gave rise to the action was in good faith and that the employer had reasonable grounds for the belief that the act or omission was not

a violation." *See* D.C. Code § 32-1012(a).[19] It is no longer true that liquidated damages cannot be recovered in a court action if the employee has already accepted payment of the unpaid wages pursuant to an investigation of the Office of Wage-Hour. Recent amendments to D.C. Code § 32-1012(f) specify that an employee only waives his or her rights if s/he accepts full payment of wages *and* liquidated damages.

Although the act does not specify the amount of liquidated damages that can be recovered by a prevailing plaintiff, the D.C. Circuit has awarded liquidated damages equal to the amount of actual wages due. *See Arias v. United States Service Industries, Inc.*, 80 F.3d 509, 513 n.3 (D.C. Cir. 1996).

Attorneys' Fees and Costs

Plaintiffs who prevail in wage payment and collection cases and in minimum wage and overtime cases **must** be awarded attorneys' fees and costs. *See* D.C. Code §§ 32-1012(c), 32-1308(b).

Attorneys' fees are also mandatory for wage claims brought in small claims court, despite D.C. Small Claims Court Rule 19, which prohibits attorneys' fees absent such a provision within a written agreement, and even in those cases, limits fees to 15% of the judgment absent a showing of "exceptional circumstances." Small Claims Rule 19. The Wage Payment and Collection Act's statutory provision requiring attorneys' fees trumps the court rule. *See Curry v. Sutherland*, 1983 WL 131192, 26 Wage & Hour Cas. (BNA) 461 (D.C. Super. Ct. 1983).

Practice Tip: Attorneys appearing in Small Claims Court should be prepared to argue the basis upon which a fee award can be granted. It is recommended that the attorney take a copy of D.C. Code § 32-1308(b), *Curry v. Sutherland*, and the current Laffey Matrix of attorneys' fees to provide to the judge (found at the U.S. Department of Justice website, www.usdoj.gov).

Criminal Penalties

The D.C. Office of Wage-Hour can refer cases for criminal prosecution to the Criminal Division of the D.C. Office of Corporation Counsel's Office of Public Protection and Enforcement (OCC), which will evaluate the case. The OCC considers the likelihood of proving the elements of the case: 1) an employer/employee relationship; 2) hours worked; 3) non-payment; and 4) the employer's ability to pay at the time the wages were due. The more that advocates can develop evidence of these elements, the more likely it is that the OCC will take on

[19] *See Laffey v. Northwest Airlines*, the employer "must affirmatively establish that he acted both in good faith and on reasonable grounds." *Laffey v. Northwest Airlines*, 567 F.2d 429, 465 (D.C. Cir. 1976) (citing to 29 C.F.R. § 790.22 (b) which states "(1) the employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act."). However, *see also, McLaughlin v. Richland Shoe Co.* 486 U.S. 128, 134, 108 S.Ct. 1677, 1682 (1988). The *McLaughlin* Court criticized the *Laffey* standard and stated that "willful" should be defined as it was in *Trans World Airlines, Inc. v. Thurston*, which defined the term under the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985).

the case. Another possibility is to file a criminal complaint against the employer with the D.C. police. The worker can file a criminal complaint with the local police station where s/he lives or where the employer is located. **Note:** At this writing, neither the OCC nor the D.C. police have been very vigorous in their efforts to enforce wage and hour laws where the D.C. Office of Wage-Hour has not been effective.

Wage Payment and Collection

An employer that willfully violates the act despite having the ability to pay its employee is guilty of a misdemeanor. If convicted, the employer can be liable for a fine of up to $300 and subject to imprisonment of up to 30 days, or both, for a first offense. For subsequent offenses, the employer is subject to a fine of up to $1,000 and imprisonment of up to 90 days, or both. *See* D.C. Code § 32-1307 (a).

In addition to criminal penalties, the mayor can assess civil penalties up to a maximum of $500 per violation ($300 for the first violation). D.C. Code § 32-1307 (b).

Minimum Wage and Overtime

Employers that willfully violate § 32-1010 of the act can be fined up to $10,000 and sentenced to up to six months' imprisonment (imprisonment only on second conviction). *Id.* at § 32-1011 (a), (b). Criminal prosecutions are conducted by Corporation Counsel in D.C. Superior Court. *Id*. at § 32-1011(c).

In addition to criminal penalties, the mayor can assess civil penalties up to a maximum of $500 per violation ($300 for the first violation). *Id*. at § 32-1011(d).

Practice Tip: A demand letter from the employee may want to reference the existence of criminal penalties; however, lawyers need to be careful not to run afoul of the ethical requirement that the lawyer does not threaten criminal prosecution for the purpose of advancing interests in a civil case.

Enforcement Options in Wage Payment & Collection, Minimum Wage, and Overtime Cases

Workers can file claims for violations of their wage payment, minimum wage, or overtime rights with the D.C. Office of Wage-Hour (within the D.C. Department of Employment Services) or file claims in D.C. Superior Court, Small Claims or Civil Division. As discussed below, each of these options has advantages and disadvantages.

D.C. Office of Wage-Hour

The Office of Wage-Hour (OWH) is the mayor's office that investigates wage and hour violations. There is no fee for the filing of a complaint at OWH. The office is located within the D.C. Department of Employment Services at 4058 Minnesota Ave. SE, 4th Floor, Washington,

DC 20019. The telephone number is (202) 671-1880.

Workers should go to OWH in person to fill out the necessary forms. The "Assignment of Claim" form must be notarized. Persons with limited English proficiency or literacy problems can receive assistance in filling out the forms at the OWH or at the D.C. Employment Justice Center. If necessary, be sure to request an interpreter when filing a claim. (See Section on the D.C. Language Access Act, in the chapter entitled "Other Employment Rights.")

A fact-finding conference will be set for approximately three to four weeks from the date of the claim. Employers are asked to bring their records; sometimes employers appear over the telephone and fax in their documentation to the office. At the end of the conference, OWH may issue a determination. If the determination is in the employee's favor, the employer may be given an opportunity for an appeal hearing at OWH. All proceedings are informal and do not constitute an adjudicative hearing subject to the Administrative Procedure Act; in addition, the rules of evidence do not apply. Once a final finding has been made by OWH, it will pressure the employer to pay, although the OWH finding is not an enforceable judgment. OWH can threaten the employer with referral of the case to the Attorney General's Office (OAG) for prosecution; however, as of this writing the OAG has not vigorously pursued these claims.

The following chart summarizes the OWH process:

What happens:	When it should happen:
1. At Wage-Hour fill out: a. Intake form. b. Assignment of Claim form. c. Request a translator, if needed.	Must be within three years of event. (D.C. Code §§ 12-301(7) and (8); D.C. Code § 32-1013)
2. Office of Wage-Hour will notify the employer of: a. the claim b. hearing date	Before the Fact-Finding Conference.
3. Fact-Finding Conference	Approximately three to four weeks from the date the claim was filed. Workers should call OWH the day before, or the morning of, their fact-finding conference, in order to confirm that it is still going to happen.
4. After the Fact-Finding Conference, a determination is issued by an investigator.	No set time frame. Overtime claims may take longer.
5. If the determination is in the employee's favor, the employer may be given an opportunity to appeal the findings.	No set time frame.

6. If OWH issues final determination in employee's favor, it can negotiate a payment schedule with the employer. If the employer does not pay, the case is handed over to Assistant Attorney General's office for evaluation.	No set time frame.
7. If OWH issues final determination in employer's favor or Assistant Attorney General will not pursue a civil action, the worker can file a lawsuit in court. In fact, the worker can file a lawsuit without first going through OWH. This may be the best option if the statute of limitations is about to run out.	**The statute of limitations on the worker's claim is three years and <u>is not tolled</u> by the administrative filing.**

Workers can appear *pro se* or through legal counsel. In the past, however, OWH has expressed an interest in keeping counsel out of the process. For example, OWH has stated that once a worker's attorney sends a demand letter directly to the employer, OWH will discontinue its investigation. Also, OWH has attempted to prevent counsel from appearing at the hearings due to its concern that counsel will interfere with the proceedings. It is recommended that counsel attempt to appear at these hearings by agreeing in advance on a limited role (*e.g.*, to make sure the worker understands what is happening at the hearing). The OWH does sometimes allow the employer's attorney to appear.

The scope of OWH's powers are set forth in D.C. Code §§ 32-1005, 32-1007, and 32-1306 (b) and (c). There are also regulations at 7 DCMR § 913.1 (laying out the investigative authority of Department of Employment Services). This authority is very broad and includes the authority to obtain sworn testimony, investigate records, and enter and inspect worksites.

If the claim involves an investigation, the process can last from three to six months. Prior to accepting a case for investigation, OWH will determine whether the worker is covered by the law, which usually involves determining whether the worker is an independent contractor rather than an employee, or whether the worker falls under one of the "administrative, executive, or professional" exemptions to the minimum wage and overtime laws. If the worker does not, the office will generally proceed with the investigation.

If an employer is ultimately found to have violated either the minimum wage and overtime law or the wage payment act, the employer must pay the unpaid wages due to the worker to OWH, and OWH will then distribute the wages to the unpaid workers. *See* 7 DCMR § 914.1. If the employer pays the unpaid wages to OWH and OWH cannot pay the appropriate worker due to an inability to locate the worker or the worker's refusal to accept, then the unpaid wages escheat to the D.C. government. *Id.* at § 914.2.

<u>Enforcing OWH Findings</u>

Although employers are supposed to comply with OWH findings that they owe unpaid

wages, enforcement is difficult. Because the OWH has only investigatory, not adjudicatory, power, its findings do not have the force of a court judgment. *See William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1193-94 (D.C. 1980) (holding that administrative proceedings conducted by the Minimum Wage Board – now OWH – do not have a binding effect because the proceedings are investigatory, rather than adjudicatory). The OWH can, however, pressure employers to accept its findings under threat of further civil action or criminal prosecution by the Office of the Attorney General. The Attorney General does not prosecute every case. The mayor's authority to take an assignment of the claim and sue in court is found at D.C. Code § 32-1012 (e).

Liquidated Damages

Historically, a disadvantage to pursuing wage-hour claims through the OWH was that it generally did not pursue liquidated damages; therefore a worker would not receive double damages if s/he received her or his wages through the Wage-Hour office. The Wage Theft Prevention Amendment Act of 2013 may change this. The act amended the Wage Payment and Collection Law, D.C. Code § 32-1306(a) to clarify that OWH should pursue liquidated damages. Moreover, the act amended D.C. Code § 32-1012 to state that a worker does not waive his or her entitlement to liquidated damages under the Minimum Wage Act unless s/he accepts full payment of those damages through OWH.

Practice Tip: The advantages to using the Office of Wage-Hour to pursue minimum wage or overtime claims are that it is free and usually faster than proceeding in court. The office may investigate the employer's payroll records at the expense of the employer, which sometimes results in an earlier settlement.

D.C. Superior Court

Workers may sue employers under either the Wage Payment and Collection Act or the Minimum Wage Revision Act in any court of competent jurisdiction, including but not limited to the D.C. Superior Court's Small Claims Court and its Civil Division. *See* D.C. Code §§ 32-1012 (b), 32-1308 (a).

There are three advantages to pursuing claims in court rather than through the OWH. The first two are liquidated damages and attorneys' fees. The third significant advantage is that the statute of limitations is tolled when filing a complaint in court.

