

# THE FAIR LABOR STANDARDS ACT

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## INTRODUCTION

On May 24, 1937, President Franklin D. Roosevelt sent a bill to Congress that sought to establish fair labor standards. Along with the bill, the President delivered a message: “Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of ensuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.”<sup>1</sup> On Saturday, June 25, 1938, President Roosevelt signed this landmark bill known as the Fair Labor Standards Act of 1938<sup>2</sup> (“FLSA”) into law.

The FLSA is the law that guarantees workers a minimum wage rate and overtime pay for hours worked in excess of 40 hours in a week.<sup>3</sup> The minimum wage and overtime compensation requirements accomplish the declared policy of the FLSA, which is to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . .”<sup>4</sup> The overtime pay requirement was also designed to serve as an incentive for employers to hire additional workers.<sup>5</sup>

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<sup>1</sup> H.R. REP. NO. 101-260, at 8-9 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 696, 696-97.

<sup>2</sup> 29 U.S.C. § 201 *et seq.*

<sup>3</sup> *See id.* §§ 206 & 207.

<sup>4</sup> *Id.* § 202(a).

<sup>5</sup> *See* *Overnight Motor Transportation Co. v. Missel*, in which the United States Supreme Court stated the following:

The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning.

316 U.S. 572, 577-78 (1942).

Not every employee, however, is covered by the FLSA. There are many FLSA exemptions. Unfortunately, many employees who should be afforded the protections of the FLSA are wrongfully classified as exempt employees. This misclassification denies workers “a fair day’s pay for a fair day’s work.”<sup>6</sup> Misclassification also results in an unfair competitive advantage that not only hurts other businesses within the industry, but also the employees properly classified within that industry.

The first section of this article provides a brief history of the FLSA. The second section examines some of the FLSA exemptions. The third section discusses the misclassification of employees that are covered by the FLSA. The fourth section discusses other FLSA violations, including misclassification of workers as independent contractors, off-the-clock cases, and interrupted meal periods. Lastly, the fifth section discusses the requirements for properly pleading a FLSA complaint.

## **HISTORY OF THE FLSA**

### ***National Industrial Recovery Act of 1933***

In 1933, as part of the “New Deal,” the National Industrial Recovery Act of 1933<sup>7</sup> (“NIRA”) was signed into law. This law gave the federal government broad power to control wages and hours. When President Roosevelt signed the bill he stated the following: “History will probably record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress.”<sup>8</sup>

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<sup>6</sup> H.R. REP. NO. 101-260, at 8-9 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 696, 696-97.

<sup>7</sup> National Industrial Recovery Act (NIRA) of 1933, ch. 90, 48 Stat. 195 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

<sup>8</sup> CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 287 (Public Affairs ed., 2003).

The Act granted the president the power to establish agencies which could control wages in any industry that the president determined was engaging in “unfair competition.”<sup>9</sup> The Act empowered the president to establish maximum hours, minimum wages, and any other labor condition if the industry was engaging in unfair practices. The president had essentially unlimited powers to control the wages and hours of employees throughout the economy.

This unbridled power, however, quickly came to an end. On May 27, 1935, the United States Supreme Court struck down NIRA as unconstitutional.<sup>10</sup> The Court found that allowing the president unfettered power to enact laws for trade and industry throughout the country to be an unconstitutional delegation of power.<sup>11</sup>

### ***The Fair Labor Standards Act of 1938***

During the constitutional battle over NIRA, Secretary of Labor Frances Perkins asked Department of Labor lawyers to draft two wage and hour and child-labor bills that might withstand scrutiny from the Supreme Court. Secretary Perkins kept the two bills in her desk drawer. One such bill was a general fair labor standards act.<sup>12</sup>

After the “switch in time that saved the nine,”<sup>13</sup> President Roosevelt thought the time was right to retrieve the bill from Secretary Perkins’ desk drawer. The lawyers that drafted the bill

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<sup>9</sup> NIRA, ch. 90, § 3(a), 48 Stat. 195 *invalidated by* A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495.

<sup>10</sup> A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

<sup>11</sup> *Id.* at 541-42.

<sup>12</sup> The other bill tucked away in Secretary Perkins’ desk drawer was the Walsh-Healey Government Contracts Act, 41 U.S.C. § 35 *et seq.* This Act governs wages and other working conditions for the workers involved with manufacturing or supply contracts with the federal government.

<sup>13</sup> Prior to 1937, the United States Supreme Court had struck down many laws, including wage and hour laws. In *Lochner v. New York*, 198 U.S. 45 (1905), the Court reviewed a New York labor law that prohibited bakeries from working their employees more than 60 hours per week. The Court held “the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.” *Id.* at 64. The Court prior to 1937 also applied a narrow construction of the Commerce Clause, which in turn led to the striking down of many pieces of federal legislation. For example, in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the United States Supreme Court held that Congress was without power under the Commerce Clause to exclude the products of child labor from interstate commerce. In

took many constitutional approaches in the hopes that the bill would survive judicial review. The bill allowed minimum wage boards to review wages in order to determine whether they were below subsistence levels in particular industries.

Initially, the bill only affected wages and hours of workers. There was no provision in the bill dealing with child labor. President Roosevelt added a child labor provision in order to increase the bill's chances of making it through Congress, as limitations on child labor were popular.

