HOT AND DEVELOPING AREAS IN FLSA LITIGATION AND ENTERPRISE COVERAGE UPDATE

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This paper discusses a few "hot" areas of the FLSA in which our firm has seen a recent increase in litigation. In addition, this paper mentions a few developing areas in FLSA jurisprudence worth being informed of and includes an analysis of the recent Eleventh Circuit decision from the consolidated appeals in *Polycarpe v. E & S Landscaping Service, Inc.*, 2010 U.S. App. LEXIS 18171 (11th Cir. Aug. 31, 2010), clarifying the parameters of FLSA enterprise coverage from Sam J. Smith who was lead counsel on the appeal.

I. INDEPENDENT CONTRACTOR CASES

Our firm has seen a recent influx of independent contractor cases, specifically in the cable installation and de-installation service industry. While these cases have a checkered past, *see Freund v. Hi-Tech Satellite,* 185 Fed. Appx. 782 (11th Cir. 2006) (unpublished); *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. Appx. 104 (4th Cir. 2001) (unpublished), recent cases have been more favorable to cable installers, *see Parrilla v. Allcom Construction & Installation Services, LLC.*, 2009 U.S. Dist. LEXIS 77585 (M.D. Fla. August 31, 2009).

As an initial matter, referring to a subset of technicians as "independent contractors" does not deprive them of the protections provided by the FLSA. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (determining that an employee's status under the FLSA is determined by the specific exigencies with which a worker is faced). The FLSA defines employment with "striking breadth," *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 3216 (1992), defining an employee as "any individual employed by an employer," 29 U.S.C. § 203(g). Further, a company

employs an individual under the FLSA, when it simply "suffers or permits" that person to perform work. *Id*.

To determine whether an individual is an employee or an independent contractor "in business for himself" the United States Supreme Court has instructed courts to evaluate the *economic realities* of the situation. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *c.f. Rutherford Food Corp.*, 331 U.S. at 727, 730-731. Contractual agreements or labeling workers independent contractors are not determinative of their employment relationship. Instead, how an employer treats its workers is probative evidence of whether an independent contractor is truly an employee.

Courts in the Eleventh Circuit have considered a number of factors to evaluate whether an employer has misclassified an employee as an independent contractor. These include: (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. *Freund v. Hi-Tech Satellit*e, 185 Fed. Appx. 782, 783 (11th Cir. 2006) (unpublished); *Demers v. Adams Homes of Northwest Florida*, Inc., 2007 U.S. Dist. LEXIS 82797, *8 (M.D. Fla. November 7, 2007); *Parrilla v. Allcom Construction & Installation Services*, LLC., 2009 U.S. Dist. LEXIS 77585, *5-6 (M.D. Fla. August 31, 2009; *Santelices v. Cable Wiring and South Florida Cable Contractors, Inc.*, 147 F. Supp. 2d 1313, 1322 (S.D. Fla. 2001); *see Perdomo v. Ask 4 Realty & Management, Inc.*, 298 Fed. Appx. 820, 821 (11th Cir. 2008)(unpublished) (affirming the district court's holding that a realtor was an independent contractor pursuant to the eight-factor test used to evaluate joint-employers in *Antenor v. D&S Farms*, 88 F.3d 925 (11th Cir. 1996)); *Cobb v. Sun Papers, Inc*., 673 F.2d 337 (11th Cir. 1982) (referencing eleven factors that may be relevant in evaluating whether a worker is an employee or an independent contractor). As no one factor is dispositive, courts employ a *totally of the circumstances* analysis.[1]

A. General Overview of Economic Reality Test Factors

1. The Nature and Degree of Control

[1] Some courts consider dependency the primary indicator of the employer-employee relationship and have framed the prominent question as to whether workers are so independent as to be in business for themselves. *See Molina*, 420 F. Supp. 2d at 1284; *see also Cromwell v. Bankston*, 348 Fed. Appx. 57, 58 (5th Cir. 2009) (finding that "[a]lthough there are facts that clearly weigh in favor of independent contractor status, notably that [the plaintiffs] controlled the details of how they performed their work, were not closely supervised, invested a relatively substantial amount in their trucks, equipment, and tools, and used a high level of skill in performing their work, these facts are not sufficient to establish, as a matter of economic reality, that [plaintiffs] were in business for themselves during the relevant time period").

In evaluating the "control" factor, courts in the Eleventh Circuit have looked at "whether workers may choose how much and when to work, whether they may hire their own employees, whether they must wear uniforms, and how closely their work is monitored and controlled by the purported employer." *Berrocal v. Moody Petroleum, Inc.*, 2009 U.S. Dist. LEXIS 17138, *17 (S.D. Fla. Feb. 22, 2009); *see Rodilla v, TFC-RB, LLC*, 2009 U.S. Dist. LEXIS 104157, *51 (S.D. Fla. Nov. 4, 2009) (same).

2. The Opportunity For Profit Or Loss

If workers can hire others to assist them in their tasks or take on other work to supplement their income, this strongly weighs in favor of independent contractor status. In *Freund*, the Eleventh Circuit determined that because the installation technician was paid by the job, and not by the hour, by performing more efficiently and hiring employees to work for him, he could control profit and loss opportunities. 185 Fed. Appx. at 783; *see Cromwell*, 48 Fed. Appx. 57 (while the workers were not precluded from taking other jobs while working for the defendant the intense work schedule as a practical matter precluded it); *Parrilla*, LLC., 2009 U.S. Dist. LEXIS 77585, * 13 (although the defendant allowed cable installers the option to hire others through their own company, this was illusory because, with the exception of one husband-and-wife team, no one did this).