Where to File – Small Claims Court or Civil Division

If the claim is only for the recovery of money and the amount in controversy is less than $5,000, it must be brought in Small Claims Court. *See* D.C. Code § 11-1321. In Small Claims Court, there is mandatory mediation that occurs as soon as 60 days after the filing of a complaint. *See* D.C. Code §§ 11-1322, 16-3906(a). If no agreement is reached in mediation, the proceedings could still be completed in as little as 90-120 days from the date the complaint was filed.

Cases that cannot be brought in Small Claims Court must be brought in the Civil Division. Proceedings in the Civil Division can take one to two years to complete. It is important to note that a judgment from either court may still need to be enforced in a subsequent collection case by the prevailing employee.

Multiple Plaintiffs

If a minimum wage or overtime suit is brought by an employee on behalf of herself and other employees in a "collective action," the **other employees must file written consent with the court to be a party to the lawsuit**. *See* D.C. Code § 32-1012 (b). A simple statement such as "I give consent to be a party plaintiff in this case brought under the minimum wage and overtime laws of the District of Columbia [and the Fair Labor Standards Act, if applicable]," signed by the client, should suffice.

Union Members

Union members generally need to enforce their wage claims through the mechanism provided in their applicable collective bargaining agreement – the union grievance procedure. In *Papadopoulous v. Sheraton Park Hotel*, the Court held that the plaintiffs were required to exhaust grievance and arbitration procedures outlined within their collective bargaining agreement before filing claims under the Wage Payment and Collection Act or the Minimum Wage Revision Act. 410 F. Supp. 217, 220 (D.D.C. 1976).[20]

Statutes of Limitations

Wage Payment and Collection

The Wage Payment and Collection Act does not contain a statute of limitations provision. In the absence of such a provision, the courts generally apply the **three-year** general statute of limitations for contract actions in D.C., D.C. Code § 12-301 (7), the three-year catch-all statute of limitations, D.C. Code § 12-301 (8), or the three-year statute of limitations set forth in the D.C. Minimum Wage Revision Act, discussed below.

Minimum Wage and Overtime

Actions for unpaid minimum or overtime wages, or liquidated damages, under the Minimum Wage Revision Act must be brought within three years of the accrual of the cause of action. *See* D.C. Code § 32-1013.

[20] However, an individual employee may assert some federal claims, including FLSA claims, in court without first exhausting applicable grievance procedures. "The pervasive statutory schemes of both Title VII and FLSA evidence Congressional intent that these rights may be judicially enforced." *Leone v. Mobil Oil Corp.* 523 F.2d 1153, 1157 (D.C. Cir. 1975) (citing *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 229, 92 S.Ct. 859, 860, 31 L.Ed.2d 165 (1972)).

Tolling of Statute of Limitations

For purposes of determining when a statute of limitations is tolled, each pay period with insufficient pay gives rise to a new claim, because wage payments are periodic. *See William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191 (D.C. 1980). **Filing a claim with the Office of Wage-Hour <u>does not</u> toll the applicable statute of limitations.**

There are two primary tolling doctrines which may give rise to an extension of the employee's recovery period – "equitable estoppel" and "equitable tolling." Equitable estoppel precludes an employer from raising the statute of limitations as a defense if the employee was unable to assert his or her claims due to the inequitable conduct of the employer. *Chung v. U.S. Dep't of Justice,* 333 F.3d 273, 278-279 (D.C. Cir. 2003). Equitable tolling applies when the employee is unable to obtain information regarding the existence of his or her claim "despite all due diligence." *Id.* (citing *Currier v. Radio Free Europe/Radio Liberty, Inc.* 159 F.3d 1363, 1367 (D.C. Cir. 1998)).

Retaliation

The D.C. Minimum Wage Revision Act has an anti-retaliation provision. D.C. Code § 32-1010 (3). The D.C. Wage Payment and Collection Act does not have an explicit anti-retaliation provision.

Under the D.C. Minimum Wage Revision Act, it is illegal to discharge or in any other manner discriminate against an employee because the employee "has filed a complaint or instituted or caused to be instituted any proceeding under or related to [the minimum wage and overtime provisions] or has testified or is about to testify in any proceeding." *See* D.C. Code § 32-1010 (3); *see also Freas v. Archer Services, Inc.*, 716 A.2d 998, 1003 (D.C. 1998) (holding that lower court erred in granting motion to dismiss because plaintiff's claim for retaliatory dismissal after complaints about unlawful deductions from his paycheck).

<u>Wage & Hour Issues for Government Employees</u>

Federal Employees

Federal employees **in a union bargaining unit** covered by the provisions of a collective bargaining agreement (CBA) pursue wage and overtime claims as union grievances, unless the CBA specifically excludes the Fair Labor Standards Act (FLSA) or overtime claims. *See* 5 C.F.R. § 551.703.

For those employees not in a bargaining unit or whose CBA excludes such claims, workers can file claims with their agencies, with the Office of Personnel Management (OPM), or file a lawsuit in U.S. District Court or the Court of Federal Claims. *See* 5 C.F.R. §§ 551.703(c); 551.705. Employees may not simultaneously file claims with both their agencies and OPM.

If the worker decides to file a complaint with his or her agency and receives an unfavorable decision from the agency, s/he may then go to the OPM. If s/he chooses to first file a complaint with OPM and receives an unfavorable decision, however, s/he may not then seek a favorable determination from the agency. *See* 5 C.F.R. § 551.705. OPM encourages workers to use their agencies' grievance procedures, if available, but does not require it. OPM claims must be sent, in writing, to the following address:

Classification and Pay Programs Manager
Center for Merit System Accountability
Office of Personnel Management
1900 E St NW, Rm. 6484
Washington, DC 20415

For information regarding the contents of the claim, please visit the OPM website, at www.opm.gov. Alternatively, workers may contact OPM at 202-606-7948. Claims may not be filed electronically. If the worker's total claim, including liquidated damages, is for more than $10,000, the case may **only** be filed in the Court of Federal Claims.

If a federal employee alleges a violation of the equal pay requirement (not minimum wage, overtime, or child labor laws), the employee should file a complaint with the Equal Employment Opportunity Commission. *See* 5 C.F.R. § 551.701(b).

D.C. Government Employees

D.C. government employees are exempt from D.C.'s wage payment and collection law and the minimum wage and overtime law. However, D.C. employees are covered by the Fair Labor Standards Act, and most employees are covered by the Comprehensive Merit Personnel Act, which contains some wage and hour provisions.

In particular, the Comprehensive Merit Personnel Act provides that employees who are not covered by a collective bargaining agreement are entitled to overtime to the extent required by the Fair Labor Standards Act. *See* D.C. Code § 1-611.03(e).

The D.C. Code mandates a 40-hour workweek for D.C. government employees. *See* D.C. Code § 1-612.01(a). In addition, employees cannot work more than six consecutive days; rather, the workweek should be five days, Monday through Friday. *Id.*[21] If the workweek is not Monday through Friday, then the worker should have two days off scheduled consecutively. A worker should have the same working hours each day, and any non-overtime workday should not exceed eight hours. There should be no scheduled breaks in work time more than one hour (except in flexible schedules). *See* D.C. Code § 1-612.01(b). Work assignments must be scheduled at least one week in advance.

[21] There are exceptions for firefighters and public school and University of the District of Columbia (UDC) employees, who are subject to the wage rules of the Board of Education and the UDC Board.

Compensatory Time

In lieu of overtime, compensatory time is available for D.C. government employees at the discretion of the employer. *See* D.C. Code § 1-611.03(d); *see also* 29 C.F.R. §§ 553.20 to 553.28. The worker earns 1.5 hours off for every one hour of overtime worked. A worker can accrue up to 240 hours (30 days), or 480 (60 days) for emergency workers. *See* 29 C.F.R. § 553.21.

Enforcement

D.C. government employees cannot file claims at the Office of Wage-Hour to collect unpaid wages or to protest minimum wage or hour violations. Instead, workers should write to their personnel and payroll departments and keep copies of all correspondence. At the same time, employees should file union grievances to protect their claims and do so quickly because many grievance procedures have very short deadlines. A worker covered by a collective bargaining agreement should and must follow the procedures in his or her collective bargaining agreement. Non-union employees should follow the worker grievance procedure contained in the District Personnel Manual, except for D.C. Public School non-union employees, who should *see* 5 DCMR §§ 800 to 906.8.

Practice Tip: D.C. government workers and advocates may get better results if they send copies of complaint letters to the head of the agency, the head of the division, the head of Labor Relations, the Mayor's Office and the city councilperson with jurisdiction over the agency.

Maryland Wage & Hour Law and Wage Payment and Collection Law

Like D.C., Maryland has both minimum wage and overtime law, and a wage payment and collection law. The Maryland Wage and Hour Law (MWHL), Md. Code Ann., Labor & Empl. § 3-401 *et seq.*, addresses minimum wage and overtime protections. The Maryland Wage Payment and Collection Law (MWPCL), Md. Code Ann., Labor & Empl. § 3-501 *et seq.*, addresses the time and receipt of pay. Any agreement not to comply with these laws is void. *See* Md. Code Ann., Labor & Empl. § 3-405. These laws are discussed in detail below.

Practice Tip: The MWHL draws on numerous definitions and concepts found in the Fair Labor Standards Act. Where there is no case law under the Maryland law, Maryland courts will seek guidance from FLSA case law.

Definitions

The following definitions apply to Maryland's minimum wage and overtime law:

Employer: The term "employer" is broadly defined. Of particular importance, the term explicitly includes individuals as employers. The definition is drawn from the Fair Labor Standards Act, as are many definitions and doctrines applicable to the MWHL.

Practice Tip: Whenever possible, name individuals as defendants in addition to the business entity. Individual liability as an "employer" is fundamentally different and easier to establish under federal and state wage and hour laws, than under other statutes, or common-law doctrines, which typically require a "piercing of the corporate veil" to attach liability at individuals. Establishing liability of the entity and individuals increases the chances of collecting on a judgment and also increases the pressure on the defendants to settle the case.

Working Time: The term "working time" is defined to include all the time the employee is required to be on the employer's premises, on duty, or at a prescribed place; is permitted to work; is required to travel in connection with the business of the employer; or waits on the employer's premises for work. This time does not include commuting time; however, as stated above, after reporting to work the employee must be paid for the time necessary to travel to a worksite.

Work: Work is defined as any service performed by an employee on the employer's time. It does not involve voluntary service so long as the individual took the job knowing that he or she would not be paid and the activity is performed for a charitable, educational, non-profit, or religious organization.

Work does not necessarily require an employee to do or accomplish anything but involves fulfilling the requirements of the employer – even if that means doing nothing for an extended period of time. It includes time traveling to a worksite if the employee is required to report to, check in, or check out at a home office or shop.

When free to leave without penalty, the worker is on his or her own time, even if instructed to remain "on call" with a beeper. Once called back to work, however, the employer must compensate the employee.

Determining the Wages of Tipped Employees: When determining the wage of an employee who receives tips, the employer may credit the employee with a predetermined amount received from tips, not to exceed 50% of the minimum wage, currently $3.62. The employee may challenge the amount credited by proving that s/he actually received less than the amount set by the employer. *See* Md. Code Labor & Empl. § 3-419. For this provision to apply, the employee must regularly receive more than $30 in tips per month, have been informed by his or her employer about the provision, and must keep all of the tips received (although pooling arrangements are considered acceptable).

