The New Era of Enforcing Workers' Rights Under the FLSA
Recovering Pre and Post Shift Wages and Overcoming the Motor Carrier Act Defense

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There is no doubt that the filing of cases under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., are on the rise. In the last four years, the number of FLSA cases filed in federal court has increased from approximately 2,898 cases in 2003 to approximately 6,735 cases in 2006.[1] As more practitioners are finding themselves in the wage and hour arena, it is important that we keep apprised of recent developments and changes in the law. Two areas where plaintiffs have made significant progress include collecting overtime compensation for pre and post shift work and in avoiding the application of the Motor Carrier Act ("MCA"), Section 213(b) of the FLSA to the claims of individuals who drive vehicles that weigh less than 10,001 pounds.

I. Compensable Work Under the FLSA

The scope of what constitutes compensable working time has been clarified with *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976), *Dooley v. Liberty Mutual*

[1]Legal and Business Publishing Group The Bureau of National Affairs, Inc. conducted a search via the U.S. Case Party Index - (PACER indexes) which classifies Fair Labor Standards cases as item 710. The trend has been steady from 2003 through 2006: 2,898 in 2003; 3,593 in 2004; 4,079 in 2005; and 6,735 in 2006

Insurance Company, 307 F. Supp. 2d 234 (D. Mass. 2004), *Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331 (N.D. Ohio 2005) and most recently in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). These cases have paved the way for recovery of unpaid wages for the time employees spend performing pre-shift and post-shift duties, for travel to and from work sites, for cleaning and maintenance duties, and for work performed at home when the activities are an integral and indispensable part of the employees principal activities. Federal courts are readily certifying such cases as § 216(b) collective actions.

A. Development of Case Law

Employees under the FLSA are entitled to compensation for "work," which is defined by the Supreme Court as an activity involving "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No.* 123, 321 U.S. 590, 598 (1944). Congress modified FLSA by enacting the Portal-to-Portal Act to limit employer liability for "effortless" preliminary or postliminary activities. 29 U.S.C. § 254(a). However, activities that take place before or after an employee commences their regular workday are compensable, "if those activities are an integral and indispensable part of the principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); *IBP, Inc.*, 541 U.S. at 22; 29 C.F.R. § 790.7(a).

In *Dunlop*, 527 F.2d at 401, the former Fifth Circuit, in binding precedent for the Eleventh Circuit, found that pre-shift activities performed by electricians that involved filling out time sheets, checking job locations, cleaning and loading trucks, picking up

electrical plans, checking job locations, removing trash accumulated from trucks accumulated during previous day's work, loading trucks and fueling trucks were "principal activities" primarily benefiting the employer and compensable. *Id.*

In *Dooley*, 307 F. Supp. 2d at 239, a Massachusetts federal district court reviewed the compensability of travel time for appraisers who alleged they "sometimes" started laptops, opened software, checked voice and email, responded to messages, set a voice mail greeting, reviewed and mapped daily assignments, and loaded supplies into their vehicles before leaving home to drive to their first appraisal site of the day. The appraisers performed similar tasks in the evenings after arriving home, including calling body shops and claimants, completing estimates, time logs, and transmitting them electronically. Comparing their home to an office, the court found this work at home was a principal activity, which was compensable under the FLSA. The court also held that the travel time that followed these activities began and ended the workday and accordingly, found the commute to and from the first job site compensable. *Id*. at 245.