In *Cromwell v. Driftwood Electrical Contractors, Inc.*, 348 Fed. Appx. 57 (5th Cir. 2009) (unpublished), the court found complete control over the plaintiffs' schedule and pay severely limited the opportunity for profit or loss. Likewise, in *Parrilla*, 2009 U.S. Dist. LEXIS 77585, the opportunity of profit or loss weighed in favor of an employer-employee relationship, where the plaintiff's piece-work pay was largely dependant on the number and type of jobs the defendant gave him. In addition, the plaintiff was unable to install cable for other companies or take on new customer work not approved by the defendant and the cable provider. In *Demers*, 2007 U.S. Dist. LEXIS 82797, at * 12, the court found the plaintiff, a sales agent, had "very little control over her profit and/or loss" even though she was paid on a commission basis because she was told which and how many lots and floors plans she could sell.

Courts in the Middle District of Florida have found that "[t]he fact that an individual could request more work or renegotiate his or her compensation is not indicative of independent contractor status, because any employee can do those things as well." *Molina v. South Florida Express Bankserv, Inc.*, 420 F. Supp. 2d 1276, 1286 (M.D. Fla. March 8, 2006); *Demers*, 2007 U.S. Dist. LEXIS 82797, at * 12.

3. Investment In Equipment Or Materials Required For Technicians Task

Major investment in tools and materials weigh towards finding that a worker is an independent contractor. While some courts consider a vehicle to be a significant investment, *Freund*, 185 Fed. Appx. at 784, others discount the weight of this expenditure when the vehicle is also a personal vehicle, *see Parrilla*, 2009 U.S. Dist.

LEXIS 77585, * 13; *Molina*, 420 F. Supp. 2d at 1285.

4. Whether The Service Rendered Requires A Special Skill

"[E]ven if an individual has specialized skills, that is not indicative of independent contractor status where the individual does not use those skills in an independent fashion." *Molina*, 420 F. Supp. 2d at 1286. For example, a licensed realtor in *Demers*, *Demers*, 2007 U.S. Dist. LEXIS 82797, was found by the court to utilize little of her own skill and initiative in selling homes when she was instructed on the words to use with customers and was only required to have knowledge of specific topics for which she was trained. 2007 U.S. Dist. LEXIS 82797, * 13. However, in *Martin v. NITV, LLC*, 2007 U.S. Dist. LEXIS 38621, *6 (S.D. Fla. May 29, 2007), the court found the plaintiff's discretion as an polygraph machine instructor to explain concepts to students and to answer their questions in his "own way," was evidence in support of finding that he was an independent contractor even through the course was scripted. However, the plaintiff was also a former police officer and had many certifications related to the service rendered.

Also, some courts have determined if the skills can be obtained through a brief training period, this supports that specialized skill is not necessarily required. *See e.g. Parrilla*, 2009 U.S. Dist. LEXIS 77585, *14 (although the skills involved proper cable wiring, connecting and configuring, those skills could be acquired in two-weeks of on-the-job training).

5. Degree Of Permanency And Duration Of The Working Relationship

A workers ability to take on other jobs in the same industry weighs against permanency. *Freund*, 185 Fed. Appx. at 784; *see Parrilla*, 2009 U.S. Dist. LEXIS 7758 *14 (finding a high degree of permanency when the plaintiff could not perform work for other installation companies among other things).

As for the duration of the working relationship: the duration of a year and a half has weighed toward an employer-employee relationship. *See Parrilla*, 2009 U.S. Dist. LEXIS 7758, *14. Three months has weighed against it. *See Thibault v. Bellsouth Telecommunications Inc.*, 2010 U.S. App. LEXIS 15267 (5th Cir. 2010). In *Cromwell*, 348 Fed. Appx. at 58, the workers were cable splicers who worked restoring damaged telecommications lines in the wake of Katrina. The Fifth Circuit stated that the "temporary nature of the emergency restoration work does not weigh against employee status." *Id*. at 60.

6. The Extent To Which The Service Rendered Is An Integral Part Of The Alleged Employer's Business

If the service rendered is an integral part of the alleged employer's business, this fact will weighs in favor of finding that the worker is an employee. *Cf. Freund*, 185 Fed.

Appx. at 784 (finding this to be the only factor weighing in favor of the plaintiff's status as an employee of the defendant).

In addition, courts may also look at the duties and tasks performed by other of the defendant's workers in comparison to the duties and tasks performed by the plaintiff independent contractors. For example, in *Holland v. Gee*, 2010 U.S. Dist. LEXIS 59598 (M.D. Fla. June 16, 2010), the court found that a data processing telecommunication technician was improperly classified as an independent contractor when employees' performing the same job as plaintiff were classified as employees; the defendant had the same expectations of the plaintiff as it had of employees who performed the same work; employees who performed the same work as the plaintiff had the same job description and title; the plaintiff received work orders from her supervisor and was required to report the results of her work by utilizing the defendant's work order system; the plaintiff was required to work 8 hours a day, Monday through Friday, and was required to sign in each morning and evening at a central location; the plaintiff was required to wear the same uniform as employees and she was assigned a vehicle to drive. *See Freund*, 185 Fed. Appx. at 784-85 (noting that how the defendant "treated its other installers is probative of the working relationship").