Exemptions from Coverage

The following workers are exempt from the Maryland's minimum wage and overtime law and its wage payment law:

- administrative, executive, or professional workers;
- non-administrative camp employees;
- children younger than 16 who work no more than 20 hours per week;

- outside salespeople;
- commissioned workers;
- seniors older than 61 who work no more than 25 hours per week;
- immediate family members of the employer;
- motion picture theater or drive-in employees;
- workers employed "as part of the training in a special education program for emotionally, mentally, or physically handicapped students under a public school system";
- workers for a company that cans, freezes, packs, or processes perishable fresh fruits and vegetables, poultry, or seafood;
- volunteers for a charity, educational institution, not-for-profit, or religious organization;
- workers for a café, drive-in, drugstore, restaurant, tavern, or other similar establishment that (i) sells food and drink for consumption on the premises, and (ii) has a gross annual income of less than $250,000; and
- certain types of farm work (Md. Code Ann., Labor & Empl. § 3-403(12)(b))

See Md. Code Ann., Labor & Empl. § 3-403.

Maryland Minimum Wage & Overtime Law

Minimum Wage

The minimum wage as set by the Fair Labor Standards Act is a "floor." As of February 16, 2006, Maryland increased the state minimum wage to **$6.15** per hour. *See* Md. Code Ann., Labor & Empl. § 3-413. As of the printing date of this manual, the federal minimum wage is $7.25/hour, and that is also the applicable minimum wage in Maryland. Under the recently enacted Maryland Minimum Wage Act of 2014, the minimum wage in Maryland is scheduled to increase to $8.00/hour in January 2015 and then will increase incrementally until reaching $10.10/hour in July 2018. Up-to-date information on the current federal minimum wage can be found at 29 U.S.C. § 206, or at the U.S. Department of Labor's web site: http://www.dol.gov/dol/topic/wages/minimumwage.htm.

Disabled Workers

Disabled workers must be paid the minimum wage except in cases where the U.S. Department of Labor has issued a certificate to the employer authorizing payment of less than the minimum wage. *See* Md. Code Ann., Labor & Empl. § 3-414.

Charges for Housing & Meals

An employer may include, as part of the wage of an employee, the cost that the employer incurs in providing board, lodging, or any other in-kind payment to the employee, unless a collective bargaining agreement precludes the items from being considered a part of an employee's wage. The Commissioner, however, may limit the charge to the actual cost, the reasonable cost, the average cost, or any other appropriate measure of fair value. *See* Md. Code Ann., Labor & Empl. § 3-418.

Cost of Uniforms

Generally, the cost of providing and maintaining a uniform that bears the name or logo of the employer may be passed on to an employee through a wage deduction – but only **with the employee's signed written authorization**. In addition, an employee may be held responsible for the depreciated value of the uniform if it is not returned as required.

Overtime

Additional Exemptions from Coverage

In addition to the employee exemptions identified above, Maryland's overtime law does not apply to the following employers:

- hotels or motels;
- restaurants;
- gasoline service stations;
- private country clubs;
- non-profit entities engaged in providing temporary at-home care services for the aged or infirm;
- amusement or recreational establishments if certain conditions are met;
- those for whom the Secretary of Transportation may set qualifications and maximum hours of service under 49 U.S.C. § 31502;
- mechanics, salespeople, or partspersons for automobiles, farm equipment, trailers, or trucks (if employer sells to the consumer);
- taxicab drivers

See Md. Code Ann., Labor & Empl. § 3-415(b) and (c).

Practice Tip: When litigating minimum wage and overtime claims, it is very important to simultaneously analyze the case under both the FLSA and MWHL. For example, while live-in domestic workers are not covered by the overtime protections of the FLSA, they are covered by the overtime protections of the MWHL. Similarly, while a Maryland motel housekeeper is not covered by the Maryland overtime protections, that same person is not exempt from the FLSA's overtime protections.

Calculating Overtime

A regular workweek is 40 hours within a seven-day period. *See* Md. Code Ann., Labor & Empl. § 3-420. Any additional hours must be credited at an overtime rate of 1½ times the "regular rate" at which the employee is paid. An employer cannot set a "regular" workweek of more than 40 hours and thereby avoid overtime liability unless subject to the limited exceptions listed below. When an employer pays a weekly salary and the employee works more than 40 hours, the employee is entitled to overtime under the FLSA and Maryland law.

Exceptions to the 40-Hour Workweek

Overtime may be computed based on a **60-hour workweek** if the employee is engaged in agriculture and exempt from the provisions of the FLSA.

Overtime may be computed based on a 48-hour workweek for an employee of a bowling establishment and for an employee of an institution that: (1) is not a hospital, but (2) is engaged primarily in the care of individuals who are aged, mentally retarded or sick, or have a mental disorder, and reside at the institution.

Record-keeping Requirements

Each employer shall keep, for at least three years, in or about the place of employment, a record of:

- The name, address, and occupation of each employee;
- The rate of pay of each employee;
- The amount that is paid each pay period to each employee; and
- The hours that each employee works each day and workweek;

See Md. Code Ann., Labor & Empl. § 3-424.

These record-keeping requirements mirror those of the Fair Labor Standards Act. Responsibility to keep records falls on the employer, and failure to provide the itemized statements can create an adverse inference at trial that the employer did not properly pay its workers. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). When the employer lacks records, an employee's direct testimony of his or her hours worked will generally be acceptable evidence of hours worked. Employees should be advised to keep their own records of hours worked, as contemporaneous employee records of hours worked are regularly accepted in court as evidence of entitlement to unpaid wages, including unpaid minimum wage and overtime compensation.

Statement of Wages and Deductions Must be Provided to Employees

An employer must furnish to each worker at the time of payment a statement of the gross earnings of the employee and deductions from those gross earnings. If the employer chooses to change the wage or payday of an employee, the employer must provide notice of the change at least one pay period in advance. *See* Md. Code Ann., Labor. & Empl. § 3-504.

State and Local Prevailing and Living Wage Laws

Practice Tip: The record-keeping requirements of the FLSA, the MWHL, and the MWPCL should be read in tandem. Employers will often not conform to these requirements, and such violations may serve to strengthen your client's claim of unpaid wages. *See, e.g.*, *Marshall v. Gerwill, Inc.*, 495 F.Supp. 744 (D.Md. 1980).

A patchwork of other laws gives additional wage protections and benefits to various types of workers in Maryland. Perhaps the most well-known are "Prevailing Wage" protections for workers in the construction industry working under certain public contracts. These are also sometimes referred to as "scale jobs" because detailed wage scales are set by governmental determination for different occupational categories and level of worker experience and training.

Maryland's Prevailing Wage Law

Maryland's Prevailing Wage Law, Md. Code Ann. State Fin. & Procurement §17-201, *et seq.*, governs, among other things, an employee's rate of pay, working hours, and other employer obligations on construction projects for which the state expends more than $500,000, and when state public funds cover 50% or more of the construction expenses. For construction projects covered by this law, all contractors and subcontractors on the job must pay the required prevailing wage rate, as well as overtime pay for hours worked in excess of 10 hours on any given day or for hours worked on Sundays and legal holidays.

Workers have a private right of action for the difference between the wages they were actually paid and the wages to which they were entitled under the established prevailing wage rates. In addition, aggrieved employees may also avail themselves of assistance from the **Maryland Division of Labor and Industry, Prevailing Wage Unit, 1100 North Eutaw St., Room 607, Baltimore, MD 21202; (410) 767-2342**. Contractors are subject to additional penalties for their failure to pay prevailing wage rates and for their failure to submit required certified payroll information to the state.

Maryland's Living Wage Law

Maryland's Living Wage Law is similar in many respects to its prevailing wage law, but it applies to different industries. While the prevailing wage law applies primarily to public works and construction contracts, the Living Wage Law applies to service contracts, with services defined as the "rendering of time, effort, or work rather than the furnishing of a specific physical product." COMAR 21.11.10.01. The law covers most forms of maintenance and information technology contracts, provided they meet the requirements listed below.

To fall under the Living Wage Law, employers must have state contracts lasting at least 13 weeks, valued for at least $100,000, beginning on or after Oct. 1, 2007. For a subcontractor to be covered, the prime contractor must be covered and certain size and contract value requirements must be met. Visit www.dllr.state.md.us for information on subcontractor requirements.

To be covered under this law, employees must be older than 18 and spend at least half of their work time on a public contract for the required value. If covered, employees on public service contracts in **Tier 1** (counties of Montgomery, Baltimore, Prince George's, Howard, Anne Arundel, and the city of Baltimore) must be paid **$13.19 per hour**. Employees in **Tier 2** (all other counties) must be paid **$9.91 per hour**. The Commissioner of Labor and Industry normally sets the rates within 90 days of July 1 each year.

The Commissioner of Labor and Industry enforces the Living Wage Law and can assess fines against employers. Employees can sue privately for their wages as well.

Baltimore City's Minimum, Prevailing & Living Wage Laws

Baltimore City has its own minimum wage law and prevailing and living wage ordinances. The Baltimore City Wage Commission is charged with enforcing these standards. *See* www.baltimorecity.gov.

Currently, the city's minimum wage is aligned with the federal minimum wage of $7.25 and applies to any employer in the city with two or more employees. Baltimore, however, was among the first jurisdictions in the country to pass a living wage (City Ordinance No. 442, City Code, Hours and Wages – Service Contracts § 26), which applies to work performed under city service contracts. The current living wage rate is $11.07 per hour. The prevailing wages for city-funded construction jobs under contracts worth $5,000 or more are established by the Board of Estimates and cover different job classifications and types of projects. Current prevailing wage rates can be found through the Wage Rate Survey link on the City Wage Commission's website (see above this paragraph). The City Wage Commission may be contacted at: Alvin Gillard, 10 N. Calvert St., Suite 915, Baltimore, MD 21202. Phone: (410) 396-3141.

Montgomery County's Living Wage Law

Montgomery County has a living wage law that requires contractors working under a service contract with the county to pay at least $13.95 per hour (a rate that is subject to upward adjustment to continue to reflect a living wage standard). The wage requirements for county service contractors are published on the Montgomery County website at: www.montgomerycountymd.gov.

Prince George's County's Living Wage Law

Prince George's County passed a living wage bill that requires contractors under county service contracts with a value greater than $50,000 and who employ 10 or more workers to pay employees a living wage. The wage rate is currently $11.25 per hour, and will be adjusted in relationship to the Consumer Price Index.

Workplace Fraud Act of 2009

The Workplace Fraud Act of 2009 addresses the widespread problem of misclassification of employees as "independent contractors" in the construction and landscaping industries. It became effective Oct. 1, 2009, and creates a presumption that, absent an exception, any work in these industries "performed by an individual for remuneration paid by an employer" is considered an employer-employee relationship. Md. Code Ann., Labor & Empl. § 3.903. The act establishes a system of fines. The law also requires employers in the construction and landscaping industries to provide notice and explanation of an independent contractor classification to any individual classified as an independent contractor or an exempt person with whom they contract. The law gives the Commissioner of Labor and Industry the authority to

investigate workplace fraud in the construction and landscaping industries, as workers in these industries are often classified incorrectly.

The employee-employer presumption in the Workplace Fraud Act is subject to three exceptions. An individual will not be considered an employee if: 1) the individual is an exempt person (*e.g.*, s/he performs services in personal capacity, free from outside direction and control, and personally provides the necessary tools/equipment); 2) the employer demonstrates that the individual usually controls his or her own business and usually works as an independent contractor; or 3) the employer provides the Commissioner with a signed contract with terms that clearly indicate that the individual is an independent contractor. *See* Md. Code Ann., Labor & Empl. § 3.903.1 *et seq*.