In February 2005, the Supreme Court heard the consolidated appeal of rulings in two circuit court cases dealing with the compensability of time spent donning and doffing specialized protective gear and its impact on the compensability of related activities during the work day. *IBP Inc.,* 546 U.S. 21. The Court unanimously affirmed the Ninth Circuit's holding in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), in which plaintiffs' donning, doffing, and cleaning activities were held to be compensable as "integral and indispensable . . . principle activity" for the benefit of the employer. *Id.* The Court departed from the First Circuit's holding in *Tum v. Barber*, 331 F.3d 1 (1st Cir. 2003), by specifically requiring that employees be compensated for the time spent

walking between their changing area and the production floor after donning and before doffing specialized protective gear. *Id*. at 302. In doing so, the Court specifically rejected the employers' theory that there might be a category of activities deemed "principal" for the purpose of compensation but not sufficiently principal to commence the workday under the Portal to Portal Act. Hence, the continuous workday rule requires compensation for activities performed during the time spent between the first and last principal activities of the work day. *Id*. at 304.

In a recent Wage and Hour Advisory Memorandum, the Department of Labor has stated that the Supreme Court in *Steiner* and again in *IBP, Inc.* have " '*made clear*' that activities integral and indispensable to principal activities are themselves principal activities that start the workday." WHAM, 2006-2, at 1, May 31, 2006 (emphasis added). Moreover, the Department of Labor conveyed that *IBP, Inc.* stands for the proposition, consistent with the continuous workday rule, that if time spent donning, walking, waiting and doffing cumulatively exceeds the *de minimis* standard, it is all compensable time. *Id*. at 3.

For more discussion regarding the same: *see Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331, *29 (N.D. Ohio 2005) (holding that the workers' shop activities were compensable, as an integral and indispensable part of their principal activities associated with the installation of insulation; that their waiting time was compensable as well, since it was primarily for the benefit of the employer; that the time spent traveling from the shop to the job site and vice versa, constituted principal activities connected with insulation installation and did not qualify as excludable preliminary and postliminary activities under the Portal-to-Portal Act.); *Burton v. Hillsborough County*,

2006 U.S. App. LEXIS 12207, **20-21 (11th Cir. May 18, 2006) (finding travel time to the first work site of the day from a county parking lot and the travel time from the last work site of the day back to the county parking lot was compensable time, because picking-up and dropping-off the work vehicle was integral and indispensable to plaintiffs' principle work activity); *Twaddle v. RKE Trucking Co*., 2006 U.S. Dist. LEXIS 18028, *18 (S.D. Ohio March 29, 2006) (finding plaintiffs' duties of starting the engines of their trucks, performing pre-trip inspections of the trucks and awaiting the receipt of driving assignments are all integral and indispensable to the plaintiffs' principal work activity even if plaintiffs' socialized, drank coffee and drank pop during this time).

B. Certification of Collection Actions for Uncompensated Work

With cases like *Dunlop*, *Dooley*, *Chao*, and *IBP, Inc.* allowing for the recovery of uncompensated work time, plaintiffs are moving to have similar cases certified as Section 216(b) collective actions. The Eleventh Circuit, in *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001), recommended that district courts use a two-tiered procedure for certifying collective actions under § 216(b), describing the first determination as the "notice stage." The Court stated that at the notice stage, the district court makes a decision, "usually based only on the *pleadings* and *any affidavits* which have been submitted – whether notice of the action should be given to potential class members." *Id*. (emphasis added). Because of the minimal evidence at this stage in litigation, the Court stated that "this determination is made using a fairly lenient standard," typically resulting in "conditional certification" of a representative class. *Id*.

Court-facilitated notice to the "class" regarding FLSA collective action litigation is warranted when plaintiffs demonstrate that there are others who may wish to opt-in