On May 24, 1937, the bill was sent to Congress, with a message from President Roosevelt: "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours."<sup>14</sup> He went on to state the following: "Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."<sup>15</sup>

William Green of the American Federation of Labor and John L. Lewis of the Congress of Industrial Organization preferred a bill that would be limited to the labor standards of low-paid, unorganized workers. It was the fear of many union leaders that by Congress setting a minimum wage it would in essence be setting a maximum wage. In addition, union leaders were fearful of intervention from the wage boards into areas they wished to be reserved for labor-management negotiations. The bill was later amended to exclude work that was covered by

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1937, President Roosevelt planned to change the composition of the Court by adding more justices. The Court subsequently changed course in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), when it upheld a Washington state minimum wage law for women, despite the fact the law at issue was similar to law the Court had struck down as unconstitutional in *Morehead v. New York*, 298 U.S. 587 (1936) less than 10 months prior. Justice Roberts was the one who changed his vote, and he denied he switched because of President Roosevelt's court-packing plan. Nonetheless, the changed vote is still referred to as "a switch in time that saved the nine." The constitutionality of the FLSA was upheld by the United States Supreme Court in *U.S. v. Darby*, 312 U.S. 100 (1941).

<sup>14</sup> H.R. REP. NO. 101-260, at 9 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 696, 697.

<sup>15</sup> *Id.*

collective bargaining. Ultimately, however, the bill was held up in the House Rules Committee and never was voted on in the House. A later attempt to get the bill passed failed.

In January of 1938, a revised version of the bill was sent to Congress. After much debate and more revisions, the bill passed the House on June 13, 1938, by a vote of 291 to 89. The Senate later approved it and the bill was sent to President Roosevelt. The FLSA was signed on June 25, 1938 and became effective on October 24, 1938.

### **FLSA EXEMPTIONS**

The FLSA mandates that employers pay their workers at least the minimum wage.<sup>16</sup> In addition, employers are required to pay their employees at least one and one-half times the regular rate for all hours worked over 40.<sup>17</sup> A violation of these provisions causes employers to face damages in the amount of the unpaid minimum wages or unpaid overtime compensation, an equal amount as liquidated damages, costs of the action, and reasonable attorney's fees.<sup>18</sup>

The FLSA does not protect everyone. There are a myriad of exemptions from the FLSA's minimum wage and overtime requirements. Perhaps the broadest of these exemptions is a category of exemptions that applies to so-called "White-Collar" employees. This category includes executive, administrative, professional, and outside sales employees.<sup>19</sup>

#### ***Executive***

To be exempt from the FLSA based on the executive exemption, the employee must meet the following requirements:

- 1) Be paid a salary of at least \$455 per week (\$23,660 per year);

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<sup>16</sup> 29 U.S.C. § 206.

<sup>17</sup> *Id.* § 207.

<sup>18</sup> *Id.* § 216(b).

<sup>19</sup> *See id.* § 213(a)(1) ("The provisions of section 206 . . . and section 207 of this title shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . .").

- 2) Have “management”<sup>20</sup> be the employee’s primary duty;<sup>21</sup>
- 3) Customarily and regularly direct the work of two or more employees;<sup>22</sup> and
- 4) Have the authority to hire or fire employees, or have the ability to offer suggestions and recommendations as to hiring, firing, advancement, promotion, or any other status change of other employees with “particular weight”<sup>23</sup> given to those suggestions and recommendations.<sup>24</sup>

### ***Administrative***

To qualify for the administrative exemption, the employee must meet the following requirements:

- 1) Be paid a salary of at least \$455 per week (\$23,660 per year);
- 2) Have a primary duty<sup>25</sup> of performing office or non-manual work that is directly related to the management or general business operations of the employer (or employer’s customers);<sup>26</sup> and

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<sup>20</sup> With respect to what constitutes “management,” the Department of Labor states the following:

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employees complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

<sup>21</sup> The “primary duty” of an employee is “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a).

<sup>22</sup> The Department of Labor states that “[t]he phrase ‘two or more other employees’ means two full-time employees or their equivalent.” 29 C.F.R. § 541.104(a). Therefore, “[o]ne full-time and two half-time employees . . . are equivalent to two full-time employees” and “[f]our half-time employees are also equivalent.” *Id.*

<sup>23</sup> The factors used to determine whether “particular weight” is given to suggestions and recommendations includes, but is not limited to, “whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which such suggestions and recommendations are relied upon.” 29 C.F.R. § 541.105.

<sup>24</sup> 29 C.F.R. 541.100(a).

<sup>25</sup> See *supra* note 21.

3) The exercise of discretion and independent judgment<sup>27</sup> with respect to matters of significance<sup>28</sup> must be part of the employee's primary duty.<sup>29</sup>

### ***Professional***

To be exempt from the FLSA based on the professional exemption, the employee must meet the following requirements:

- 1) Be paid a salary of at least \$455 per week (\$23,660 per year);
- 2) Have a primary duty:<sup>30</sup>
  - i) that requires knowledge of an advanced type<sup>31</sup> of field in science or learning<sup>32</sup> customarily acquired by a prolonged course of specialized intellectual instruction<sup>33</sup>; or

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<sup>26</sup> The Department of Labor states that “[t]he phrase ‘directly related to the management or general business operations’ refers to the type of work performed by the employee.” 29 C.F.R. § 541.201(a). Therefore, “an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” *Id.*

<sup>27</sup> The Department of Labor states that “the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” 29 C.F.R. § 541.202(a).

<sup>28</sup> The phrase “matters of significance” “refers to the level of importance or consequence of the work performed.” 29 C.F.R. § 541.202(a).

<sup>29</sup> 29 C.F.R. § 541.200(a).

<sup>30</sup> *See supra* note 21.

<sup>31</sup> Work requiring advanced knowledge is “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.” 29 C.F.R. § 541.301(b).