The requirements for each of these exceptions are extensive and fact-specific. See the construction and landscaping illustrations below for examples of how the law applies. Visit www.dllr.state.md.us for more information.

Construction Illustrations

The following examples, provided by the Maryland DLLR, demonstrate how the Workplace Fraud Act's classifications apply in the construction industry.

a. John Brown has an oral agreement with ACE Building Company (ACE) to do carpentry work on houses in a development designated by ACE. John Brown supplies his own hand tools. ACE supplies the material for each job. He has to do the work himself and he works on a full-time basis for the company. For some work he is paid on a piecework basis and for some work he is paid on an hourly basis. He does not have assistants, does not have an office, and does not advertise in newspapers or otherwise hold himself out to the public as being in the carpentry business. ACE can fire him any time before he finishes a job without contractual liability. John Brown is an employee of ACE.

b. HVAC, Inc. (HVAC) is the mechanical subcontractor on a large hospital construction contract. There is so much work to perform that HVAC contracts with two other companies, Air Supply, Inc. (Air Supply) and Kool and the Gang, Inc. (Kool) to assist with the work. Air Supply and Kool each have their own employees. HVAC retains some supervisory control over the employees of the other companies to make sure that the job is being done to the specifications of the overall mechanical contract. Air Supply and Kool exercise supervision over the installation methods of their respective workforces. Even though the two subcontractors are in the same business as HVAC and they perform the same type of work at the same location as HVAC, there is no employer-employee relationship between the contracting companies, and there is no employee-employer relationship between the subcontractors' employees and HVAC.

c. Sarah Green is a painting subcontractor who has contracted with XYZ General Contracting, Inc. (XYZ) to paint 264 houses. She hired 40 painters to do the work for her, although only about 15 are on the job at any one time. She supplies all the paint, brushes, and ladders. She designates the house to be painted and either pays the painters per house or by the

hour. Detailed instructions about the work are not necessary because of the painters' skill in their trade. Sarah Green inspects the work and requires them to repaint any unsatisfactory work. The painters cannot engage helpers without her consent. She can discharge them for any reason, and they are free to resign at any time. The painters assume no business risks and have no capital investment. None of them has an established business. The painters are employees of Sarah Green, not XYZ, and Sarah Green is an independent contractor, not an employee of XYZ.

d. Milton Manning, an experienced tile and terrazzo journeyman, orally agreed with MEGA, Inc. (MEGA) to perform full-time services at construction sites. He uses his own tools and performs services in the order designated by MEGA and according to its specifications. MEGA supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers' compensation insurance on him. He does not have a place of business or hold himself out to perform similar services for others. Either party can end the services at any time. Milton Manning is an employee of MEGA.

COMAR *09.12.40.06*

Landscaping Illustrations

The following examples, provided by the Maryland DLLR, demonstrate how the Workplace Fraud Act's classifications apply in the landscaping industry.

a. The JB Landscaping Company (JB) is hired to install the landscaping for a new large housing development. After JB commences work, it determines that it does not have enough employees to complete the job. JB subcontracts some of its work to the Red Company (Red), a smaller landscape company. JB sets the work hours for all workers on the job. Red provides the plants and other necessary tools and equipment for the job. Red maintains its own place of business but does not perform service for more than one person or company at a time. Either JB or Red can end the services at any time. Red pays federal employee taxes. Red is an independent contractor.

b. While working on a large landscaping job with a Friday deadline, the Tree Company (Tree) determines that it needs additional workers to meet that deadline. On Wednesday afternoon, Tree contacts Keith Brown to see if he knows at least five workers who can report to the landscaping job in the morning. Keith Brown engages five other workers to assist with the Tree job. Tree sets the hours, provides the tools and equipment, and frequently inspects the work during the day. Keith Brown does landscaping work but does not have his own business. Tree pays Keith Brown a lump sum, which he distributes to the other workers. Keith Brown and the five other workers are employees of Tree.

c. The Green Company (Green), a landscaping company, is hired to landscape a building complex. Once the work is under way, the owner of the building complex decides to install a pond with a waterfall. Green does not build ponds and waterfalls so it subcontracts that work to the Water Company (Water). Water is licensed to build ponds with waterfalls, and it carries workers' compensation and liability insurance under the company name. Water performs

services for more than one person at a time. All equipment and tools necessary for the pond installation are owned by Green. Because of Water's experience in the area, there is no oversight of the daily work by Green. Water is paid by Green at the completion of the job. However, Green is ultimately responsible for the final product if there are any faults or defects in the construction. Water is an independent contractor.

COMAR 09.12.40.05

When investigating a possible misclassification, the Commissioner may: 1) enter the employer's place of business (or worksite) for purposes of investigation; 2) require the production of records; 3) issue subpoenas for records and testimony; and 4) pursue judicial relief and the assessment of fines for an employer's failure to comply. Under the Workplace Fraud Act, employers who have been found to have mistakenly or unknowingly classified an individual employee incorrectly have 45 days to come into compliance without a penalty. If an employer does nothing to comply in the required time period, a penalty of up to $1,000 per misclassified employee may be imposed. Employers who "knowingly" misclassify employees, however, may be subject to a penalty of up to $5,000 per misclassified employee. An employer may be assessed up to double the $5,000 penalty if it has previously been found in violation by a final order of a court or administrative unit. An employer in violation three or more times may be assessed up to $20,000 per misclassified employee.

The Workplace Fraud Act also established an Employee Misclassification Task Force, charged with ensuring agency cooperation and enforcement of the act. Individuals who believe they have been misclassified can submit a form to the Task Force, which, after an investigation and a positive finding, will prompt the Task Force to notify other state agencies (Unemployment, Workers' Compensation, etc.) that this employee has been misclassified by his employer. Each agency will then take action according to the needs of the case and their own internal procedures and definitions. The form to report a potential misclassification can be found at http://wrmanual.dcejc.org/5. Completed forms can be mailed to:

Division of Labor and Industry
Worker Classification Protection Unit
1100 N. Eutaw St., Room 607
Baltimore, MD 21201

Maryland Wage Payment and Collection Law

The Maryland Wage Payment and Collection Law (MWPCL) passed in 1991 and is codified at Md. Code Ann., Labor & Empl. § 3-501 *et seq*. It requires employers to pay wages within certain time limits and provides remedies for violations. The text of the law and a relatively comprehensive guide named the "Maryland Wage Payment Guide" (http://wrmanual.dcejc.org/6) can be found on the Maryland Department of Labor & Industry website.

Additional Coverage Issues and Definitions

The law applies to all employers "who employ an individual in the State" of Maryland. The Wage Payment and Collection law does not specifically address workers who work in more than one jurisdiction, but like all remedial legislation, it should be liberally interpreted to find the broadest possible coverage. Md. Code Ann., Labor & Empl. § 3-501(b). The MWPCL does not apply to independent contractors. Thus, under the MWPCL, like the FLSA and MWHL, it is important to be able to identify an "employee" versus an "independent contractor."

Employee v. Independent Contractor:

For employee/independent contractor issues in the construction and landscaping industries in Maryland, see the discussion of the Workplace Fraud Act of 2009 above.

For the employee/independent contractor analysis in all other industries, the following factors should be considered:

- Who has the right to control and direct the individual who performs the services, not only to the result but to the details and means by which that result is accomplished?
- Who has the right of discharge?
- Who furnishes the tools, materials, and a place to work?
- Is the person performing the services in a position to suffer financial loss if the objective is not achieved?
- A signed agreement declaring that a worker is an independent contractor does not, by itself, establish that s/he is such.
- This is often a complex determination that has huge implications for both the employer and employee (*e.g.*, tax implications).
- Wages: The act defines "wages" to mean "all compensation due to an employee for employment," including overtime, a bonus, commission, fringe benefit, or any other remuneration promised for service. *See* Md. Code Ann., Labor & Empl. § 3-501(c).

Fundamental Rules about Wage Payments

Wages for Non-Exempt Workers Must be Paid at Least Twice a Month

Wages for non-exempt workers must be paid at least twice each calendar month, and paydays must be regular and designated in advance by the employer. If the regular payday of an employee is a non-workday, an employer shall pay the employee on the preceding workday. *See* Md. Code Ann., Labor & Empl. § 3-502(a)(1). Administrative, executive, or professional employees are exempt workers under this provision and may be paid less frequently than twice a month. *Id.* at § 3-502(2).

Wages Must be Paid Quickly after Termination of Employment

Each employer must pay a terminated employee all wages due for previous work done on or before the first pay day after the termination on which the employee was regularly scheduled

to be paid. *See* Md. Code Ann., Labor & Empl. § 3-505. This section does not permit employers to avoid the prompt payment after termination to administrative, executive, and professional employees. This is a "by the next payday" requirement.

Vacation Time when Workers Leave Employment

Workers are not automatically entitled to accumulated vacation pay when they leave employment; it depends on the employer's regular and stated policy. If the employer informs employees in writing at the time of hiring that unused vacation time will be forfeited when their employment is terminated, then an employee will not be able to claim and recover compensation for unutilized vacation time. On the other hand, where the employer does not have a written policy that limits the compensation for accrued leave to a terminated employee, that employee is entitled to the cash value of whatever unused earned vacation leave was left – provided it was otherwise usable. *See* http://wrmanual.dcejc.org/7.

Sick Leave when Workers Leave Employment

Sick leave is a safeguard against illness, and as such, unlike vacation pay, sick leave generally cannot be claimed at termination unless expressly written into the employee's contract or stated by the employer's policy.

Severance Pay

There is no requirement that any employer pay a departing employee severance pay.

Under certain conditions, what is termed "severance pay" is actually deferred compensation for work already performed (consideration for past services) or given as a gift, bonus, or incentive for the outgoing employee to do or refrain from certain actions. For a detailed discussion, *see Stevenson v. Branch Banking and Trust Corp.*, 159 Md. App. 620, 638 (2004).

Deductions from Wages

An employer may not take any deductions from an employee's paycheck unless the deduction is pursuant to existing law (such as the deductions for income tax withholding and social security) or those otherwise legally permitted. Md. Code Ann., Labor & Empl. § 3-503. The Maryland Division of Labor and Industry explains the basic standards for wage deductions as follows:

"Work, whether satisfactory or not, must be awarded compensation. Wage deductions are extraordinary, and are prohibited unless:

(1) A court has ordered or allowed the employer to make the deduction. Examples include court ordered wage garnishments and orders to pay child support.
(2) The Commissioner of the Maryland Division of Labor and Industry has allowed the deduction to offset or "pay for" something of value the employee has received. Examples include long-distance telephone calls on the employer's business phone, personal loans, wage advances, etc.

(3) Allowed by some law or regulation of the government. Examples include state and federal taxes.

(4) The employee has given express written authorization to the employer to make the deduction. This should take the form of a separate and distinct statement, signed by the employee, concerning only the deduction and nothing more. Even with a proper authorization, however, employers must still pay at least the federal minimum wage in the case of a deduction made to offset a loss to the employer due to the admitted or court determined fault or negligence of an employee (for example, careless damage to the employer's truck). If the deduction is made to offset something the employee received or retained from the employer which had monetary value (for example, personal loan, use of long-distance telephone line, materials, etc.), the deduction may reduce the employee's wages below the minimum wage. Finally, an authorized deduction may be invalid if it violates or is inconsistent with other federal or state laws or regulations."