and who are "similarly situated" with respect to the job requirements and pay provisions. *Dybach v. State of Fla. Dept. of Corrections*, 942 F.2d 1562, 1566 (11th Cir. 1991); *Hipp*, 252 F.3d at 1217-18. As explained by the district court in *Barron v. Henry County School System*, 242 F. Supp. 2d 1096, 1103 (M.D. Ala. 2003), it is not necessary for the plaintiffs to point to a particular policy or practice in order to establish that potential opt-in plaintiffs are "similarly situated" for notice purposes. However, when a plaintiff establishes that a common policy or practice exists, then the Court may conditionally certify the class under § 216(b) based on "some" evidence of this common practice. *Id.* at 1106. *See e.g.*, *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 U.S. Dist. LEXIS 58484, **7-8 (S.D. Fla. May 17, 2006) (an improper company-wide pay policy provides a reasonable basis for collective notice); *Garza v. Chicago Transit Authority*, 2001 U.S. Dist. LEXIS 6132, *6 (N.D. Ill. May 8, 2001) (employees in divergent job classes entitled to notice upon modest factual showing of a common policy or plan); *Ballaris v. Wacker Siltronic Corp.*, 2001 U.S. Dist. LEXIS 13354, **8-9 (D. Or. August 24, 2001) (hourly employees required to change into and out of "bunny suits" given notice upon evidence of workplace policies that required working without overtime compensation).

Even an employer's pay policy may be a common policy or plan that warrants conditional certification and facilitation of notice. In *Frank v. Gold'n Plump Poultry, Inc.*, 2005 U.S. Dist. LEXIS 20441 (D. Minn. September 14, 2005), the court conditionally certified and authorized notice for a class of chicken plant processing and sanitation employees who asserted that they were not fully compensated for time spent donning, doffing and sanitizing gear. Gold n' Plump argued that notice was not proper

because plaintiffs and potential class members were not similarly situated in that individual line supervisors determined pay and employees were compensated differently (some employees were paid based on punch cards, some employees were paid based on start and stop times, and other employees were paid using a combination of the two methods). In addition, employees worked in different geographical locations and reported to different supervisors who are given autonomous decision-making authority. The court rejected Gold n' Plump's arguments and responded that there is a low burden of proof required from plaintiffs at this stage. The court stated plaintiffs may be similarly situated regardless of whether their pay is based on different punch methods. In evaluating whether the plaintiffs had met the lenient standard for conditional certification and facilitation of notice, the court determined plaintiffs presented a colorable basis that they were victims of a "single decision, policy or plan." *Id*. at *8. The court found that plaintiffs affidavits sufficiently established that Gold'n Plump had a common practice of failing to compensate employees for time spent donning, doffing and sanitizing equipment. Furthermore, the plaintiffs and potential class members were similarly situated because all were affected by this common practice. The court also found that notice from the Department of Labor informing Gold n' Plump that it must pay employees for donning, doffing and sanitizing equipment was evidence of a *single decision* sufficient for class certification.

Courts have found distinctions among plaintiffs and potential class members will not necessarily derail conditional certification and authorization of notice at this early stage. In *Boyd v. Jupiter Aluminum Corporation,* 2006 U.S. Dist. Lexis 35654 (N.D. Ind. May 31, 2006), the plaintiffs are hourly employees who work for Jupiter

Aluminum's processing plant. The plaintiffs' moved for notice based on their employer's practice of failing to pay them and others similarly situated for all overtime hours worked. Specially, the plaintiffs asserted that Jupiter Aluminum failed to compensate them for arriving at their workstations prior to their shift, for working through lunch, for attending work-related meetings, and for donning and doffing protective gear and walking to their workstation. Jupiter Aluminum attempted to argue that plaintiffs failed to make even a modest showing that employees were subjected to a single common policy. The court did not agree, and found plaintiff's affidavit stating he observed other co-workers showing up early for work too was enough evidence to support that there was a common policy. Jupiter Aluminum also argued that there was no common plan because plaintiffs were given different instructions regarding when to arrive for their shift (i.e., one plaintiff stated he was told by his supervisor to arrive early and another plaintiff stated he was told by the same supervisor to arrive fifteen (15) minutes prior to the start of his shift). The court found "[t]hese are distinctions without a difference . . . . and are not substantial enough to preclude notice at this point of the case." *Id.* at *12. The common practice, supporting certification, was that Jupiter Aluminum paid its employees for the length of their shift and not based on the actual time they worked.