Also, while a corporate entity created by a worker forming their "own business" is a fact some courts have considered in evaluating the employment relationship, *see Freund*, 185 Fed. Appx. at 783, other courts refuse to give much credence to this fact when the employer required the creation of the corporate identity, *Parrilla*, 2009 U.S. Dist. LEXIS 77585, *15-16 (M.D. Fla. August 31, 2009) (finding the Independent Contractor Agreement and the requirement that cable installers form their own companies, if anything, "only suggests that Defendant deliberately created a facade to mask the true nature of the parties; relationship").

B. Evaluating the Economic Realities for Cable Installers

More specifically, the following cases help identify relevant facts in evaluating whether a cable installer or de-installer, as an economic reality, is an independent contractor.

In *Chao v. Mid-Atlantic Installation Services, Inc*., 16 Fed Appx. 104 (4th Cir. 2001) (unpublished), the Fourth Circuit agreed with the district court's legal conclusions and reasoning that under the *economic reality* test the plaintiffs, cable installation and repair technicians for Mid-Atlantic and Comcast customers, were independent contractors. First, as to the control factor, the district court had determined that the cable installers had broad discretion and business judgment in the manner in which they completed their work. The court found that even though Mid-Atlantic assigned the cable installers daily routes and required that they report their progress to a dispatcher, they could also complete their work in any order they chose and could perform personal tasks or conduct other personal business during the day. The court rejected the argument that back charges against pay for deficient performance was a control characteristic of an employment relationship. Instead, the district court found that back charges

supported cable installers independent status because minimizing back charges affected their opportunity for profit or loss. The court also found cable installers investment in equipment, tools, and a truck and whether to hire employees to assist them affected their opportunity for profit or loss. The district court found "'investment in equipment' and their right to employ workers weigh strongly in favor" of finding cable installers independent contractors. The court also recognized that cable installers invested in specialized tools, uniforms, pagers, their own liability insurance, automobile insurance, and were responsible for tax withholdings. As for the cable installers' degree of skill, the district court stated that the skills of cable installers are akin to carpenters, construction workers, and electricians who are typically independent contractors. Based on this analysis, the Fourth Circuit affirmed summary judgment for the employer finding that the plaintiffs were independent contractors.

Finding *Chao* substantially similar, the Eleventh Circuit in *Freund v. Hi-Tech Satellite*, 185 Fed. Appx. 782 (11th Cir. 2006) (unpublished) affirmed the district court's determination that a satellite installation technician was an independent contractor. In evaluating the control factor, the district court had found that even though the defendant scheduled the plaintiff's installation appointments, the plaintiff had the ability to reschedule the appointments. Also, the plaintiff had discretion as to how he carried out his duties except "1) he was not allowed to perform any additional services that were not paid for by the customers without [the defendant's] approval; 2) he had to wear a [company] shirt during appointments; 3) he had to follow certain minimum specifications for the installations; 4) and he had to call [the defendant] to confirm he had completed the installation and to report any problems that had arise." *Id*. at 783. The court however determined the defendant was not interested in the cable installers day-to-day habits, hours worked, or methods. He was allowed to perform installations for other companies and subcontract out work. Also, several cable installers had created their own corporate entities. Even though the plaintiff had not, the court found this weighed in support of independent status. The district court further found that the "looseness of the relationship" permitted the plaintiff profit or loss based on his managerial skill. The plaintiff could earn more money by accepting more jobs, performing work efficiently, and hiring employees to assist him. The plaintiff invested by supplying all his own tools, truck, and could hire workers. The court also found the plaintiff's installation work required special skills and that due to his ability to work for other installation companies there was no significant degree of permanence. Overall, the Eleventh Circuit determined that the district court did not err in finding that the plaintiff cable installer was an independent contractor.

However, *Freund* can be distinguished, and recently was in *Parrilla v. Allcom Construction & Installation Services, LLC.*, 2009 U.S. Dist. LEXIS 77585 (M.D. Fla. August 31, 2009). In *Parrilla*, the court found the defendant exerted significant control over the plaintiff, a cable installation technician, as the defendant controlled his work schedule, the type of work he performed, the amount of time he could take off work, and the manner in which his work was to be carried out. The plaintiff was required to arrive at work at 7:30 a.m. each morning to pick up work orders. He had no control over the work orders he received, the types of jobs on the work orders, or the order in which the

jobs were to be completed. He was not permitted to deviate at all from the work orders specifications and could not perform work for other cable installation providers. There was evidence that the defendant would penalize, or threaten to penalize, cable installers who frequently requested time off, failed to show up in the morning, or did not attend mandatory weekly meetings. Furthermore, the defendant would assess the plaintiff with fixed monetary penalties if the work was performed unsatisfactory. Furthermore, the plaintiff was subject to "spot-checks" or monitoring during or after a job. The court determined that the plaintiff's opportunity for profit or loss also weighed in favor of an employment relationship, where his piece-work pay was largely dependant on the number and type of jobs the defendant gave him and he was unable to perform work for other cable installation companies or take on customer work not pre-approved by both the defendant and the cable provider. Although the plaintiff provided most of the equipment necessary for performing his work, the investment was small, approximately $1,000. Also, while the court found the plaintiff's skills involved proper cable wiring, connecting and configuring, the defendant's manager testified that such skills could be acquired in two-weeks of on-the-job training. The fact that the plaintiff was unable to work for other installation companies likewise exhibited to the court a high degree of permanency with the employer. Based on the totality of the circumstances, the court found the cable installation technician was an employee.