Practice Tip: Some employers regularly violate this section of the law by illegally deducting from employees' pay. Illegal deductions include those for uniforms when not authorized; deductions for "breakage, spoilage," and other undocumented costs; and workers' compensation insurance payments.
See www.dllr.state.md.us/.

Remedies & Enforcement

Remedies

Maryland Minimum Wage & Overtime Violations

If the employer pays the worker less than the minimum wage, the worker may bring an action against the employer for the amount due and reasonable attorneys' fees and costs. Attorneys' fees and costs, however, are not mandatory. *See* Md. Code Ann., Labor & Empl. § 3-427(a). An agreement to pay the worker less than the minimum wage is not a valid defense to the action. *Id.* at 3-427(c). The act also provides for criminal penalties of a fine up to $1,000. *Id.* at 3-428(d).

Maryland Wage Payment Violations

If the employer has not paid the worker, the worker can bring an action two weeks after he or she should have been paid. The worker may recover the amount owed, and if the wages were not withheld "as a result of a bona fide dispute," up to three times the amount of the wages owed, plus attorney's fees and costs. *See* Md. Code Ann., Labor & Empl. § 3-507.[22]

In addition, an employer who willfully violates the Maryland Wage Payment Act is guilty

[22] The Maryland Court of Appeals has interpreted this language to mean whether the employer had "act[ed] in good faith" in withholding the wages owed. *See Admiral Mortgage v. Cooper*, 357 Md. 533, 543 (2000).

of a misdemeanor and may be fined as much as $1,000. A worker who knowingly makes a false statement to a government official in connection with an investigation under this subtitle is guilty of a misdemeanor and may be fined as much as $500. *See* Md. Code Ann., Labor & Empl. § 3-508.

Finally, notwithstanding an employee's claim, the Commissioner of Labor and Industry may enforce the provisions of the Maryland Wage Payment Act by (a) trying to informally mediate any dispute; or (b) with the written consent of the employee, asking the Attorney General to bring an action on behalf of the employee. *See* Md. Code Ann., Labor & Empl. § 3-507. As in an employee suit, the court may award up to three times the deserved wage, and reasonable counsel fees and other costs. Under current practice, the Commissioner is underfunded and not enforcing the Wage Payment Act through this government power.

Legislation was approved during the 2009-2010 legislative sessions "clarifying" that the definition of the term "wage" as used in the MWPCL includes unpaid overtime wages. *See* HB 214/SB 694. The express purpose of this legislation was to reject U.S. district court decisions which held to the contrary. *See, e.g., McLaughlin v. Murphy*, 372 F. Supp. 2d 465 (D.Md. 2004). This means that overtime wages due under the MWHL or the FLSA are subject to the potential "trebling" of damages under MWPCL. While this legislation took effect on Oct. 1, 2010, the position of employee advocates is that the language in HB214/SB 694 that states that the statute "clarifies" the existing law means that claims for unpaid minimum wage or overtime wages are subject to trebling under MWPCL even if the violations occurred prior to Oct. 1, 2010.

Attorneys' Fees and Costs

A worker who wins his or her lawsuit under either the MWHL or MWPCL may seek **reasonable attorneys' fees** and other costs, though the award of costs and fees is not mandatory. As stated in *Friolo v. Frankel*, 373 Md. 501 (2003), the lodestar approach (multiplying the reasonable number of hours worked times a reasonable hourly rate of the attorney, then considering case-specific adjustments) applies under both the MWHL and MWPCL. The court specified that in all instances, a case-by-case analysis will be done to reach a final award of attorneys' fees. *See also* Md. Code Ann., Labor & Empl. § 3-507.1.

Practice Tip: Under the FLSA, an award of attorneys' fees to a prevailing plaintiff is mandatory. Thus, if bringing a claim under MWHL and/or MWPCL, the attorney should analyze whether there is a claim under the FLSA (which is likely if there is a MWHL claim) and also plead the FLSA if it is important to be able to recover attorneys' fees.

Enforcement

Private Lawsuits

Both the MWHL and MWPCL allow for private parties to bring suit. Lawsuits can be brought in state District Court for claims less than $30,000. The District Courts conduct bench trials only. Claims valued at $5,000 or less are considered "small claims"; in small claims court there is no discovery and the rules of evidence generally do not apply. The state Circuit Court

has jurisdiction for claims more than $5,000. Either plaintiff or defendant can request a jury. If a plaintiff files a claim in district court that is valued over $15,000, a defendant can request the case be transferred to Circuit Court by requesting a jury.

Pursuant to its supplemental jurisdiction, a federal court may hear a case in which claims are brought pursuant to the FLSA and state law.

Practice Tip: Both the MWHL and the MWPCL allow for, but do not require, the prevailing plaintiff to be awarded attorneys' fees. State court judges do not generally have the same familiarity with trying cases under fee-shifting statutes as do federal judges. This should be taken into account when determining in which forum to file suit.

Wage Liens

As of October 1, 2013, employees in Maryland have a powerful new tool to collect unpaid wages. The Lien for Unpaid Wages Law, codified at Md. Code, Lab. & Empl. Art., § 3-1101, *et seq.*, allows employees to establish a lien against their employer's personal or real property by serving an employer with a notice of unpaid wages (the form of this notice is the responsibility of Maryland DLLR and is yet to be determined). Importantly, **an employer has the burden to dispute the amount owed by filing a complaint in Circuit Court**. If the employer does not file a complaint within 30 days, the employee may record the lien. At that point, presumably, the employer may not contest the encumbrance of his property. Less clear is how such proceedings bear on a subsequent suit for money damages.

Administrative Complaints

In addition to the private cause of action afforded employees under both of Maryland's wage statutes, **complaints for violations of the state minimum wage and wage payment laws** may be submitted to the Maryland Division of Labor and Industry, **Employment Standards Division at 410-767-2357**; Monday-Friday, 8 a.m.-5 p.m. The division suggests, but does not require, that the employee send a demand letter to the employer prior to filing of a complaint with the agency. The Maryland Wage Complaint Form, to be sent to the agency, may be found at http://wrmanual.dcejc.org/8 (English) or http://wrmanual.dcejc.org/9 (Spanish). Generally, the Division of Labor & Industry will not investigate claims of less than $200.

Correspondence may be sent to 1100 North Eutaw St., Room 607, Baltimore, MD 21201. The division will send the employee a claim form to be completed and returned. Upon receipt of a claim form, the Employment Standards Division will assign an investigator to the case and seek to resolve the claim for unpaid wages with the employer. If these efforts fail, the case may be referred to the Attorney General's office for filing of a lawsuit on behalf of the employee.

This office is understaffed. If a complainant can secure private counsel, the agency will generally stop its investigation.

Complaints of overtime violations and federal wage and hour law violations should be

submitted to the U.S. Department of Labor Baltimore District Office Wage and Hour Division at 1-866-487-9243 or (410) 962-4984. Because the federal standards are more comprehensive and protective than the state's standards, DLLR refers persons complaining of overtime violations to the federal agency.

Maryland Flexible Leave Act

Effective Oct. 1, 2008, the Flexible Leave Act, Chapter 644 of the Laws of Maryland 2008, authorizes employees of employers with 15 or more individuals to use "leave with pay" for an illness in the employee's immediate family which includes a child, spouse or parent. Leave with pay is considered time away from work for which an employee is paid and includes sick leave, vacation time, and compensatory time. An employee may only use leave with pay that has been earned. Employees who earn more than one type of leave with pay may elect the type and amount of leave with pay to be used. An employee who uses leave with pay under this law is required to comply with the terms of any collective bargaining agreement or employment policy.

The Flexible Leave Act prohibits an employer from discharging, demoting, suspending, disciplining, or otherwise discriminating against an employee or threatening to take any of these actions against an employee who exercises rights under this law. This law does not affect leave granted under the Federal Family and Medical Leave Act of 1993 (FMLA).

Criminal Complaint for Theft of Services

Another possible avenue of relief for an employee who has not received earned compensation within the legally mandated time frame is the filing of a criminal charge under the Maryland Theft of Services statute. *See* Md. Crim. Law, § 7-104(e). This statute makes it a crime to obtain compensable services of another "by deception." This crime is a felony when value of the services involved are worth $500 or more. It carries a potential penalty of up to 15 years imprisonment, a fine not exceeding $25,000, or both, and orders of restitution.

Bad Check Relief

In some instances employees with unpaid wage claims will have been issued checks with insufficient funds by their employer. In such instances, in addition to remedies available through the wage payment (and wage and hour laws), the employee may have a remedy under Maryland's "Bad Check" law. *See* Md. Code, Comm. Law Art., §§ 15-801–4. Under this statute, when the maker of a bad check does not remedy the bounced check within 10 days after the bad check has been "dishonored," the holder of the bad check may send a written notice of dishonor to the maker and demand payment for the face amount of the check and a collection fee of up to $35. After 30 days from the date the written notice of dishonor was sent, if the maker of the bad check continues to fail to make good on the failed check, the holder may be entitled to additional damages for an amount up to two times the amount of the check, but not in excess of $1,000. The written notice of dishonor shall be sent by mail to the last known address of the maker, and must substantially comply with the form prescribed by § 15-803(a) of the Commercial Law Article.

Mechanics' Liens

Under Maryland's mechanics lien statute, Maryland Real Property Code §9-101 *et seq.*, all new private construction projects and projects in which existing structures are renovated to the extent of 15% or more of their value are usually subject to attachment of a mechanics lien to cover debts incurred by subcontractors, including individual laborers working for subcontractors, for work performed (and materials provided) to the construction project. This is a relatively underutilized tool for recovering unpaid wages and is likely to be particularly effective on prominent construction projects.

For a laborer to obtain a mechanics' lien, he or she must give written notice of an intention to claim a lien to the owner of the property on which the work was performed. This notice must be provided within 120 days after performance of the work. (Each paycheck is a separate occurrence of debt. The 120 days runs against each pay period, including the first workweek, and does not run from the end of the project.) The written notice must be in the form set out in the Mechanics Lien statute (§ 9-104) and needs either to be hand-delivered to the owner of the property or sent by registered or certified mail, return receipt requested.

Section 9-104 provides the following approved language:

Notice to Owner or Owner's Agent of
Intention to Claim a Lien

_____ (Subcontractor) did work or furnished material for or about the building generally designated or briefly described as
_____
_____

The total amount earned under the subcontractor's undertaking to the date hereof is $ ..... of which $ ..... is due and unpaid as of the date hereof. The work done or materials provided under the subcontract were as follows: (insert brief description of the work done and materials furnished, the time when the work was done or the materials furnished, and the name of the person for whom the work was done or to whom the materials were furnished).

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing notice are true to the best of the affiant's knowledge, information, and belief.

_____
(Individual)
on behalf of
(Subcontractor)
(Insert if subcontractor is not an individual)

After notice has been properly given and if payment has not been made, the contractor or employee must file a petition in the Circuit Court in that county where the real property at issue

is located. The petition must be filed within 180 days after completion of the performance of work (or the furnishing the materials). The court will then order the property owner to show cause why the mechanics lien should not attach. The court is authorized to enter a final order granting the lien to the petitioner if the owner fails to respond to the show cause order, or fails to show cause why the lien should not attach. An evidentiary hearing will be scheduled if the property owner presents evidence of a legitimate dispute concerning petitioner's claim to a lien.