<sup>32</sup> The Department of Labor states the following as to what constitutes a “field of science or learning:”

The phrase ‘field of science or learning’ includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

29 C.F.R. § 541.301(c).

<sup>33</sup> With respect to the phrase “customarily acquired by a prolonged course of specialized intellectual instruction,” the Department of Labor states the following:

The phrase . . . restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also available to employees in such professions

ii) that requires invention, imagination, originality, or talent<sup>34</sup> in a recognized field of artistic or creative endeavor<sup>35 36</sup>.

### ***Outside Sales***

To qualify for the outside sales exemption, the employee must meet the following requirements:

(1) Have a primary duty of:<sup>37</sup>

(i) making sales within the meaning of section 3(k) of the Act;<sup>38</sup> or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer;<sup>39</sup> and

(2) Be customarily and regularly<sup>40</sup> engaged away from the employer's place or places of business<sup>41</sup> in performing such primary duty.<sup>42</sup>

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who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

29 C.F.R. § 541.301(d).

<sup>34</sup> Whether an employee's primary duty requires "invention, imagination, originality or talent" "depends on the extent of the invention, imagination, originality or talent exercised by the employee." 29 C.F.R. § 541.302(c). Consequently, "[t]he duties of employees vary widely" and a determination of whether the exemption applies "must be made on a case-by-case basis." *Id.*

<sup>35</sup> Work performed "in a recognized field of artistic or creative endeavor" "includes such fields as music, writing, acting and the graphic arts." 29 C.F.R. § 541.302(b).

<sup>36</sup> 29 C.F.R. § 541.300(a). Having a primary duty that satisfies i) above is known as the "learned professional exemption," while having a primary duty that satisfies ii) above is known as the "creative professional exemption."

<sup>37</sup> *See supra* note 21. With respect to the primary duty of an outside sales employee, "work performed incidental to and in conjunction with the employee's own outside sales or solicitors, including incidental deliveries and collections, shall be regarded as exempt outside sales work." 29 C.F.R. § 541.500(b).

<sup>38</sup> Section 203(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).

<sup>39</sup> With respect to this phrase, the regulations state the following:

Exempt outside sales work includes not only the sale of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

29 C.F.R. § 541.501(c).

## MISCLASSIFICATION OF EMPLOYEES

While many employers in this country follow the law, unfortunately there are some who attempt to skirt the requirements of the FLSA in order to gain a competitive advantage in their industry. One way in which some companies attempt to get around the FLSA requirements is to misclassify employees as exempt. This not only affects those who are misclassified, but it also affects other companies within the industry and the employees who are properly classified and afforded the protections of the FLSA.

In his message to Congress, President Roosevelt stated the following: “Enlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of the business itself.”<sup>43</sup> A joint statement issued by the House and Senate Labor Committees, after hearings held to determine the effect of substandard labor conditions on interstate commerce, stated that “the overwhelming majority of reputable employers consider competition in wages as an unfair and unreasonable method of competition in commerce.”<sup>44</sup> The FLSA itself states that “Congress finds the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for

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<sup>40</sup> To satisfy the “customarily and regularly” requirement, the “frequency . . . must be greater than occasional but which, of course, may be less than constant.” 29 C.F.R. § 541.701. Thus, the work must be “normally and recurrently performed every workweek; it does not include isolated or one-time tasks.” *Id.*

<sup>41</sup> With respect to the phrase “away from the employer’s place or places of business,” the Department of Labor states the following:

The outside sales employee is an employee who makes sales at the customer’s place of business or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

29 C.F.R. § 541.502.

<sup>42</sup> 29 C.F.R. § 541.500(a).

<sup>43</sup> H.R. REP. NO. 101-260, at 9 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 696, 697.

<sup>44</sup> *Joint Hearing on H.R. 7200 and S. 2475 Before the S. Comm. on Education and Labor and the H. Comm. on Labor*, 75th Cong. 6 (1937).

health, efficiency, and general well-being of workers . . . constitutes an unfair method of competition in commerce . . . .”<sup>45</sup>

An employer gaining a competitive advantage by violating the FLSA has a profound affect not only on those it employs, but also on other companies within the industry and their employees. The cost of labor is often the largest expense for a company. Employers violating the FLSA are able to cut labor costs significantly and, in turn, either pocket the windfall profit or pass this savings along to the consumer by lowering its prices. This can greatly affect other companies’ bottom lines by these companies losing market share or having to slash prices in order to stay competitive.

Also, FLSA violations can decrease the wages of employees of other companies within the industry. The Supreme Court has observed that “one major means of spreading substandard labor conditions was recognized to be through the lowering of prices for goods produced under substandard conditions . . . .”<sup>46</sup> This is due to the downward pressure placed on the prices by the violating employer. This could lead law-abiding companies to cut costs by, for example, lowering wages, reducing benefits, or laying off workers.

FLSA exemptions are applied only to those employees that clearly and unmistakably fall within the spirit and terms of the exemption.<sup>47</sup> As a result, FLSA exemptions are narrowly construed against employers who classify their employees as exempt.<sup>48</sup> It is the employer that bears the burden of proving the employee is properly classified as exempt.<sup>49</sup>

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<sup>45</sup> 29 U.S.C. § 202(a)(3).

<sup>46</sup> *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 511 n. 12 (1950).

<sup>47</sup> *Brock v. Norman’s Country Mkt., Inc.*, 835 F.2d 823, 826 (11th Cir. 1988)(*quoting* *Lyles v. K-Mart Corp.*, 519 F.Supp. 756, 760 (M.D. Fla. 1981)).

<sup>48</sup> *Walters v. Am. Coach Lines of Miami, Inc.*, 575 F.3d 1221, 1226 (11th Cir. 2009)(*citing* *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995)).