In a case preceding *Freund*, *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313 (S.D. Fla. 2001), a district court denied the defendants' motion for summary judgment finding there were material issues of fact regarding the nature and degree of control over the plaintiff cable installer. The court found that the plaintiff had specialized skill and stated "a cable installer in today's market is considered a skill tradesman." *Id*. at 1320. In addition, the court found the plaintiff made significant investment in tools and equipment (approximately $850 in tools, a pick-up truck for $6,000, and a pager and its services) and paid for his own general liability instance and applied for a federal employer's identification number. These facts that court found supported the defendants' contention that the plaintiff was an independent contractor. However, in contrast, the court found the defendant's level of control over the plaintiff supported an employment relationship. The plaintiff testified he was required to report for work at 6:30 a.m. and would be reprimanded or denied work if he was late. He could not complete jobs based on his own schedule, but was required to complete jobs within certain time frames. He was required to perform work according to the specifications provided to him by "the company" and was required to maintain communication with the company throughout the day. Furthermore, he was to work exclusively for the defendant during an "assigned program" pursuant to contract and was not permitted to hire helpers to assist him. Accordingly, the court found there was a sufficient issue of material fact as to whether the plaintiff was an employee or an independent contractor.

While not a cable installer case, in *Olson v. Star Lift Inc.*, 2010 U.S. Dist. LEXIS 50715 (S.D. Fla. April 29, 2010), a forklift repair and maintenance technician classified as independent contractor was recently found by a district court to be an employee. The defendant controlled the time the plaintiff went to work and where he worked. He wore a company uniform, drove a company van, and was reimbursed for gas and transportation

expenses. Moreover, he could not hire other workers to assist him in his work duties and the skills required for the job could be learned during a few weeks of training. Furthermore, the court recognized that the employer paid the plaintiff's liability instance. Although the court found several factors weighing in favor the plaintiff's status as an independent contractor, including the fact that he had to buy his own tools, performed much work unsupervised, and could earn more compensation if he worked faster, the court concluded that in examining all the facts the plaintiff was economically dependent on the defendant.

See also Cromwell v. Bankston, 348 Fed. Appx. 57, 58 (5th Cir. 2009) (finding cable splicer was an employee under the FLSA); *Thibault v. Bellsouth Telecommunications Inc*., 2010 U.S. App. LEXIS 15267 (5th Cir. 2010)(finding cable splicer an independent contractor).

At bottom, with the right set of facts, cases like *Freund* and *Chao* can be distinguished and *Parrilla* provides a good roadmap for doing so. Once an employment relationship is established, these cases are quite appealing as cable installers and de-installers are blue-collar workers who often work 6 days a week and accrue substantial overtime. For example, on May 2, 2010, United States District Court for the Western District of Wisconsin preliminarily approved a settlement of $18 million between field technicians and Charter Communications in *Marc Goodell, et. al. v. Charter Communications, LLC*, Case No. 3:08-cv-00512-CIf. The plaintiffs, which include field technicians in California, Missouri, Michigan, Minnesota, Illinois, Nevada, Washington, Oregon and Nebraska, had alleged they were denied overtime and other earned wages.

II. TIP CASES

Our firm has also seen a recent uptick in tip cases. Under the FLSA, employers may claim a tip credit, in which an employee's tips are credited towards the employer's minimum wage obligation, when (1) the tip credit is claimed for a qualified tipped employee, (2) the employee receives notice, and (3) all tips are retained by the employee with exception to a valid tip pool. 29 U.S.C. § 203(m); *see* DOL, Fact Sheet #15, http://www.dol.gov/whd/regs/compliance/whdfs15.pdf. A "tipped employee" is any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. 29 U.S.C. § 203(t). An employer must pay tipped employees under the FLSA a direct wage of $2.13 when claiming the tip credit. This amount was fixed in the FLSA's 1996 Amendments; however, under Florida law, the direct wage employers must pay tipped employees when claiming the tip credit is higher. Pursuant to the Florida Constitution, Art. X, § 24(c), "'tipped employees' who meet eligibility requirements for the tip credit under the FLSA may credit towards satisfaction of the minimum wage tips up to the amount of the allowable FLSA tip credit in 2003 [which was $3.02]". Beginning January 1, 2009, Florida employers were required to pay tipped employees a direct wage of $4.19 per hour ($7.21-$3.02). On July 24, 2009, when the federal minimum wage increased to $7.25 per hour, the direct wage required for Florida's tipped employees increased to $4.23 per hour. It was determined on January 1, 2010 that the minimum wage in Florida would remain unchanged at the current federal

and Florida minimum wage rate of $7.25 per hour. Therefore, the direct wage required for tipped employees in Florida has also remained changed at $4.23 per hour. *See* State of Florida Agency for Workforce Innovation, Florida Minimum Wage, http://www.floridajobs. org/ minimumwage/index.htm (dated October 15, 2009).