Little Miller Act Claims

The Miller Act is a federal statute that requires general contractors to purchase a payment bond on federally funded construction contracts (of $100,000 or greater value) for construction or renovation of public property in lieu of a mechanics lien remedy since such is not available against government property. Many states have passed what are called "Little Miller" acts providing similar requirements and remedies for construction projects on state property. Maryland's "Little Miller Act" is codified at Md. Code Ann., State Fin. & Procurement § 17-101 *et seq.* and covers construction projects on state property where the contract is valued at $100,000 or greater. (Sub-state jurisdictions may impose similar requirements for contracts valued between $25,000 and $100,000.)

The contractor is required to provide "payment security" typically in the form of a bond for 50% of the value of the contract. Persons who have supplied labor ("suppliers") under the project but who have not received their earned wages are entitled to sue for their unpaid wages against the payment security. A supplier who does not have a direct contractual relationship with the contractor (that is, someone who worked for a subcontractor) must give written notice to the contractor by certified mail of his or her intent to sue, within 90 days after furnishing labor or materials to the project. The notice must include detail as to the amount of the debt, the cause of the underlying debt (*e.g.*, unpaid wages for labor performed and on what dates), and the identity of the subcontractor who has failed to compensate the claimant for his or her labor. A supplier who does have a direct relationship with the contractor may file directly without giving notice of the intent to sue. Suit must be filed within one year of when the state accepts the construction project as complete.

Retaliation

The MWHL states that an employer may not discharge an employee because the employee has (1) complained to the employer or the state agency that the employee has not been paid in accordance with the act's minimum wage and overtime provisions; (2) brought an action under the act; or (3) testified in an action brought under the Act. *See* Md. Code Ann., Labor & Empl. § 3-428(a)(3). The Maryland Wage Payment and Collection Law does not contain an explicit retaliation provision. Claims under that statute, however, are generally allowed.

Virginia Wage & Hour Law

Minimum Wage

Virginia has a minimum wage act, but it mimics the federal minimum wage of $7.25 under the Fair Labor Standards Act (29 U.S.C. §201 *et seq*.). *See* Va. Code Ann. §40.1-28.10. Virginia does not have its own overtime laws. For overtime claims, workers have to rely on federal law and file claims with the U.S. Department of Labor.

Exempt Workers

There are numerous exceptions to the Virginia Minimum Wage Act, including but not limited to the following:

- Farm laborers and workers;
- Domestic workers or those employed in a private home or in a charitable institution primarily supported by public funds;
- Persons acting for an educational, non-profit, religious, or charitable organization where the employee-employer relationship does not exist or where the services are done on a volunteer basis;
- Newsboys, shoe-shine boys, golf course caddies, baby-sitters, ushers, doormen, concession attendants and cashiers in theaters, persons working for a boys' and/or girls' summer camp;
- Traveling salesmen or outside salesmen working on a commission basis;
- Taxi drivers
- All persons younger than 16, and all persons younger than 18 who are employed by a parent or legal guardian;
- Persons whose earning capacity is impaired by physical or mental handicap;
- Persons whose employment is covered by the Fair Labor Standards Act as amended;
- Persons confined in any penal, corrective, or mental institution in Virginia.
- Persons who normally work and are paid based on the amount of work done
- Students and apprentices in a bona fide educational or apprenticeship program
- Persons younger than 18 currently enrolled in any secondary school, higher education institution, or trade school and employed 20 hours or less a week
- Persons enrolled full-time in any secondary school, higher education institution or trade school and in a work-study program or its equivalent at the institution where they are enrolled

See Va. Code Ann. §40.1-28.9(B).

Exempt Employers

Employers that employ fewer than four employees at any one time (family members do not count as employees for this purpose) are exempt from the act. *See* Va. Code Ann. § 40.1-

28.9(B)(15).

Remedies and Penalties

Employers who "knowingly and intentionally" pay workers less than the required minimum wage are punishable by a fine of at least $10 and not more than $200. *See* Va. Code Ann. § 40.1-28.11. Additionally, the employer must pay the worker the balance of the unpaid minimum wages, plus interest at eight percent per annum accruing from the date the wages were due to the worker. The court also may require the employer to pay the worker's reasonable attorneys' fees. *Id.* at § 40.1-28.12.

Alexandria City's Living Wage Policy

Alexandria City has a "living wage" ordinance, which requires companies holding service contracts performed for city-owned or city-controlled property to pay workers **$13.13/hour**.[23] Construction contracts for more than $50,000 that are formally solicited are exempt under the ordinance. All contractors awarded a contract requiring the Living Wage are required to provide quarterly and annual reports of wages paid to the city. If an employee believes he is entitled to the Living Wage and he is not receiving it, the worker should contact the city's Director of Procurement. The Director of Procurement has the authority to terminate the contract and debar the contractor from doing business with the city. For more information, contact the Procurement Department at (703) 746-4944, at Suite 301, 100 North Pitt St., Alexandria, VA 22314.

Wage Payment & Collection

Wages Must Be Paid At Least Twice a Month

Employers must establish regular pay periods for workers, with salaried workers paid at least once a month and workers who are paid on an hourly rate paid at least once every two weeks or twice a month. Students enrolled in a work-study program at a secondary school, trade school, or institution of higher education may be paid once a month at the option of the hiring institution, as may workers with weekly wages of more than 150 percent of Virginia's average weekly wage,[24] upon agreement by the worker. *See* Va. Code Ann. § 40.1-29(A). Only executives are exempted from these requirements. *Id.*

Wages Must Be Paid Quickly After Termination or Quitting

If a worker is terminated or quits, the employer must pay all wages or salary due for work performed up to the termination, on or before the next regular payday, or the day on which the worker would have been paid had employment not been terminated. *See* Va. Code Ann. § 40.1-

[23] The City Council adopted an ordinance on Sept. 12, 2009, that rolled the FY09 contract rate ($13.65) back to the FY08 level ($13.13). Any contract entered into *after* the date of the ordinance uses the $13.13/hour rate.

[24] The Virginia Employment Commission most recently listed the Average Weekly Wage at $994. *See* Virginia Employment Commission, *Quarterly Census of Employment and Wages*, 4th Quarter 2009.

29(A)(1).

Method of Payment

Wages may be paid in U.S. dollars, by check payable at face value in U.S. dollars, by prepaid debit card, or by direct deposit into an account designated by the worker. *See* Va. Code Ann. §40.1-29(B).

Withholdings

With the exception of payroll, wage, and withholding taxes, employers may not withhold any part of a worker's wages without the written and signed consent of the worker. Employers are required to provide workers with a written statement of gross wages earned for any given pay period and the amount and purpose of any deductions from these wages upon the request of the worker. *See* Va. Code Ann. § 40.1-29(C). Additionally, employers may not require workers to forfeit wages as a condition of employment or the continuance of employment, nor may the employer require a worker to sign an agreement providing for such forfeiture. *Id.* § 40.1-29(D). (Workers who are considered executive personnel are an exception to this rule). However, wages may include the employer's reasonable costs of furnishing lodging and/or meals to the worker if such are both customarily provided by the employer and used by the worker. *Id.* § 40.1-28.9 (C).

Remedies

Employers who violate the Virginia Wage Payment Act are liable for the full amount of wages due to the worker, plus interest at eight percent per annum from the date the wages were due, plus attorneys' fees of one-third of the amount of the judgment. *See* Va. Code Ann. § 40.1-29(F) & (G). Employers who knowingly withhold wage payments or fail to make timely payments also may be subject to a civil penalty of up to $1,000 for each violation. *Id.* § 40.1-29(A)(2). Employers who willfully violate this law with intent to defraud a worker also are guilty of a misdemeanor for claims less than $10,000, and, for claims of at least $10,000, employers are guilty of a class 6 felony. *Id.* at 40.1-29(E).

Statute of Limitations

For **unwritten contracts**, the statute of limitations is **three years**; while **written contracts (defendant signed) have a statute of limitation of five years**. *See* Va. Code Ann. § 8.01-246. The limitations apply in Wage Payment claims and the Virginia Minimum Wage Act claims. *See* Va. Code Ann. § 40.1-28.8 *et seq.*

Filing a Wage & Hour Claim

Administrative Complaints

At one time, wage and hour claims arising in Virginia could be filed with the Virginia Department of Labor and Industry (DOLI); however, for several years this agency has been underfunded. It is possible to file a wage and hour complaint with the DOLI; however, currently

it is unknown whether complaints submitted to this agency are actually investigated or even what the process is. Therefore, EJC does not recommend filing a complaint with this agency. For more information, please see the agency website: www.doli.virginia.gov. Because there is no Virginia law that provides workers with the right to overtime, overtime claims are outside the jurisdiction of the Virginia DOLI.

Federal wage and hour complaints (such as complaints about overtime violations) in Virginia must be filed with the U.S. Department of Labor, Wage-Hour Division, in the District Office location nearest the worker's business or job location. Workers in Northern Virginia should file in the Baltimore District Office: United States Department of Labor, Wage and Hour Division, 2 Hopkins Plaza, Room 601, Baltimore, MD 21201. Those in Southwestern Virginia should file in the Charleston Area Office: 500 Quarrier St., Ste. 120, Charleston, WV 25301. Complaints in the remainder of the Commonwealth should be filed in the Richmond District Office: 400 N. 8th St., Room 416, Richmond, VA 23219. The Wage and Hour Division also may be reached by phone at 1-866-4-USWAGE.

Wage & Hour Actions in Court

Wage and Hour claims for amounts less than $5,000 may be brought in Small Claims Court in Virginia, in which case neither party is allowed attorney representation.

Alternately, workers may bring their clams in General District Court, provided that the claim is for no more than $15,000. If the case is set for trial, the worker must prepare a Bill of Particulars that explains the basis of the claim. The Fairfax Bar Association and Legal Services of Northern Virginia's Pro Bono Employment Law Project will help workers prepare their Bills of Particulars, and in some cases where the amount in controversy is too large for small claims court but too small to interest private counsel, the project may offer representation. However, the project generally recommends filing a complaint with the Virginia Department of Labor and Industry.[25]

Other Wage & Hour Issues

Day of Rest

The statutes providing employees with a day of rest were repealed by the Virginia legislature in 2005. *See* 2005 Va. Laws. Ch. 823 (H.B. 2393).

[25] Although workers may pursue either an administrative complaint or file suit, filing a complaint is the recommended course of action, according to the Fairfax Bar Association and Legal Services of Northern Virginia's Pro Bono Employment Law Project. Complainants should be aware, however, that DOLI has been underfunded and understaffed for several years. As a result, complaints do not always get the attention they deserve.

Wage and Hour Related Issues

Undocumented Workers

Documentation status is irrelevant to the right to be paid for work performed. Although it is possible that the employer will try to report the worker to the Department of Homeland Security and have the worker deported, most employers are aware that the immigration laws provide for fines against employers who hire undocumented workers as well, and that they are therefore risking liability themselves.

Practice Tip: There is no duty to report undocumented persons to the Department of Homeland Security. In fact, if a client tells her attorney that she is undocumented, the attorney-client privilege protects the information and the attorney has an ethical obligation to not disclose it to a third party.