<sup>49</sup> *Id.* (citing *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d at 594).

### ***Misclassification of Managers***

Misclassification most often occurs using the executive exemption. “Managers” and “assistant managers” of businesses are often paid a salary and worked 60 hours or more each week. Many of these “managers,” however, have very little, if any, decision-making authority and their primary duties often include tasks such as unloading delivery trucks, stocking shelves, running the cash register, and mopping the floor. Employers would argue that, although the “managers” perform non-managerial duties, they are nevertheless “in charge.” That is, the “manager” is responsible for handling customer complaints, making sure the store is safe and clean, filling in when an employee calls in sick, etc. A finding that an employee is exempt from the FLSA because they are “in charge” of a business has been expressly rejected by the Eleventh Circuit.<sup>50</sup> Whether a “manager” is properly exempt requires a fact-intensive inquiry into the actual job duties of the employee.

### ***Misclassification of Mortgage Loan Officers***

Many employees employed as “mortgage loan officers” are treated as exempt from the FLSA’s overtime requirement and are thereby denied overtime compensation.<sup>51</sup> The predominant exemption asserted by employers is the “administrative exemption.” In a 2006 Opinion Letter, the Department of Labor concluded that, based on the job duties of a mortgage

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<sup>50</sup> See *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1272 (11th Cir. 2008)(“Family Dollar’s ‘in charge’ label strikes us as a savy way to bypass meaningful application of the fact-intensive factors.”).

<sup>51</sup> While the job title “mortgage loan officer” is used herein, many job titles are used throughout the financial services industry, including “mortgage loan representative,” “mortgage loan consultant,” “mortgage loan originator,” “mortgage banker,” etc. The specific job title used is not important, but rather the focus must always remain on the actual job duties and compensation of the employee, as these are the factors which determine exempt or nonexempt status. See 29 C.F.R. § 541.2 (“A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”).

loan officer, the administrative exemption was applicable.<sup>52</sup> Application of the administrative exemption to mortgage loan officers, however, has changed under the Obama Administration. In an Administrator's Interpretation issued in March 2010, the Department of Labor found the exemption to be unavailing to employers.

Through Wage and Hour investigations and case law, the following was considered the typical duties of a mortgage loan officer:

Mortgage loan officers receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity. Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens. They also run credit reports. Mortgage loan officers enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings.<sup>53</sup>

In its analysis, the Department of Labor focused on the second requirement of the administrative exemption,<sup>54</sup> which is that the employee's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."<sup>55</sup> The Department of Labor found that determining whether a typical mortgage loan officer serviced the business of his or her employer or engaged

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<sup>52</sup> Op. Letter, Wage & Hour Div. U.S. Dep't of Labor, FLSA2006-31, 2006 DOLWH LEXIS 42, at \*19 (Sept. 8, 2006).

<sup>53</sup> Adm'r Interpretation No. 2010-1, Wage & Hour Div. U.S. Dep't of Labor, 2010 DOLWH LEXIS 1, at \*3 (Mar. 24, 2010).

<sup>54</sup> *Id.* at \*5.

<sup>55</sup> 29 C.F.R. § 541.200(a)(2).

in routine sales work requires an analysis of whether those who perform the typical job duties of a mortgage loan officer have a primary duty of making sales.<sup>56</sup>

The Department of Labor began its analysis by noting that case law demonstrates that, historically, mortgage loan officers have been paid often entirely by commissions and that even today many mortgage loan officers are primarily compensated by commissions in addition to a base salary.<sup>57</sup> The Department of Labor also discussed the fact that mortgage loan officers are often trained in sales techniques and their performance is evaluated based on their sales volume.<sup>58</sup> It was also found to be relevant that many employers defending lawsuits brought by mortgage loan officers argued that the mortgage loan officers were exempt “outside sales” employees, which requires a concession that the employee’s primary duty is making sales.<sup>59</sup> Finally, the Department of Labor noted that numerous courts had found that the primary duty of a mortgage loan officer was making sales, and that it was not aware of any court decision which found the primary duty of a mortgage loan officer to be anything other than making sales.<sup>60</sup> The Department of Labor, therefore, concluded that “a careful examination of the law as applied to the mortgage loan officers’ duties demonstrates that their primary duty is making sales and, therefore, mortgage loan officers perform the production work of their employers.”<sup>61</sup>

### ***Misclassification of Pharmaceutical Sales Representatives***

Pharmaceutical sales representatives are often denied overtime compensation, based primarily on the argument that such employees are exempt pursuant to the outside sales

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<sup>56</sup> Adm’r Interpretation No. 2010-1, Wage & Hour Div. U.S. Dep’t of Labor, 2010 DOLWH LEXIS 1, at \*13.

<sup>57</sup> Id. at \*16-\*17.

<sup>58</sup> Id. at \*18.

<sup>59</sup> Id. at \*19-\*20.

<sup>60</sup> Id. at \*22.

<sup>61</sup> Id. at \*22-\*23.

exemption of the FLSA. However, the cornerstone of the outside sales exemption is that the employee must have a primary duty of making sales.<sup>62</sup> Promoting a product that eventually might be sold by another person does not constitute “making sales” within the meaning of the exemption.<sup>63</sup> But that in fact is exactly what pharmaceutical sales representatives do on a daily basis.