A. The Tip Credit and its Requirements

A tip is defined as "a sum presented by a customer as a gift or gratuity in recognition of some service performed." 29 C.F.R. § 531.52. Tips may include amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills. 29 C.F.R. § 531.53. Gifts in forms other than money or its equivalent, such as theater tickets, passes, or merchandise are not counted as tips. *Id*. Likewise, compulsory service charges that an employer adds to bills, typically for large parties or events, are not tips received by the employee. 29 C.F.R. § 531.55. Employees who work in a dual capacity, such as a hotel waiter who also works as the hotel maintenance man, is a tipped employee only with respect to the occupation in which he customarily and regularly receives at least $ 30 a month in tips. 29 C.F.R. § 531.56. Non-tip generating work performed incidental to the tipped employee's regular duties, such as a waiter's side work (i.e., folding napkins, organizing silverware, prepping condiments, etc.) can be subject to a tip credit as long as the time spent performing the non-tip generating tasks do not exceed 20 percent of the employee's overall duties. *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360, 1366-67 (S.D. Fla. 2009). A tip credit against wages may be taken in addition to any other credit for board, lodging, or other facilities to which an employer is entitled. 29 C.F.R. §531.55. Moreover, the tip credit provision applies on an individual basis, thereby allowing an employer to claim it for some employees even though it cannot be claimed for others. DOL Field Operations Handbook ("FOH"), §30d00c1.

1. The Notice Requirement

First, employers who wish to claim a tip credit must inform their employees of the tip credit provisions. *See* 29 U.S.C. § 203(m). However, neither the statute nor the regulations address what it means to "inform." In *Kilgore v. Outback Steakhouse*, 160 F.3d 294 (6th Cir. 1998), the Sixth Circuit considered "what information must the employer pass along to the employee and how may the employer convey that information" to satisfy the notice requirements of Section 203(m). The court held that while the FLSA requires employers to inform its employees that it intends to treat tips as satisfying part of its minimum wage obligations, it does not require an employer to "explain" the tip credit provisions to its employees. The court determined that the defendant's written notice of its tip policy to employees through employment documents could be sufficient to satisfy Section 203(m)'s notice requirement. Nonetheless, the court did allow three individual employees to proceed to trial on their individual claims because there was a question as to whether these employees' received notice. In *Pellon v. Business Representation International*, Inc., 528 F. Supp. 2d 1306, 1310-1311 (S.D. Fla. 2007), a court in the Southern District of Florida determined that plaintiffs who were

orally informed and informed by way of their pay check stubs, that they would receive a reduced salary plus tips, in addition to a prominently displayed posting concerning the tip credit, was sufficient notice to comply with Section 203(m).

2. Tipped Employees Must Earn At Least the Minimum Wage

Second, employers who claim a tip credit are responsible to ensure that its tipped employees receive at least the minimum wage. "[I]t is presumed that . . . the [tipped] employee will be receiving at least the maximum tip credit in actual tips: 'If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips.'" 29 C.F.R. § 531.59.

Courts in the Southern District of Florida have rejected arguments that Section 203(m) requires payment for "every hour worked" and that a defendant's failure to pay for off-the-clock work invalidates the tip credit. *See Muldowney v. MAC Acquisition*, LLC, 2010 U.S. Dist. LEXIS 11280 (S.D. Fla. February 9, 2010); *Perez v. Palermo Seafood, Inc.*, 2008 U.S. Dist. LEXIS 112252 (S.D. Fla. May 8, 2008).

3. Tip Pool

Third, employers who claim a tip credit must allow tipped employees to retain all their tips. "Only tips actually received by an employee as money belonging to him[,] which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a 'tipped employee' under the FLSA." 29 C.F.R. § 531.52. However, the caveat to this rule is that Section 203(m) permits employers to require tipped employees to share their tips with other tipped employees through a valid tip pool arrangement. *See Kilgore v. Outback Steakhouse of Florida, Inc*., 160 F. 3d 294 (6th Cir. 1998). Apart from of the tip pool arrangement, tipped employees may *voluntarily* share their tips with non-customarily and non-regularly tipped employees. However, tip sharing must truly be voluntary, it may not be coerced or a condition of employment. *See* WH Admin. Op. (Mar. 26, 1976); WH Admin. Op. (Oct. 26, 1989); FOH §30d04c; *see also Zhao v. Benihana*, 2001 U.S. Dist. LEXIS 10678 (S.D.N.Y. 2001) (finding that tip sharing was mandatory where a manager "oversaw and helped enforce the tip [sharing] policy").

B. Tip Credit Violations

The following are a few FLSA violations typical of employers who utilize the tip credit.

1. Invalid Mandatory Tip Pool Arrangement

A tip pool is not valid, and an employer will not be able to take a tip credit, "[i]f tipped employees are required to participate in a tip pool with other employees who do not customarily receive tips." *Wajcman v. Investment Corp. of Palm Beach*, 620 F. Supp.

2d 1353, 1356, n. 3 (S.D. Fla. 2009) (citing 29 U.S.C. § 203 (m)). Only "tipped employees" can participate in a valid tip pool. 29 U.S.C. § 203 (m); *Ash, LLC*, 676 F. Supp. 2d at 1371. According to 29 C.F.R. § 531.57, waiters, bellhops, taxicab drivers, barbers, or beauty operators qualify as tipped employees. However, employees, who only occasionally or sporadically receive tips of more than $30 a month, such as during Christmas or New Years, are not tipped employees. *Id*. "Customarily and regularly," as referenced in 29 U.S.C. § 203(t), "signifies a frequency which must be greater than occasional, but which may be less than constant." *Id*. However, employees who only receive tips through a tip pool, and do not receive tips directly from the customer, may still be "tipped employees" for purposes of Sections 203(m) and (t). *See* 29 C.F.R. § 531.57; FOH §30d04(a) ("It is not required that all employees who share in tips must themselves receive tips from customers").