Immigration Status is Irrelevant to a Claim for Wages or Damages

Undocumented workers are not barred from recovering unpaid wages under D.C. or Federal law, despite the Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) (the court held that, in an action under the NLRA, undocumented workers could not recover back pay from employers who fired workers in retaliation for attempting to organize a union). This did not apply, however, to back pay for work actually performed. The *Hoffman* decision is strictly limited to remedies under the NLRA and has not been held to apply to the FLSA.

In *Reyes*, 814 F. 2d 168, 170 (5th Cir. 1987), the Fifth Circuit upheld the right of undocumented workers to receive protections under the Fair Labor Standards Act. *See also Patel v. Quality Inn South*, 846 F.2d 700 (7th Cir. 1988); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998) (explaining the policy basis for extending protections to undocumented workers).

More recently, some lower courts have clarified that *Hoffman* did not undermine the rights and remedies that undocumented workers have under the FLSA. *See Zavala v. Wal-Mart Stores*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (noting that even after *Hoffman*, the Department of Labor interprets the FLSA to include undocumented workers; distinguishing back pay for work actually performed from the type of back pay at issue in *Hoffman*; citing the broad definition of "employee" in the FLSA; and noting that enforcing wage and hour laws with regard to undocumented workers is not inconsistent with immigration policy); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002); *cf. Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004) (stating that *Hoffman* did not apply to actions under Title VII, in part because *Hoffman* was predicated on the limited authority of the NLRB to weigh competing federal interests, a limitation that does not apply to courts interpreting other laws).

Advising on and Reducing Risk of Immigration Action

At least one federal court has held that it is illegal under the FLSA to report a worker to

the immigration authorities as retaliation for his wage-hour complaint. *See, e.g., Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056-60 (N.D. Cal. 1998). Attorneys representing undocumented workers also might be able to obtain a protective order to protect information related to the worker's immigration status. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063-64 (9th Cir. 2004) (upholding a protective order as "justified because the substantial and particularized harm of the discovery – the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights – outweighed NIBCO's interests in obtaining the information at this early stage in the litigation").

The D.C. Office of Wage-Hour does not share information with the Department of Homeland Security. The Office of Wage-Hour does not require social security numbers to process a claim or recover wages. The U.S. Department of Labor (DOL) entered into a Memorandum of Understanding with the INS, which now applies to the DHS, to encourage undocumented workers to report workplace abuses. DOL investigators are not supposed to inquire into a worker's immigration status or to inspect the employer's immigration status verification procedures when investigating labor standard violations. *See* BCIS Memorandum of Understanding to Enhance Worksite Enforcement Sanctions and Labor Standards (Nov. 23, 1998) at www.dol.gov.

Practice Tip: On court filings and demand letters, it may be advisable for the attorney to use his or her office address as the address for undocumented workers who are their clients, to protect their confidentiality.

Home Health Care Aides

Treatment under Federal Law

In September 2013, the DOL issued new regulations regarding the treatment of home health aides under the FLSA, significantly narrowing the application of the "companionship" exemption. *Please see* previous section regarding Home Care Workers.

This companionship exemption applies to care in private homes, but it does not apply to aides in assisted-living or nursing home facilities. 29 C.F.R. § 552.3.

Treatment under D.C./State Law

Under current D.C. law, home health aides are exempt from overtime under the same "20 percent" test as in federal law, described above. 7 D.C.M.R. § 902.5. Home health aides may also be exempt from D.C.'s living wage law – which currently requires pay of at least $12.50 per hour – if they are employed by a managed-care organization or by a private home. The living wage law also exempts Medicaid contracts if direct care services are not provided by a home care agency, a community residence facility, or a group home for mentally disabled persons. These provisions have not been fully litigated, however, and so their full application is unclear. 7 D.C.M.R. § 1007(i).

Under Maryland law, home health aides must be paid minimum wage, and most must receive overtime. Md. Code Ann., Labor & Empl. § 3-415. Home health aides working for non-profit organizations are exempt from Maryland's overtime pay requirement. *Id.* Under Maryland's Living Wage Law, although home health aides and other caregivers are not expressly exempted, it is possible that the law may not apply to the employer's contract with the state, due to the contract's value or purpose.

Under Virginia law, home health aides are generally exempt from the state's minimum wage and overtime requirements.

For more information on the application of state and federal wage and overtime law to home health aides, visit www.dol.gov.

Employee vs. Independent Contractor

There are few cases under D.C. law interpreting the definition of "employee," so courts will turn to federal decisions under the FLSA. The definition of employee under the federal FLSA is very broad: an employee is anyone whom an employer "suffers or permits" to work. 29 U.S.C. § 203(g). "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The Supreme Court more recently reaffirmed the "striking breadth" of the "suffer or permit" definition under the FLSA, which extends coverage to workers who may not be considered "employees" under traditional agency law principles. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

In order to determine just who is an employee, courts use an "economic realities" approach, looking at the employment relationship as a whole, with emphasis on economic realities. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). **How an employer refers to its workers is not a variable in the determination of whether they are employees or independent contractors.**

Factors under the test include:

- whether the "employer" has the power to hire and fire the purported contractor;
- whether the employer supervises and controls employee work schedules or conditions of employment;
- whether the worker performs a task integral to the employer's business;
- whether the employer determines rate and method of payment;
- whether the employer maintains employment records;
- whether the employer owns equipment necessary for the job; and
- the degree of skill required for a job (the more skilled, the more likely someone is an independent contractor).

Both D.C. and Maryland have statutes designed to prevent the knowing misclassification of employees as independent contractors. For more information, see the Workplace Fraud Act

subsections of the D.C. and Maryland sections of this manual.

Joint Employers

A worker can also have "joint employers"; that is, two entities that are each his or her employer under the economic realities test, each of which is jointly and severally liable for unpaid wages. *See* 29 C.F.R. § 791.2. If a worker has joint employers, all his work during the week is considered one job for purposes of minimum wage and overtime. There is also a test for who is a joint employer, which considers:

- whether employers are not completely disassociated with respect to the employment of a particular worker and may be deemed to share control of the employee (29 C.F.R. § 791.2);
- whether the employee's work simultaneously benefits two or more employers or he regularly works for two or more employers during the same week (29 C.F.R. § 791.2(b));
- whether there is an arrangement between employers to share the worker's services, for example, to exchange employees (29 C.F.R. § 791.2(b));
- whether one employer acts in interest of other employer in relation to the employee (29 C.F.R. § 791.2(b));
- who owns the property and facilities where the work occurred;
- what is the degree of skill required to perform the job;
- who has made an investment in equipment and facilities;
- whether the nature of the employment is permanent and exclusive;
- the nature and degree of control of the workers;
- the degree of supervision, direct or indirect, of the work;
- who has the power to determine the pay rates or the methods of payment of the workers;
- who has the right, directly or indirectly, to hire, fire or modify the employment conditions of the workers; and
- who prepares payroll and payment of wages.

Personal Liability for Individual Employers

The D.C. Acts and the FLSA all define "employer" to include individuals, so employees may maintain actions against not only their companies but also sometimes against their employers as individuals. The D.C. Court of Appeals addressed an employer's individual liability under D.C.'s wage payment law in *Sanchez v. Magafan*, 892 A.2d 1130, 1131-32 (D.C. 2006). In this case, an employee sued the owner of the restaurant where he worked for failure to pay wages earned under an oral employment agreement. Rejecting the owner's argument that the restaurant, not the owner himself, was the only "employer" under the Act, the court of appeals reversed the grant of summary judgment. *Id.* at 1132-34.

Additionally, federal courts of appeals have interpreted the FLSA to provide for the personal liability of individuals who constitute employers, holding individuals liable when an "economic reality" test shows them to have exercised sufficient control to be considered employers. *See, e.g., Baystate Alternative Staffing, Inc., v. Herman*, 163 F.3d 668, 677-78 (1st

Cir. 1998) ; *U.S. Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 778 (6th Cir. 1995) ("A corporate officer who has operational control of the corporation's covered enterprise is an 'employer' under the FLSA."); *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984) ("[To] determine[e] whether an employment relationship exists for purposes of the FLSA, [courts] must evaluate the 'economic reality' of the relationship.").

Under the economic reality test, the relevant factors that tend to demonstrate that an individual is an employer include the power to hire and fire the employees; control over the schedules or conditions of employment, rates of pay and method of payment, and other significant functions of business; a significant ownership interest in the corporation; and maintenance of the employment records. *Cole Enters.*, 62 F.3d at 778; *Carter*, 735 F.2d at 12; *see also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999).

Practice Tip: Whenever possible, name individuals as defendants in addition to the corporate entity. Establishing liability of individuals and the entity increases the chances of collecting on a judgment, and also increases the pressure on the defendants to settle the case.

Collecting a Judgment & the Bankrupt Employer

In D.C. Superior Court (civil division or small claims), there is a special procedure to get information about a defendant's ability to pay. Under D.C. Code § 16-3908 and Small Claims Rule 18, when a judgment is entered in a wage matter, the worker can file a motion asking the Court to order the defendant to appear for oral examination under oath as to his financial status and ability to pay the judgment. This can be done as often as once a week for four weeks. After the oral examination, the judge can issue supplementary orders "as seems just and proper" to make sure the judgment is paid "upon reasonable terms." Whether or not the defendant appears for the oral examination, the plaintiff can attempt to collect through wage garnishment, attachment of a bank account (examine the employer's pay checks for account information), and liens on real property.

If an employer has filed for bankruptcy, all secured debts of that employer are paid first. After all secured claims are paid, priority goes first to unsecured claims for domestic support obligations, then to certain administrative expenses owed to trustees, and then to "wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual" within the 180 days before the filing of the bankruptcy petition (capped at $10,000 for each individual or corporation to whom pay is owed). *See* 11 U.S.C. § 507(a). Wages are entitled to priority of payment over contributions to employee benefit plans, unsecured creditors, and taxes. *Id.* While this is a fairly high priority level, it is important to remember that because secured claims get paid first, there might not be anything left to pay for wages. The employee will have to file a "Proof of Claim" (Form B10) in the bankruptcy proceeding to recover unpaid wages earned prior to the filing of the bankruptcy proceeding. For wages earned after the filing of the bankruptcy petition, the employee will have to file a "Request for Administrative Expenses" pursuant to 11 U.S.C. § 503.

Bad Checks

Employers sometimes issue bad checks to their workers. Under D.C. Code § 22-1510, it is illegal to write a check "with intent to defraud" knowing that the bank account does not have sufficient funds. If the check amount is $100 or more, it is a felony punishable by a $3,000 fine and three years in jail. Writing a bad check for an amount less than $100 is a misdemeanor, punishable by a $1,000 fine and 180 days in jail.

In Virginia, an employer who knowingly writes a bad check of $200 or more to an employee is guilty of a felony. *See* Va. Code Ann. § 18.2-182. The employer is guilty of a Class 1 misdemeanor if the employer knowingly writes a bad check of less than $200 to an employee. *Id*. at § 18.2-182. If the employee is not paid within 30 days of making a written demand, the employer may also be liable for punitive damages up to $250. *Id*. at §§ 8.01-27.1 to -27.2.

Note: "Intent to defraud" is easily established when the check bounces because of insufficient funds, the employer is notified of the insufficient funds, and the employer does not pay the required amount within five days. *Id.*

Practice Tip: When a worker receives a bad check, immediately send a letter to the employer **certified, return receipt requested**, notifying the employer of the bad check and requesting payment in five days. Cite the criminal code and penalties listed above. If payment is not made in five days, consider counseling the worker to file a police report at any police station. For D.C., call 202-727-1010 to find the location of police stations.