Pharmaceutical sales representatives meet with physicians in order to encourage the physicians to prescribe a particular pharmaceutical. The physicians, however, do not actually purchase any pharmaceuticals from representatives. And while pharmaceutical sales representatives often give free samples to physicians, there is no transfer of ownership for value.<sup>64</sup> Moreover, pharmaceutical sales representatives do not receive commitments to buy, or even a commitment to prescribe, as physicians have an ethical obligation to prescribe only drugs suitable for the medical needs of their patients.<sup>65</sup>

The administrative exemption is also unavailable to exempt pharmaceutical sales representatives from FLSA coverage. Application of the administrative exemption requires “exercise of discretion and independent judgment with respect to matters of significance.”<sup>66</sup> Pharmaceutical sales representatives do not have the authority to formulate or implement

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<sup>62</sup> See 29 C.F.R. § 541.500(a)(“The term ‘employee employed in the capacity of outside salesman’ in section 13(a)(1) of the Act shall mean any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act . . .”).

<sup>63</sup> See *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010)(finding that “the regulations . . . make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale.”).

<sup>64</sup> See *id.* at 154 (“The reps may give physicians free samples, but the Reps cannot transfer ownership of any quantity of the drug in exchange for anything of value.”).

<sup>65</sup> See *id.* (“As the district court noted, ‘physicians have an ethical obligation to prescribe only drugs suitable for their patients’ medical needs, meaning that *they cannot make a binding commitment to a Rep to prescribe*’ a particular Novartis product.”)(citation omitted)(emphasis in original).

<sup>66</sup> 29 C.F.R. § 541.200(a)(3).

management policies, and are often required to operate within severe limitations prescribed by their employers.

## **OTHER FLSA VIOLATIONS**

### ***Misclassification of Independent Contractors***

Some employers attempt to get around the requirements of the FLSA by misclassifying their employees as independent contractors. The problem is many employers try to have their cake and eat it too. Employers want to classify individuals as independent contractors to avoid the requirements of the FLSA, and yet maintain a level of control over these individuals that is indicative of an employer-employee relationship.

Employers can avoid the requirements of the FLSA by hiring independent contractors, rather than employees, because the FLSA does not protect independent contractors. There must be an employee-employer relationship in order for the FLSA to apply. The FLSA provides a circular definition of the term “employee:” “[A]ny individual employed by an employer.”<sup>67</sup> The FLSA defines the term “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee,”<sup>68</sup> and defines the term “employ” as “to suffer or permit to work.”<sup>69</sup>

The United States Supreme Court has noted the “striking breadth” of the verb “employ” and stated that it “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>70</sup> Thus, inquiry into whether an individual is an employee or an independent contractor is not dependent upon

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<sup>67</sup> 29 U.S.C. § 203(e)(1).

<sup>68</sup> *Id.* § 203(d).

<sup>69</sup> *Id.* § 203(g).

<sup>70</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

the terminology the parties used or by the common law concepts of the terms.<sup>71</sup> Rather, the determination must be made based on the “economic realit[y]” of whether an individual is in fact an employee or an independent contractor conducting business for himself.<sup>72</sup> The factors used to determine whether an individual is an employee or an independent contractor are as follows:

- (1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the working relationship; and
- (6) the extent to which the service rendered is an integral part of the alleged employer’s business.<sup>73</sup>

The Supreme Court has frequently emphasized that the minimum wage and overtime pay under the FLSA cannot be waived.<sup>74</sup> Allowing FLSA rights to be abridged by contract or otherwise waived would nullify the statute’s purposes and thwart its legislative policies.<sup>75</sup> Nevertheless, many employers classify their employees as independent contractors in order to get around the requirements of the FLSA.

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<sup>71</sup> Henderson v. Inter-Chem Coal Co., Inc., 41 F.3d 567, 570 (10th Cir. 1994).

<sup>72</sup> Freund v. Hi-Tech Satellite, Inc., 185 Fed.Appx. 782, 782 (11th Cir. 2006)(quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947))(alteration in original).

<sup>73</sup> *Id.* at 783 (quoting Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987)).

<sup>74</sup> Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981).

<sup>75</sup> *Id.*

Misclassifying employees as independent contractors not only avoids the obligations imposed by the FLSA. Employers can also avoid paying payroll taxes, social security taxes, and worker's compensation premiums by classifying their employees as independent contractors. Employers also avoid the burden of providing benefits under a host of other federal and state laws, e.g., Family Medical Leave Act and worker's compensation benefits.

As mentioned above, the term "employee" under the FLSA is much broader and encompasses more individuals than traditional agency law principles.<sup>76</sup> The fact that an individual is called an independent contractor, signs an independent contractor agreement, and agrees to relinquish the protections of the FLSA is irrelevant. It must be determined whether, as a matter of economic reality, an individual is an employee or an independent contractor.<sup>77</sup> This determination is made based on the factors listed above.

### ***Off-the-Clock Cases***

The FLSA generally requires employers to pay employees for all hours worked. Any physical or mental exertion that is controlled or required by the employer and that primarily benefits the employer is work within the meaning of the FLSA.<sup>78</sup> Exertion is not even necessarily required because an employee may be hired to do nothing but wait for something to happen.<sup>79</sup>

Activities which are preliminary to or postliminary to principal activities are not covered by the FLSA.<sup>80</sup> However, any activity which is considered "integral and indispensable" to a

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<sup>76</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 326.

<sup>77</sup> *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed.Appx. at 782 (11th Cir. 2006)(*quoting* *Rutherford Food Corp. v. McComb*, 331 U.S. at 728).

<sup>78</sup> *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005)(*quoting* *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)).

<sup>79</sup> *Id.* (*quoting* *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)).

<sup>80</sup> 29 U.S.C. § 254(a)(2).

principal activity will itself be considered a principal activity.<sup>81</sup> The following factors are considered when determining whether an activity is integral and indispensable to a principal activity: “(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer.”<sup>82</sup> Therefore, an activity performed prior to or after performance of a principal activity is not required by the FLSA to be compensated. However, if the activity performed prior to or after performance of the principal activity is required by the employer, if it is necessary for the employee to perform his or her duties, and it primarily benefits the employer, then it will be considered integral and indispensable to a principal activity and, thus, must be compensated pursuant to the FLSA.