The analysis of whether an employee is a "tipped employee" that can participate in a tip pool typically hinges on whether the employee is in an occupation that "customarily and regularly" receives tips. To determine if the employee "engaged in an occupation in which he customarily and regularly" receives tips, courts have looked at the employee's level of customer interaction. *See Wajcman*, 620 F. Supp. 2d at 1359 citing *Roussell v. Brinker Intern., Inc*., 2008 U.S. Dist. LEXIS 52568 (S.D. Tex. July 9, 2008) (agreeing with the Sixth Circuit that the level of customer interaction is "highly relevant" and that the extent of an employee's interaction with customers is "critical" in determining whether an employee may participate in a valid tip pool)(emphasis added)(citing *Myers v. Copper Cellar Corp*., 192 F.3d 546, 550 (6th Cir. 1999); *see also Kilgore*, 160 F.3d at 300-02 (finding hosts who "perform important customer service functions: they greet customers, supply them with menus, seat them at tables, and occasionally 'enhance the wait.'… have more than a de minimis interaction with the customers" and were appropriately tipped employees for purposes of the tip pool even through they never received tips directly from customers because company policy prohibited it).

Some recent decisions have found or at least questioned whether customer interaction was insufficient to allow for tip share have involved sushi chefs, cardroom supervisors, and food expeditors. In *Ash v. Sambodromo*, LLC, 676 F. Supp. 2d 1360, 1371 (S.D. Fla. 2009), the court denied summary judgment finding that there was a genuine question of material fact as to whether sushi chefs, who did not directly serve customers but prepared sushi in the middle of the restaurant for customers' entertainment, had sufficient interaction with customers to be considered tipped employees.

On March 5, 2009, a jury returned a verdict in *Wajcman v. Inv. Corp*., Case No. 07-80912-Civ-Hopkins (S.D. Fla. 2009) determining that the defendant's policy of mandating a tip pool in which poker dealers were required to share tips with cardroom floor supervisors was an invalid tip pool arrangement. In reviewing the evidence for purposes of determining whether liquidated damages should be awarded, the court recognized that the floor supervisors had only *de minimus* customer interaction even though the written job description mentioned that floor supervisors have "[d]aily contact with customers." *Wajcman*, 620 F. Supp. 2d at 1359. The court further found that the defendant had "underestimated the significance of the 'customer interaction' test, relying

too heavily on industry practice to support its decision to include the floor supervisors in the tip pool." *Id*.

Also in March 2009, a jury determined that Chili's operated an improper tip pool by coercing servers to tip out quality assistance food expeditors ("QAs") who had limited to no interaction with customers. *Roussell v. Brinker International Inc.*, Civil Action No. H-05-3733 (S.D. Tex. 2009). *Roussell* however also exhibits the complications that may arise in bringing a large collective action for an alleged invalid tip pool arrangement. After discovery, in *Roussell*, the district court decertified the class of opt-in plaintiffs (approximately 3,445) and only permitted the 55 deposed opt-ins and Plaintiff Roussell to proceed onto trial. 2008 U.S. Dist. LEXIS 52568 (S.D. Tex. July 9, 2008). In this case there was no written nationwide policy requiring servers to share tips with the QAs. To the contrary, there was evidence that the defendant issued company-wide guidelines in January 2006 that QAs could not participate in mandatory tip pools. The plaintiffs' presented evidence that asserted managers required, coerced, pressured, and encouraged servers to tip share with QAs. However, the court found the use of representative testimony necessary for a large FLSA collective action of this size would be problematic due to the question of whether the Chili's tip sharing policy imposed on servers was voluntary, coerced, or mandatory.

2. Illegal Deductions

Deductions that reduce an employee's wages below the applicable minimum wage are illegal deductions under the FLSA, 29 C.F.R. § 531.35. Employers who claim the tip credit typically pay employees the minimum amount required by law. Therefore, deductions for uniforms, walk-outs, and register shortages, will often drop the employer payment of direct wages below the minimum direct wage requirement.

3. Failure to Properly Calculate Overtime

If an employer fails to include the tip credit, certain bonuses, or commissions in its calculation of the tipped employee's regular rate, they have improperly calculated the tipped employees' overtime compensation. Overtime compensation under the FLSA, for hours worked in excess of 40 hours per week, is computed by multiplying 1.5 times an employee's regular rate. 29 U.S.C. §§ 207 *et seq*. For tipped employees, the regular rate includes the employee's direct wage plus any tip credit claimed by the employer, the reasonable cost or fair value of any facilities furnished by the employer, as well as any commissions and certain bonuses. 29 C.F.R. § 531.60. An employee's tips received in excess of the tip credit are not included in the regular rate. *Id*. The regular rate is then calculated by dividing the employee's total remuneration (except statutory exclusions) in any workweek by the total number of hours actually worked for which such compensation was paid.

III. DEVELOPING FLSA JURISPUDENCE TO KEEP WATCH

A. Pharmaceutical Cases

A recent and well-reasoned favorable decision from the Second Circuit evaluating whether pharmaceutical sales representatives are exempt under the outside sales and administrative exemption makes this area one to watch.