In *Gambo v. Lucent Technologies*, 2005 U.S. Dist. LEXIS (N.D. Ill. December 22, 2005), the court authorized notice for employees who worked in the company's North American Region Delivery and Customer Support Center based on plaintiffs' modest factual showing of a common policy or plan that other employees were denied overtime compensation. The uncompensated time, for which plaintiffs claimed they were denied

overtime pay, was accumulated during "on-call" time in which employees were required to respond to a pager within seven minutes. Lucent Technologies argued that its decentralized nature made a common policy or plan impossible. The court disagreed and stated, if several independent decentralized units adopt the same unlawful overtime policy that operates in a similar way and affects similar workers, this is enough to establish that a common policy or plan exists.

Similarly, in *Guerra v. Big Johnson Concrete Pumping Inc.*,[2] 2006 U.S. Dist. LEXIS 58484 (S.D. Fla. May 17, 2006), the Court in the Southern District of Florida found the plaintiff sufficiently established a common policy or plan by alleging his employer had a company-wide policy of denying employees compensation in their final paycheck following termination of employment. The employer argued that plaintiff's definition of potential class members as similarly situated laborers was overly broad. The definition of "laborers" did not specify job descriptions, job duties, or geographical locations. The court found this argument unpersuasive finding the nature of plaintiff's claim was based on a company-wide pay policy; and for that reason, all laborers were similarly situated. The court did however recognize that had plaintiff alleged a "discrete or particularized violation," such as a supervisor informally docking his pay in contravention of an otherwise lawful policy or if the type of job affected how overtime was paid, then the employer's objection may have some relevancy. *Id*. at *7. The court granted plaintiffs motion for certification of a collective action and permitted supervised notice.

[2] Plaintiff Guerra also sought recovery of minimum wages in violation the Florida Minimum Wage Act, *Fla. Const.* Art. X, §24. See, *Guerra v. Big Johnson Concrete Pumping Inc.*, 2006 U.S. Dist. LEXIS 58973 (S.D. Fla. June 28, 2006)

However, the court, in *Moeck v. Gray Supply Corporation*, 2006 U.S. Dist. LEXIS 511 (D.N.J. January 5, 2006), took a more restrictive stance and refused to certify a class based on the "many potential distinctions of each putative class members' claim." *Id*. at *15. The plaintiffs were natural gas and main line installers who alleged that they were required to report to their yards and work for thirty (30) minutes in the morning and thirty (30) minutes in the afternoon without pay. Plaintiffs asserted that this unpaid time was referred to as "free time." Plaintiffs testified that one supervisor required workers under his supervision to work "free time," and that they had heard another supervisor use the same term. Furthermore, they allege they were told that failure to work "free time" could result in termination. The court found that plaintiffs failed to present evidence that they and potential class members were victims of a single policy, decision or plan. *Id*. at *13. The court found there was no evidence presented that other supervisors implemented the same policy; and based on plaintiffs' own testimony, the court found there were different reporting practices and policies in each yard. One plaintiff stated that at times he was permitted to report directly to his job site without going to the yard first and another plaintiff stated he could "call-in" at the yard the night before and obtain information on the following day's work sites. With these facts, the court held that there were too many distinctions among the potential class members' claims for class certification to be proper. *Id*. at **14-15.

In *Ledbetter v. Pruitt Corporation*, 2007 U.S. Dist. LEXIS 10243 (M.D. Ga. February 12, 2007), the court likewise denied class certification and notice on the basis that the plaintiff failed to sufficiently present a common pattern or practice of the alleged FLSA violation or any other evidence that the potential class members were similarly