Also, time spent walking, riding, or traveling to and from where performance of the employee’s principal activities are performed is not required to be compensated by the FLSA.<sup>83</sup> The FLSA will, however, require that this time be compensated if it occurs after the employee’s first principal activity and before the employee’s last principal activity.<sup>84</sup> In other words, once a principal activity is performed and the employee’s workday begins, any walking, riding, or traveling that occurs afterwards must be compensated so long as the walking, riding, or traveling occurs prior to the last principal activity performed. This is known as the “continuous workday” rule.

Whether an activity is integral and indispensable to a principal activity arises most often in “donning and doffing” cases, which are cases in which employees are required to put on

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<sup>81</sup> *Alvarez*, 546 U.S. at 37.

<sup>82</sup> *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007).

<sup>83</sup> 29 U.S.C. § 254(a)(1).

<sup>84</sup> *Alvarez*, 546 U.S. at 37.

protective gear prior to starting work and take off the protective gear at the end of the shift, but receive no compensation for time spent doing so. The donning and doffing of specialized protective gear is integral and indispensable to many employees' principal activities.<sup>85</sup> As a result, the time spent donning and doffing is often required to be compensated. Also, as a result of the continuous workday rule, any activity that occurs after the donning at the beginning of the shift and before the doffing at the end of the shift must too be compensated.

### ***Interrupted Meal Periods***

The majority of employers require that their employees clock-out for lunch. Typically, an unpaid meal period of 30 minutes or more is considered a bona fide meal period, although the meal period can be shorter than 30 minutes under special conditions.<sup>86</sup> The employee must be completely relieved from duty during the meal period.<sup>87</sup> The employee will not be considered relieved from duty if he or she is required to perform any duties, active or inactive, while eating.<sup>88</sup> An employer does not have to let employees leave the premises during meal periods.<sup>89</sup> If, however, there is any interruption during the meal period the entire time must be counted as working time. For example, if a nurse is paged 15 minutes into her unpaid 30 minute lunch break to go perform work duties, the entire 30 minutes must be compensated.

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<sup>85</sup> See *Alvarez*, 546 U.S. at 30 (“Thus, under *Steiner*, activities, such as the donning and doffing of specialized protective gear, that are ‘performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).’” (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956))).

<sup>86</sup> 29 C.F.R. § 785.19(a). An example of special conditions which could allow a bona fide meal period to be shorter than 30 minutes would be if the employer and employee agreed that a shorter meal period would be sufficient and the facts demonstrated that the shorter amount of time was in fact sufficient. See Op. Letter of the Wage & Hour Div., 2000 WL 33969986 (Sept. 25, 2000)(“Where the employer and employees agree that a shorter bona fide meal period is sufficient and the facts of the particular situation demonstrate its sufficiency, as is the case here, it is our opinion that the period agreed upon of fifteen minutes is adequate.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 29 C.F.R. § 785.19(b).

## PLEADING THE FLSA CASE

### *History of Federal Pleading Practice*

In the same year that the FLSA was enacted, 1938, the Federal Rules of Civil Procedure were put in place.<sup>90</sup> Rule 8(a)(2) of the Federal Rules of Civil Procedure sets forth the standard of pleadings brought in federal court: “A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>91</sup> As with most new rules, the interpretation of the rule was addressed by the courts. In *Conley v. Gibson*, the Supreme Court established a bright line standard with respect to Rule 8 that has been followed for more than half a century.<sup>92</sup> In *Conley*, African American railway workers sued their union under the Railway Labor Act. The plaintiffs’ complaint alleged that the collective bargaining agreement between the Union and the Railroad gave the African American employees protection from discharge and loss of seniority.<sup>93</sup> According to the plaintiffs, however, the union “did nothing to protect the [African American employees] against discriminatory discharges and refused to give them protection comparable to white employees.”<sup>94</sup>

The Union moved to dismiss the complaint on several grounds, among which, was the allegation that the complaint failed to state a claim of relief upon which relief could be given. In addressing the sufficiency of the complaint, the Supreme Court enunciated the test for considering a motion to dismiss for failure to state a claim:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>95</sup>

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<sup>90</sup> See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 Minn. L. Rev. 375, 380 (1992)

<sup>91</sup> See Rule 8(a)(2), Fed.R.Civ. P.

<sup>92</sup> *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957).

<sup>93</sup> *Id.* at 43.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 45-46

In establishing this standard, the Court noted that the “Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome.”<sup>96</sup> Rather, the Court asserted, the purpose of the pleading rule “is to facilitate a proper decision on the merits.”<sup>97</sup>

Further, the Court stated that “all the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>98</sup> Following *Conley* and the notice pleading standard articulated in that case, the determining factor for courts considering a Rule 12(b)(6) motion to dismiss became whether the complaint alleged any set of facts in support of the plaintiff’s claim.

Approximately 45 years later, in *Swierkiewicz v. Sorema N.A.*, the Supreme Court again addressed the notice pleading standard in another employment/employee rights case.<sup>99</sup> In *Swierkiewicz*, the plaintiff, a 53 year old French national of Hungarian descent, filed suit alleging race discrimination in violation of Title VII and age discrimination pursuant to the Age Discrimination in Employment Act (ADEA).<sup>100</sup> The district court granted the employer’s motion to dismiss on the basis that the plaintiff’s complaint did not adequately allege a prima facie case under the *McDonnell Douglas* standard and the U.S. Court of Appeals for the Second Circuit affirmed the district court’s order.<sup>101</sup>

However, the Supreme Court rejected what it deemed as being a “heightened pleading standard” adopted by the Second Circuit. Specifically, the Court held that a plaintiff alleging employment discrimination need not plead a prima facie case of discrimination in order to

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<sup>96</sup> *Id.* at 48.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 47.