In *In re Novartis Wage & Hour Litig.*, 2010 U.S. App. LEXIS 13708 (2d Cir. N.Y. 2010), the Second Circuit determined that the plaintiffs, pharmaceutical sales representatives, were not exempt under the FLSA's outside sales exemption or the administrative exemption vacating the district court's decision that had found them exempt. The court found that the pharmaceutical sales representatives that promoted products to physicians did not make sales to the physicians or obtain orders or contracts as required by the outside sales exemption. "Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." 29 C.F.R. § 541.503(a). The court reasoned that "where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale." *Id*. at 34-35.

The court further determined that the defendant failed to show that its pharmaceutical sales representatives exercised discretion and independent judgment with respect to matters of significance as required to satisfy the administrative exemption. The court recognized that it was undisputed that the defendant's pharmaceutical sales representatives:

* have no role in planning Novatis's marketing strategy;
* have no role in formulating the "core messages" they deliver to physicians;
* are required to visit a given physician a certain number of times per trimester as established by Novartis are required to promote a given drug a certain number of times per trimester as established by Novartis;
* are required to hold at least the number of promotional events ordered by Novartis;
* are not allowed to deviate from the promotional "core messages"; and
* are forbidden to answer any question for which they have not been scripted.

The Second Circuit found the defendant's contention that pharmaceutical sales representatives exercised discretion in that they determined the order in which to see physicians, how to gain access to their offices, how to allocate budgets for promotional events, and how to allocate samples was not sufficient to find the exercise of discretion and independent judgment in their primary duties necessary to meet the administrative

exemption.

Review of other recent pharmaceutical decisions, show courts are clearly not in agreement when is comes to the exempt status of pharmaceutical sales representatives. *See Jirak v. Abbott Labs., Inc*., 2010 U.S. LEXIS 58804 (N.D. Ill. June 10, 2010) (determining the pharmaceutical sales representatives were not exempt under the outside sales or administrative exemptions). *But see Baum v. AstraZeneca LP*, 2010 U.S. App. LEXIS 6047 (3rd Cir. March 24, 2010) (the district court found the pharmaceuticals sales representatives were exempt under the outside sales exemption. On appeal, the Third Circuit affirmed the district court's ruling, but on other grounds, finding the pharmaceutical sales representatives were administratively exempt); *Christopher v. SmithKlein Beecham Corp*., 2010 U.S. Dist. LEXIS 12813 (D. Ariz. Jan. 29, 2010 (finding the pharmaceutical sales representative were outside sales exempt).

B. Fluctuating Workweek Cases

Cases interpreting the "fixed nature" of 29 C.F.R. § 778.114 (the fluctuating work week regulation) is another area in which recent case law has been developing in favor of employees. For employers to utilize the fluctuating workweek method for calculating overtime compensation, in which remuneration is divided by all hours worked and only an additional half the regular-rate must be paid for hours worked over forty in a workweek, certain requirements must be met. These requirements include that the employee be paid a fixed amount for all hours worked no matter how few or many. Decisions by the First, Second, and Third Circuits focusing on the "fixed nature" of the fluctuating workweek test have determined that certain additional payments will invalidate an employer's ability to use the FWW by destroying the fixed nature of the payment. However, there are also less favorable decisions related to additional payments made in the form of commissions in the Seventh and Tenth Circuits, and withdrawn DOL opinion letters and proposed regulations that make this area one to watch closely as well.

1. The First Circuit

In *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003), the Town of Agawam paid police officers night-time shift differentials, extra pay for every hour worked over 8 hours a day, and for off-duty work, in addition to a fixed amount of straight time pay. The First Circuit found that these payments violated the plain language of §778.114. It explained that "it is not enough that the officers receive a fixed *minimum* sum each week; rather, to comply with the regulation, the Town must pay each officer a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*." *Id*. at 288. The court recognized that the police officers salary did not constitute all the straight-time compensation the officers received each week and that the additional pay varied. Therefore, the court determined the additional payment made application of the FWW method invalid.

Similarly, in *Dooley v. Liberty Mut. Ins. Co.*, 369 F. Supp. 2d 81 (D. Mass. 2005), an insurance company paid its auto damage appraisers premiums in addition to their

straight-time pay for working non-overtime hours on Saturdays. The district court reasoned that because Section 778.114 requires a fixed straight time pay for all the hours an employee works, whether few or many, additions to straight time pay are not allowed. It found that the Saturday premium pay violated the fixed straight time pay requirement and found an application of the FWW improper.

2. The Second Circuit

In *Ayers v. SGS Control Services, Inc.*, 2007 U.S. Dist. LEXIS 19634 (S.D.N.Y. Feb. 26, 2007), the employer paid its inspectors a base salary plus "sea payments" for working off shore and for working on scheduled days off. The employer did not include the additional payments in its calculation of the employees' regulate-rate. The court explained that because "sea pay" or "day-off" pay were to be included in the regular-rate these payments increased straight-time pay under 29 C.F.R. § 778.114(a). The court stated "[i]n other words, regardless of the number of hours worked in a particular week, the employee's "straight time pay" cannot change, although overtime premiums are not included in "straight time pay." *Id*. at *31.The court found that as a result "any Plaintiff who received sea pay or day-off pay did not have 'fixed' weekly straight time pay, in violation of 29 C.F.R. § 778.114(a)." *Id*. at *33.