situated. The plaintiff, who worked for Pruitt, a professional healthcare agency that provides healthcare services to various facilities in Georgia, moved for class certification and statewide notice on behalf of herself and those similarly situated. The plaintiff claimed that Pruitt had a company-wide policy and practice of not paying employees minimum wage and/or overtime compensation for all hours worked because it automatically deducted a thirty (30) minute lunch break each day regardless of whether the employee was relieved from their job duties for that period of time or not. The court found the statewide class proposed by the plaintiff consisted of employees not similarly situated because they had different job responsibilities, worked in different facilities and locations, and were subjected to different working conditions. Further, the court found plaintiff did not sufficiently show that automatic meal deductions would result in a company-wide policy and practice of an FLSA pay violation. The court stated that automatic meal deduction are not *per se* illegal, and that the plaintiff could not ensure that each employee did not a take a full lunch break each day. The court also noted that the plaintiff provided no details regarding the circumstances under which the meal deductions were taken. The court held that purely claiming a policy and practice violation of the FLSA will not satisfy the similarly situated requirement without showing that the policy and practice is more than merely a sporadic occurrence. *Id*. at **14-15. The court also found collective adjudication was not appropriate because of the individualized analysis required to calculate potential damages for each employees' minimum wage and overtime claim.[3]

[3] *Contra, Klay v. Humana, Inc.*, 382 F.3d 1241, 1250, 1259 (11th Cir. 2004) (the need for individualized damage calculations will not foreclose certification even under the more rigorous Rule 23 standard).

II. Avoiding the Motor Carrier Act Exemption

A new strategy has surfaced for avoiding the Motor Carrier Act ("MCA") exemption, Section 213(b) of the FLSA for drivers of light-weight vehicles weighing less than 10,001 pounds: Strict statutory construction. On August 10, 2005, an amendment to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") limited the jurisdiction of the Secretary of Transportation over non-commerical motor vehicles that have a gross vehicle weight ("GVW") of less than 10,001 lbs. The effect of this amendment, although touted by management attorneys as unintentional, is a statutory change of law that will require employers to pay overtime wages to certain employees who prior to August 10, 2005 were considered exempt employees under Section 213(b)'s MCA exemption. As this change of law is rather recent, plaintiff's attorneys seeking to avoid the MCA exemption should thoroughly brief the court regarding this jurisdictional change.

A. Brief History of the MCA and FLSA Relationship

A gap in protection of the maximum-hour protection for workers was created almost 70 years ago. In 1935, Congress passed the MCA to regulate the hours of service of truck drivers, and to provide other safety rules. The MCA gave the Secretary of Transportation ("Secretary") the authority to regulate the hours of service of truck drivers. However, the Secretary chose to regulate the hours of service only of those drivers in trucks with over 10,000 pounds GVW.

In 1938, when Congress passed the FLSA, it wanted to avoid conflicts between the FLSA and the MCA and included an exemption from the FLSA's overtime

regulations for those workers subject to the Secretary of Transportation's jurisdiction under the FLSA.

Congress' recognition of the necessity for the exemption from the FLSA for workers under the jurisdiction of the Secretary reflected its expectation that the Secretary would enact legislation regulating the maximum hours of service for employees within her jurisdiction.

However, and notwithstanding her authority to do so, the Secretary has never exercised her power to establish qualifications and maximum hours of service over light-weight (vehicles of under 10,001 pounds GVW) motor private carriers in the interest of safety. *See* 49 U.S.C. § 31502(b). Nor has the Federal Highway Administration (FWHA), the agency of the Department of Transportation (DOT) responsible for motor carrier safety, ever regulated or enforced any reporting, permitting, or maximum-hour requirements on vehicles weighing less than 10,001 pounds. Instead, the Secretary and the FWHA have focused primarily on safety regulations for medium- to large-sized commercial vehicles, leaving a gap in coverage for those workers over whom the Secretary of Transportation could, but had chosen not, to exercise such jurisdiction: truck drivers whose trucks weighed less than 10,001 pounds GVW.