<sup>99</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

<sup>100</sup> *Id.* at 508-09.

<sup>101</sup> *Id.* at 509.

survive a motion to dismiss.<sup>102</sup> Instead of having to plead a prima facie case under the *McDonnell Douglass* framework, the Court held that a discrimination complaint must provide fair notice of the claims by containing “a short and plain statement of the claims showing that the pleader is entitled to relief.”<sup>103</sup> In addition, the Court again asserted that under the federal system’s “simplified standard for pleading” “a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts.”<sup>104</sup> Based on *Conley* and *Swierkiewicz*, the typical employment discrimination plaintiff could feel reasonably confident that he could survive a motion to dismiss so long as his complaint contained a statement that put the defendants on notice of the claims against them.

***New Standard Established: from “No Set of Facts” to “Plausible on its Face”***

In *Bell Atlantic Corp., v. Twombly*, the Supreme Court reconsidered its long standing interpretation of Rule 8 and the notice pleading standard.<sup>105</sup> In *Twombly*, the plaintiffs filed a class action alleging that the defendants violated § 1 of the Sherman Act because defendants allegedly “conspired to restrain trade.”<sup>106</sup> Specifically the plaintiffs claimed that the defendants, several regional telephone companies called Incumbent Local Exchange Carriers (ILECs), conspired to restrain trade by (1) engaging in “parallel conduct” in their respective service areas to inhibit the growth of competitive local exchange carriers (CLECs) and (2) agreeing to refrain from competing against one another.<sup>107</sup>

The district court dismissed the lawsuit, ruling that the parallel business conduct allegations, taken alone, did not constitute a claim under § 1 of the Sherman Act. The district

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<sup>102</sup> *Id.* at 511-12.

<sup>103</sup> *Id.* at 512.

<sup>104</sup> *Id.* at 514.

<sup>105</sup> *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

<sup>106</sup> *Id.* at 550-51.

<sup>107</sup> *Id.*

court reasoned that there could be other factors that explained the parallel business activities besides conspiracy.<sup>108</sup> Therefore, that court ruled that the plaintiffs needed to allege additional facts likely to exclude independent self-interested conduct as the basis for the parallel actions. On appeal, the Second Circuit reversed the district court and held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there were no set of facts in support of plaintiffs' claims that would entitle them to relief.<sup>109</sup>

In addressing whether the "parallel conduct" allegation sufficiently stated a cognizable claim, the Supreme Court asserted that the "no set of facts" standard announced in *Conley* was no longer the measuring stick.<sup>110</sup> Rather, the *Twombly* Court held that in order to survive a motion to dismiss a complaint must include "enough facts to state a claim of relief that is plausible on its face."<sup>111</sup>

Furthermore, the *Twombly* Court asserted that the "plausible on its face" standard does not "require heightened fact pleading of specifics."<sup>112</sup> However, under this new plausibility standard, the Court emphasized that a complaint must allege more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>113</sup> At first glance, it was unclear whether the new standard announced in *Twombly* applied only in anti-trust cases or whether the plausible on its face standard replaced *Conley's* "no set of facts" standard in all civil litigation.

However, the clarification of this issue came two years later in *Ashcroft v. Iqbal*.<sup>114</sup> Following the September 11, 2001 terrorist attacks, Javid Iqbal, a Pakistani Muslim, was arrested

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<sup>108</sup> *Id.* at 552.

<sup>109</sup> *Id.* at 553.

<sup>110</sup> *Id.* at 561-562.

<sup>111</sup> *Id.* at 570.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 555.

<sup>114</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

by the FBI and Immigration and Naturalization Service (INS) on charges of fraud relating to identification documents and conspiracy to defraud.<sup>115</sup> Iqbal was designated by the government as a person of “high interest” to the ongoing September 11<sup>th</sup> investigation and placed in a maximum security facility.<sup>116</sup>

After serving a term of imprisonment on the criminal charges and being deported to Pakistan, Iqbal filed a *Bivens* action against various officials, including Attorney General John Ashcroft and FBI director Robert Mueller.<sup>117</sup> The lawsuit alleged that the defendants designated Iqbal as a person of high interest based on his race, religion, or national origin in violation of the First and Fifth Amendments to the U.S. Constitution. The complaint further alleged that the defendants “condoned, and willfully and maliciously agreed to subject” Iqbal to harsh conditions of confinement on account of his religion, race and/or national origin.<sup>118</sup> After the district court denied the defendants motion to dismiss, the defendants appealed to the Second Circuit.

On appeal, the Second Circuit applied the *Twombly* plausibility standard and affirmed the district court.<sup>119</sup> The Supreme Court also applied the plausibility standard established in *Twombly* to determine whether Iqbal’s *Bivens* complaint adequately stated a claim for relief.<sup>120</sup> However, the Court concluded that Iqbal’s complaint had not “nudged [his] claims” of discrimination “across the line from conceivable to plausible.”<sup>121</sup> In reversing the case, the Court held that Iqbal’s allegations of Ashcroft and Mueller’s alleged involvement in the

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<sup>115</sup> *Id.* at 1943.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1943-44.

<sup>118</sup> *Id.* at 1944.