Wage Garnishment

There are two types of garnishment situations that commonly arise. In one instance, an employer will garnish wages that it believes the employee owes to the employer (*e.g.*, as a result of breakage). In the second instance, the employer will garnish wages that the employee may owe to a third party (*e.g.*, child support).

In the case of garnishment for the benefit of a third-party creditor, employers are prohibited from deducting from an employee's wages unless the alleged debt has been properly reduced to a court judgment and wage garnishment as described in D.C. Code § 16-572. *See* D.C. Code § 16-583 (except as provided in the District of Columbia **Child** Support Enforcement Amendment Act of 1985 or as provided in the D.C. Code, section 16-916, before entry of a judgment in an action against a debtor, the creditor may not obtain an interest in any property of the debtor by garnishment proceedings). It is not clear whether Section 16-572 requires an employer to seek an order before withholding wages from an employee for breakages or other debts that the employee may owe to her employer.

Both D.C. and federal law limit the amount that can be garnished when garnishment is proper. Under both D.C. and federal law, the maximum garnishment is 25% of disposable wages for the week in question, or the amount "by which [the employee's] disposable wages for that week exceed 30 times the federal minimum hourly wage," whichever is less.15 U.S.C. §

1673(a); D.C. Code § 16-572. Only one attachment upon the wages of a judgment debtor can be made at a time. D.C. Code § 16-572. D.C. Code § 1-629.03 and § 1-629.04 cover debt collection from D.C. government employees for debts to the D.C. government.

D.C. law does not contain any exceptions to the limitations set forth in Section 16-572; however, the federal provisions do contain several exceptions. In the case of an order for the support of another person (e.g., child support, alimony), up to 50 or 60% of disposable wages can be garnished. 15 U.S.C. § 1673(b). Although federal law allows for garnishing these amounts, employers in the District of Columbia could still violate D.C. law for excessive garnishment, as the federal law does not displace more generous state laws. 15 U.S.C. § 1677; *see also* 28 U.S.C. § 3101 *et seq*. for federal procedures for collecting a debt (*i.e.*, debts owed to the federal government).

Maryland law ensures that deductions from wages may only be made for certain reasons. *See* Md. Code Ann., Labor & Empl. § 3-503. Virginia protects against excessive garnishments. *See* Va. Code Ann. § 34-29. For more information about wage garnishment in Virginia, consult Legal Services of Northern Virginia's website: www.lsnv.org.

An employer may not terminate a worker because his or her wages are being garnished. *See* 15 U.S.C § 1674. There is, however, no private cause of action by which an employee may challenge a wrongful termination under this section. *See LeVick v. Skaggs Cos,*. 701 F.2d 777 (9th Cir. 1983); *Smith v. Cotton Bros. Baking Co.*, 609 F.2d 738 (5th Cir. 1980). Virginia law also protects against termination based on an employee's wage garnishment. *See* Va. Code Ann. § 34-29(f).

Child Labor

A combination of federal and D.C. laws limit the amount and types of work that minors can perform. *See* D.C. Code § 32-201 *et seq*., 29 C.F.R. § 570 *et seq.* It is unlawful to employ children 13 and younger, except in limited circumstances. *See* D.C. Code § 32-201.[26] Workers aged 14 and 15 have limits on hours of work and conditions under which they can work.[27] They may only be employed outside of school hours; when school is not in session, the maximum workweek is 40 hours, with no more than eight hours per day. *See* 29 C.F.R. § 570.35. When school is in session, children can work no more than 18 hours per week, with a maximum of three hours per day. *Id*. Work must occur between 7 a.m. and 7 p.m. except in the summer, where children 14-15 can work until 9 p.m. *Id.* Children 16 and 17 years old cannot work in certain industries.[28] Children 16 and 17 can work only between 6 a.m. and 10 p.m., no more than

[26] Exceptions include newspaper deliverers; actors and performers; children employed by parents for housework or agricultural purposes. Children 10 years or older may be employed outside of school hours in distributing newspapers on fixed routes, but not stuffing (for which the minimum age is 16). Children 12 years or older may sell newspapers on the street. *See* D.C. Code §§ 32-215 – 32-221.

[27] Children 14 to 15 cannot work in manufacturing, in hazardous occupations, or on motor vehicles, railroads, trucks, airplanes, boats, pipelines, warehousing or storage, communications or public utilities, or construction. *See* 29 C.F.R. § 570.33. Office work in any of these industries is acceptable.

[28] Including working with or manufacturing small arms, ammunition or explosives, operating a motor vehicle or acting as an outside helper, coal mines, logging, bakery machines, paper products and others. *See* 29 C.F.R. § 570.51 - 570.68.

48 hours per week, no more than eight hours a day, and no more than six consecutive days. *See* D.C. Code § 32-202. For those 18 and older, no restrictions apply.

A combination of federal and Maryland laws limit the amount and types of work that minors can perform. *See* Md. Code Ann., Labor & Empl. § 3-201 *et seq.*; 29 C.F.R. § 570 *et seq.* Generally, the most protective standards, whether state or federal, are those that govern. It is unlawful to employ children 13 and younger, except in limited circumstances. *See* Md. Code Ann., Labor & Empl. § 3-203.[29] Minors between the ages of 14 and 17 may only work under certain restrictions, and then, only with a work permit. The Maryland Division of Labor and Industry explains Maryland standards:

"Minors 14 and 15 years of age may not be employed or permitted to:

- work more than four hours on any day when school is in session
- work more than eight hours a day on any day when school is not in session
- work more than 23 hours in any week when school is in session
- work more than 40 hours in any week when school is not in session
- work before 7 a.m. or after 8 p.m. Minors may work until 9 p.m. from Memorial Day to Labor Day.
- work more than five consecutive hours without a non-working period of at least 30 minutes."

"Minors 16 and 17 years of age:

- May spend no more than 12 hours in a combination of school hours and work hours each day.
- Must be allowed at least eight consecutive hours of non-work, non-school time in each 24 hour period.
- May not be permitted to work more than five consecutive hours without a non-working period of at least 30 minutes.

Under federal law, youth must be 14 years of age to work in any non-agricultural employment. Fourteen- to 15-year-olds may work subject to the following restrictions:

- during non-school hours;
- a maximum of three hours on school days;
- a maximum of 18 hours during the school week;
- a maximum of eight hours on non-school days;
- a maximum of 40 hours during non-school weeks; and
- between 7 a.m. and 7 p.m. (except from June 1 through Labor Day, when evening hours are extended to 9 p.m.)

[29] Including newspaper delivery; children employed by parents or a person standing in the place of a parent; domestic work in or around a home, caddying on a golf course; instructing on an instructional sailboat; work performed as a counselor or instructor at a Maryland Youth Camp; or work performed for a non-profit organization (under certain conditions).

There are exceptions for youth who are **14 and 15 years old if they are** enrolled in an approved Work Experience and Career Exploration Program (WECEP). Through this program, youth may work up to 23 hours during school weeks and three hours on school days (including during school hours). The FLSA does not limit the number of hours or times of day for workers **16 years and older**. However, youth who are 16 and 17 years old cannot work in certain industries considered unsafe for that age group.[30]

For further information on the employment of minors in Maryland, please see the Maryland Division of Labor and Industry, Employment of Minors Fact Sheet, found online at www.dllr.state.md.us. For additional information about employment of minors by employers regulated by the FLSA, please see www.dol.gov. Enforcement of federal child labor laws is handled through the U.S. Department of Labor's district offices. Issues arising in Maryland are handled by the Baltimore District Office:

Baltimore District Office
U.S. Dept. of Labor
ESA Wage & Hour Division
2 Hopkins Plaza, Room 601103 S. Gay St.
Baltimore, MD 21201
Phone: 1-866-4-USWAGE (1-866-487-9243)
http://www.nelp.org/docUploads/pub18.pdf

Slavery

Of course, slavery is illegal. Yet, slavery comes in many guises: for example, workers may be forced into slavery, involuntary servitude, or peonage in private homes as domestic servants, on farms as agricultural labor, or in sweatshops. Others are undocumented workers, trafficked into or within the country and forced into labor in private homes, factories, fields, or in brothels.

The Thirteenth Amendment provides that slavery and involuntary servitude are illegal. Those provisions are also codified at 18 U.S.C. § 1584, which further provides for criminal penalties. The U.S. Code provisions do not specify what constitutes "involuntary servitude," but that term has been interpreted by the First Circuit to mean that a worker was required to work against his or her will as a result of (1) physical restraint; (2) legal coercion; or (3) plausible threats of physical harm or legal coercion. *See United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995). The worker must reasonably believe, given his or her subjective beliefs, that there was no alternative but to work for the perpetrator. The Supreme Court has stated that threats of deportation could constitute legal coercion. *See United States v. Kozminski*, 487 U.S. 931 (1988). Mere psychological coercion has been held insufficient to create involuntary servitude. *Id.* However, with the creation of the creation of the *Victims of Trafficking and Violence Protection*

[30] Including working with or manufacturing small arms, ammunition or explosives, operating a motor vehicle or acting as an outside helper, coal mines, logging, bakery machines, paper products, and others. *See* 29 C.F.R. §§ 570.51 through .68.

Act of 2000, the new crime of "forced labor" was created to cover cases where people are kept in "involuntary servitude" situations through the use of psychological coercion. Pub. L. No. 106-386, 114 Stat. 1464, § 102(b)(13) & (14) (codified as amended at 22 U.S.C. § 7101(b)(13) & (14) and 18 U.S.C. § 1589. Thus, an individual who "knowingly provides or obtains the labor or services of a person…(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint," can be fined or imprisoned up to 20 years. *See* 18 U.S.C. § 1589.

Former President Clinton signed the *Victims of Trafficking and Violence Protection Act of 2000* into law in October 2000. This law allows individuals who are (1) victim[s] of severe forms of trafficking; (2) physically present in the United States on account of such trafficking; (3) complying with any reasonable request for assistance in investigation or prosecution of acts of trafficking, or have not attained 15 years of age; and, (4) and would suffer extreme hardship involving unusual and severe harm upon removal to apply for a nonimmigrant visa to remain in the U.S. *Victims of Trafficking and Violence Protection Act of 2000 (TVPA)*, Pub. L. 106-386, 114 Stat. 1464, Sec 107(e)(1)(T)(i)(I)-(IV) (codified at 8 U.S.C. § 1101 (a)(15)(T)) (hereinafter VTVPA; 8 CFR § 214.11(a)); *see also* 8 C.F.R. § 212.16.).

In April 1998, several federal agencies formed the National Worker Exploitation Task Force (WETF) and 15 regional task forces. The Task Force Complaint Line is 1-888-428-7581 (weekdays 9 a.m. to 5 p.m.) and can answer calls in "most languages," and after hours in English, Spanish, Russian, and Mandarin Chinese. Take a look at their website for information: www.justice.gov/crt/about/crm/htpu.php.

If you have a suspected case of trafficking in persons for forced labor, or have questions about the issue, please contact Ayuda, Inc. at 202-387-4848. Or contact the Break the Chain Campaign, which "offers legal and social services to trafficked, enslaved and exploited workers." Visit http://www.ips-dc.org/BTCC or call (202) 234-9382. Other resources for victims of trafficking in D.C., Maryland, Virginia, and other states are listed at http://www.humantrafficking.org/countries/united_states_of_america/ngos.