The Secretary's unwillingness to exercise power to regulate motor private carriers weighing less than 10,001 pounds did not diminish the authority given to her. Because the Secretary had preserved jurisdiction over all motor private carriers, the hours of drivers of vehicles of less than 10,001 pounds in interstate commerce were historically left unregulated by either the Secretary of Transportation's hours-of-work regulations or

the FLSA. Thus, many workers in the transportation industry were deprived of the overtime pay protections other workers in the United States enjoy.

In fact, many workers whose primary duties are *outside* the transportation industry have also been considered exempt from the FLSA due their incidental involvement with interstate transportation. *See Friedrich v. U.S. Computer Services*, 974 F.2d 409, 413 (3rd Cir. 1992) (Computer field service technicians who drove cars between job sites); *Wirtz v. C & P Shoe Corporation*, 336 F.2d 21, 29 (5th Cir. 1964) (Shoe stockers who performed limited driving duties); *Turk v. Buffets, Inc.*, 940 F.Supp. 1255 (N.D. Ill. 1996) (Repair technicians); *Walton v. Louisiana Compressor Maintenance*, 3 WH Cases2d 1630 (E.D. La. 1997) (same); *Peraro v. Chemlawn Services Corporation*, 692 F.Supp. 109, 114 (D. Ct. 1988) (Carpet Cleaners).

On August 10, 2005, this gap in coverage closed after Congress passed and President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The SAFETEA-LU amended the definition of "motor private carrier" found in 49 U.S.C. § 13105 to confine "motor private carrier" to carriers transporting property by "commercial motor vehicle (as defined in [49 U.S.C.] section 31132)." In section 31132, a *commercial motor vehicle* is defined as a vehicle with a gross vehicle weight of at least 10,001 pounds.

Although legislative history provides scant insight into Congress' intent in making this far reaching modification, a conference report confirms that the change in the definition of motor private carrier was in part to "harmonize[] the reach of the commercial and the safety statutes by eliminating the requirement for motor carriers to register if they are not subject to the Federal motor carrier safety regulations."

Conference Report: H.R. Rep. No. 109-203 (July 28, 2005), 151 Cong. Rec. H 7033; H.R. Rep. No. 109-12 § 4118 (Mar. 7, 2005), 151 Cong. Rec. H 988.

Intentional or not, the result of the statutory language of the SAFETEA-LU amendment is quite clear: the change to the definition of "motor private carrier" to include only vehicles weighing 10,001 pounds or more limits the juristiction of the Secretary over those who drive these vehicles. Moreover, it brings employees transporting property in interstate commerce in vehicles weighing less than 10,001 pounds within the regulatory arm of the FLSA.

B. Relevant Caselaw Before and After the SAFETEA-LU Amendment of August 10, 2005

Prior to August 10, 2005, federal courts acknowledged that the Secretary had jurisdiction over drivers of any size and type vehicle that transports goods in interstate commerce.[4] As discussed above, this was true regardless of whether the Secretary utilized this authority. *See Southern Gasoline Co. v. Bailey*, 319 U.S. 44 (1943)*; Lynn Martin v. Coyne International Enterprises, Corp.*, 966 F.2d 61 (2d. Cir. 1992); *Friedrich v. U.S. Computer Services d/b/a U.S. Computer Systems d/b/a CableData*, 974 F.2d 409 (3d. Cir. 1992); *Turk v. Buffet*s, 940 F. Supp 1255 (N.D. Ill. 1996).

Friedrich v. U.S. Computer Services is often cited for this proposition. The plaintiffs in *Friedrich* were computer repair technicians. They drove personal vehicles or rental cars to customers' homes to perform installation, maintenance, and repairs on