<sup>119</sup> *Id.*

<sup>120</sup> See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971)(finding that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents)

<sup>121</sup> *Id.* at 1951.

discriminatory policies were too “conclusory.”<sup>122</sup> Consequently, the Court held that the Iqbal complaint did not contain any factual allegation sufficient to plausibly suggest Ashcroft and Mueller’s discriminatory state of mind.<sup>123</sup> In addition, the Court also specifically rejected the idea that the pleading standard announced in *Twombly* applied only in the context of antitrust litigation.<sup>124</sup> Instead the Court held that the *Twombly* decision was based on the Court’s interpretation and application of Rule 8, Fed.R.Civ.P. and as such, the *Twombly* decision “expounded the [plausible on its face] pleading standard for all ‘civil actions.’”<sup>125</sup>

### ***The Application of Swierkiewicz, Twombly and Iqbal to FLSA Complaints***

The Supreme Court’s recent decisions in *Swierkiewicz*, *Twombly* and *Iqbal* have seemingly created conflict rather than clarity when it comes to proper pleading pursuant to Rule 8. On the one hand, the *Swierkiewicz* Court stated that plaintiffs can still rely on notice pleading to state a claim. On the other hand, however, *Twombly* and *Iqbal* make it clear that the standard for how federal courts are to treat a Rule 12(b)(6) motion has indeed been elevated. Stated differently, a plaintiff must plead facts that do more than establish a conceivable claim, however, the plaintiff does not have to plead facts that are so detailed that they establish a prima facie case. The only remaining question, therefore, is with what specificity must complaints be pleaded? The Eleventh Circuit’s interpretation of *Twombly* has perhaps given some guidance.

In *Watts v. Florida International University*, the plaintiff filed a § 1983 action alleging that his employment was terminated because of the plaintiff’s religious beliefs.<sup>126</sup> The district court granted the defendants’ motion to dismiss.<sup>127</sup> However, with respect to the plaintiff’s free

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1951-54.

<sup>124</sup> *Id.* at 1953.

<sup>125</sup> *Id.*

<sup>126</sup> See *Watts v. Fla. Int’l Univ.*, 405 F.3d 1289, 1292 (11<sup>th</sup> Cir. 2007).

<sup>127</sup> *Id.* at 1293.

exercise of religion claim, the Eleventh Circuit reversed the district court finding that the plaintiff's complaint gave enough facts to render an element of his claim plausible.<sup>128</sup> In regards to the requisite pleading standard, the Eleventh Circuit stated:

The Supreme Court's most recent formulation of the pleading specificity standard {the *Twombly* standard} is that "*stating such a claim requires a complaint with enough factual matter (taken as true) to suggest*" the required element. *Id.* The standard is one of "*plausible grounds to infer.*" *Id.* The Court has instructed us that the rule "*does not impose a probability requirement at the pleading stage, but instead simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence*" of the necessary element. It is sufficient if the complaint succeeds in "*identifying facts that are suggestive enough to render [the element] plausible.*" *Id.*<sup>129</sup>

Thus, in essence, the Eleventh Circuit has used the language of the *Twombly* opinion to define the plausibility standard as meaning enough identifying factual matter (taken as true) to suggest the required element of a plaintiff's claim.

After *Watts*, the Eleventh Circuit applied this same standard in the context of a FLSA complaint. In *Labor v. Labbe*, the Secretary of Labor filed suit against a roofing company alleging that the defendant violated the FLSA by failing to pay its employees applicable minimum wage and overtime and by failing to keep accurate employment records.<sup>130</sup> The district court granted the defendant's Rule 12(b)(6) motion to dismiss and the Eleventh Circuit reversed the dismissal.<sup>131</sup>

First, the Eleventh Circuit again recited the *Twombly* standard enunciated by the Supreme Court and in the *Watts* decision. Next, the Eleventh Circuit asserted that "the requirements to state a claim of a FLSA violation are quite straightforward. The elements that must be shown are simply a failure to pay overtime compensation and/or minimum wages to covered employees

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<sup>128</sup> *Id.* at 1294-96.

<sup>129</sup> *Watts*, 405 F.3d at 1295-96 (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556 (2007))

<sup>130</sup> *Labor v. Labbe*, 319 Fed.Appx. 761, 763 (11<sup>th</sup> Cir. 2008).

<sup>131</sup> *Id.* at 762.

and/or failure to keep payroll records in accordance with the Act.”<sup>132</sup> Lastly, the *Labbe* Court went on to find that the Secretary of Labor’s complaint, which addressed the “straightforward” of a FLSA claim, was sufficient to withstand a motion to dismiss:

The complaint alleges that Labbe is a covered employer and provides a listing of the specific names of the covered employees as Appendix A to the complaint. The complaint alleges that since June 16, 2002, Labbe repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates. The complaint also alleges in a separate paragraph that since June 16, 2002 Labbe failed to keep appropriate records of the “wages, hours and other conditions and practices of employment maintained by it” as required by law. While these allegations are not overly detailed, we find that a claim for relief for failure to pay minimum wage, to provide overtime compensation, or to keep appropriate records under the FLSA does not require more.<sup>133</sup>

## CONCLUSION

It has been estimated that 70 percent of employers are out of compliance with the FLSA in some way.<sup>134</sup> Unwary and conscious employers alike are exposed to huge potential liability as a result of their violations. FLSA litigation has increased significantly over the past several years and there is no sign of it slowing down.

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<sup>132</sup> *Id.* at 763.

<sup>133</sup> *Id.* at 763-64.

<sup>134</sup> Diane Cadrain, *Guard against FLSA claims: Fair Labor Standards Act lawsuits are increasing. Are your classifications in order?*, HR MAGAZINE, Apr. 1, 2008, at 97.