[4] Solely intrastate travel may also satisfy the interstate commerce requirement if the transportation is part of a continuous movement in interstate commerce. Courts tend to evaluate the essential character of the shipment to determine whether the out-of-state shipper had a fixed and persistent intent that the shipment continues in interstate commerce to its final destination. *See Walling v. Jacksonville Paper*, 317 U.S. 564 (1943). Although not addressed by this paper, the discussion regarding when intrastate transportation becomes travel in interstate commerce is also a developing topic worthy of further examination. *See Foxworthy v. Highland Dairy Co.*, 997 F.2d 670, 673 (10th Cir. 1993); *Watkins v. Ameripride Services*, 375 F.3d 821, 826 (9th Cir. 2004); *Herman v. Suwannee Swifty Stores, Inc.*, 19 F.Supp. 2d 1365, 1373 (M.D. Ga. 1998); *Masson v. Ecolab, Inc.*, 2005 U.S. Dist LEXIS 18022, at **29-31 (S.D.N.Y. 2005).

customers' computer hardware systems. The plaintiffs argued that the Secretary waived her power to regulate companies like U.S. Computer Services,[5] whose employees drive vehicles weighing less than 10,000 pounds, because she had chosen not to regulate them.[6] The district court did not agree and relied on the Supreme Court's decision in *Southland Gasoline Co.* to conclude that "the DOT's failure to excise its power to regulate does not mean that it has waived it." *Id*. at 413. The district court further recognized that in 1984 Congress amended Section 3102 of the MCA, and *had Congress wished to limit the application of the MCA to only commercial motor vehicles it would have done so* at that time. The appellate court affirmed the district court's holding, and stated the "DOT's election not to regulate lightweight and passenger vehicles does not strip it of its power to establish maximum hours and qualifications for private motor carriers." *Id*. at 416. The court ultimately found that the plaintiffs' transported property (i.e., maintenance and repair tools) in interstate commerce and were therefore motor private carriers subject to the MCA and exempt for the FLSA's overtime requirements.

Martin v. Coyne International Enterprises, Corp. agreed with the *Friedrich* court and found that the Secretary had jurisdiction over employees who delivered laundry in vans weighing less than 10,000 pounds restricted to the Buffalo, New York area. In *Coyne*, the Secretary of Labor argued that the Secretary of Transportation's regulations promulgated by the FHWA in 1988 (the enforcement arm for the MCA) omitted regulations for drivers of light-weight vehicles thereby cancelling her power over this group of drivers. The district court did not agree with the Secretary of Labor's position,

[5] Referred to in *Friedrich* as CableData.
[6] The Motor Carriers Safety Act (MCSA) regulates "commercial motor vehicles" weighing more than 10,000 lbs or used to transport more than fifteen (15) passengers or hazardous materials. 49 U.S.C. § 2503(1); 49 C.F.R. §390.5.

explaining that the decision not to exercise a given power does not mean that power does not exist. The appellate court affirmed, and once again plaintiffs were eventually deemed exempt employees under Section 213(b).

Prior to August 10, 2005, even courts cognizant of the unfair and perhaps unintended result the MCA exemption may have, recognize that only Congress has the power to limit the Secretary's jurisdiction over these individuals. *See Turk v. Buffet*s, 940 F. Supp at 1261. In *Turk v. Buffet*s, the court reiterated that the Secretary retains jurisdiction over drivers of light-weight vehicles regardless of whether it exercises this power. The plaintiffs were service technicians whose primaries duties included evaluating, servicing, and maintaining restaurant equipment. They drove company-owed Ford pick-up trucks, most of which weighed less than 10,000 pounds when loaded with repair equipment. The *Turk* court recognized that although unfortunate outcomes may result from the applicable of the MCA, when "statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id*. at 1260 (quoting *Russello v. United State*s, 464 U.S. 16, 20 (1983)).

On August 10, 2005, Congress changed the statutory definition of "motor private carrier" limiting the Secretary's jurisdiction to those who drive trucks weighing 10,001 or more pounds. The SAFETEA-LU amendment to the MCA is unambiguous and there is no legislative history to show that there was a contrary Congressional intent. Following suit, federal courts have recognized that post-August 10, 2005, the SAFETEA-LU modified who is covered by the MCA exemption. In *Dell'Orfano v. Ikon Office Solutions, Inc.*, Civil Action No. 5:05-CV-245 (M.D. Ga. August 29, 2006), the court

found "it is clear that the motor carrier exemption has no application to any claims in this case after August 10, 2005" when "[i]t is undisputed in this case that Plaintiff drove a vehicle that weighed substantially less than 10,000 pounds."

Other federal courts have come to the same result: Workers who were previously exempt under the old definition of "motor private carrier" are no longer exempt under the revised definition of "motor private carrier" if they travel in vehicles weighing less than 10,001 pounds. *Musarra v. Digital Dish, Inc.*, 454 F. Supp. 2d 692 (S.D. Ohio 2006); *see King v. Asset Appraisal Services, Inc.*, 2006 U.S. Dist. LEXIS 94937 (D. Neb. October 23, 2006); *O'Neil v. Kilbourne Medical Laboratories*, 2007 U.S. Dist. LEXIS 22620 (E.D. Kentucky March 28, 2007).[7]

Presently, employers can not rely on the MCA exemption if their employees travel in light-weight motor vehicles weighing less than 10,001 pounds. Courts reviewing the SAFETEA-LU amendment will likely find its statutory language unambiguous and that there is no congressional record to support the contrary. Therefore, any change to the current state of the law must result from further Congressional action.

C. Congressional Update

On June 14, 2006, the House of Representative passed a Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia and Independent Agencies (THUD) Appropriations Bill, H.R. 5576, that included a provision that could once again redefine "motor private carrier" to include vehicles with a GVW of

[7] Notwithstanding, courts have stated that the SAFETEA-LU amendment to the MCA is not retroactive. *See Musarra*, 454 F. Supp. 2d at 703 (absence clear language evincing Congressional intent to the contrary, the amendment cannot be applied retroactively).

less than 10,001 pounds, thereby reinstating jurisdiction to the Secretary of Transportation and the MCA exemption to the FLSA for drivers of those vehicles. H.R. 5576 was expressly made retroactive to recapture any benefit received since August 10, 2005. It was referred to the Senate and placed of the Senate Legislative Calendar on July 26, 2006, however, when the 109th lame duck Congressional Session came to an end in 2006, H.R. 5576 remained pending. H.R. 5576 has since been rolled into the Revised Continuing Appropriations Resolution of 2007.

On February 27, 2007, the Committee on Transportation introduced H.R. 1195 to amend the SATETEA-LU to make technical corrections. However, no technical correction was proposed to reinstate the MCA exemption to the FLSA for employees who travel in light-weight vehicles. In early March 2007, the House Transportation and Infrastructure Committee met and marked-up H.R. 1195 with no proposal for reinstatement. The House of Representatives passed H.R. 1195 on March 26, 2007, and the SAFETEA-LU technical corrections bill was referred to the Senate Committee on Environment and Public Works chaired by Barbara Boxer, D-California. The current version of H.R. 1195 omits any mention of amending the SAFETEA-LU to again broaden the scope of the MCA exemption.

NELA has been actively engaged in lobbying Congress to protect the rights of workers who have only recently benefited from this important change of law.

CONCLUSION

The "continuous workday rule" affirmed by the Supreme Court in *IBP, Inc.* and favorable FLSA collective action decisions certifying cases for pre and post-shift work is

an important win for workers' rights advocates; as is the SAFETEA-LU amendment to the MCA limiting the scope of the Section 213(b), MCA exemption.

For almost 70 years the gap between the MCA and FLSA has left many workers without the protection of either the Secretary of Transportation or the FLSA to guard against burdensome and dangerously long hours worked without overtime pay. To ensure that these workers continue to receive protections under the FLSA, we must inform the courts about this statutory change of law, which impacts employees who drive light-weight vehicles weighing less than 10,001 pounds, and we must educate our congressional representatives to preserve this important workers' right.