3. The Third Circuit

In *Adveva v. Interteck Caleb Brett, Inc.*, 2010 U.S. Dist. LEXIS 1963 (D. N.J. Jan. 11, 2010) (unpublished), the plaintiffs were oil, gas, and chemical inspectors who were paid a salary plus if eligible "day off pay," "off shore pay", and "holiday pay". The plaintiffs asserted that because of these special payments the employer did not pay them a "fixed amount as straight-time pay" as required to apply the FWW method. The court agreed, recognizing that the employees were not paid a fixed salary regardless of hours worked, as required by the regulation, because their salary fluctuated based on whether they received additional "sea pay". The court stated "[i]f the regulation merely required that employees received a minimum salary every week, which could be increased by such bonuses, then Defendants' argument would have substantial force. The regulation, however, contains no such thing. Consequently, the Court holds that Defendants are precluded from using FWW method of payment as such premiums and bonuses run afoul of the 'fixed salary' requirements of 29 C.F.R. § 778.114(a)." In a footnote the court in *Adveva* also stated that is was not persuaded by the decision *Lance v. The Scotts Company*, 2005 U.S. Dist. LEXIS 14949 (E.D. Ill. July 21, 2005) (*see infra*) relied on by the defendants as to why commission payments do not violate the FWW. The court said that *Lance* "explicitly ruled pursuant to 29 C.F.R. 778.118" and "the weight of authority that explicitly deals with the issue at bar has held that such payments are violative of the FWW" citing to *O'Brien* and *Dooley.*

In *Brumley v. Camin Cargo* Control, Inc., 2009 U.S. Dist. LEXIS 126785 (D. N.J. April 22, 2010) (unpublished), the plaintiffs were inspectors for a company that samples, inspects, tests, and certifies petroleum products at U.S. market ports of entry and were paid a salary and "holiday pay" and "day off pay". The court, relying on *Ayers* and

Adeva, because they similarly dealt with inspectors and their reasoning gave meaning to the plain language of Section 778.114, found the defendants use of holiday pay and day off pay "results in the absence of a 'fixed salary' required by the regulations." *Id*. at 12.

4. The Seventh Circuit

The plaintiff in *Lance v. The Scotts Company*, 2005 U.S. Dist. LEXIS 14949 (E.D. Ill. July 21, 2005), argued that adding commissions and salary to determine the hourly-rate for overtime pay was impermissible under the FWW method. The court relying on 29 C.F.R. § 778.118, which provides the method for calculating the regular-rate and overtime when commissions are paid, disagreed and determined that the defendant's formula adding commissions and salary to determine the regular-rate was consistent with the FLSA and its regulations, and that the employer satisfied the criteria for utilizing the FWW method.

Likewise, in *Perez v. RadioShack Corporation*, 2005 U.S. Dist. LEXIS 33420, *17-18 (N.D. Ill. Dec. 14, 2005), the plaintiffs did not argue that commission payments made use of the FWW method improper, but did argue that "only salary may be considered for purposes of the fluctuating workweek test." The court disagreed and determined that "[s]o long as commissions and bonuses are paid each month as a matter of course, those amounts must be included in determining the . . . regular-rate of pay."

5. The Tenth Circuit

The plaintiffs in *Clements v. Serco, Inc*., 530 F.3d 1224 (10th Cir. 2008), who were civilian military recruiters, were paid a base salary and commission but no overtime. Without any analysis as to the fixed nature of the salary when commissions are paid, the Tenth Circuit affirmed the district court's back-pay calculation using the FWW method.

6. DOL Proposed Regulations and Opinion Letters

The DOL in opinion letter FLSA2009-24, January 16, 2009, which was withdrawn on March 2, 2009, stated "[r]eceipt of additional bonus payments does not negate the fact that an employee receives straight-time compensation through the fixed salary for all hours worked whether few or many, which is all that is required under § 778.114(a)."

In addition, the opinion letter stated "a salary arrangement is permitted by the Act if the amount of the salary **and any bonuses, premium payments, or other additional pay of any kind not excluded from the regular rate under section 7(e)(1) through (8) of the Act** [2] is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest." The underlined and bolded

language quoted above was published in proposed regulations 73 F.R. 43654 (July 28, 2008) which did not pass. [3]

IV. IMPORTANT DEVELOPMENT: THE ELEVENTH CIRCUIT CLARIFIES THE PARAMETERS OF ENTERPRISE COVERAGE UNDER THE FLSA

On August 31, 2010, the Eleventh Circuit issued an opinion in six consolidated appeals that clarifies when an employee is covered by the Fair Labor Standards Act under the enterprise coverage prong of the FLSA. *See Polycarpe v. E & S Landscaping Service, Inc.*, 2010 U.S. App. LEXIS 18171 (11th Cir. Aug. 31, 2010). In the consolidated appeals, the employees worked as landscapers, security-system technicians, and construction workers and were employed by "local service providers" some of whom also provided products to their customers. *Id.* at *2. In each of the consolidated cases, the plaintiffs argued that they were covered by the FLSA pursuant to the enterprise coverage provisions of the FLSA.

A. The Enterprise Coverage Provision of the FLSA

The Eleventh Circuit noted that "[a]n employer falls under the enterprise coverage section of the FLSA if it 1) 'has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person' and 2) has at least $ 500,000 of 'annual gross volume of sales made or business done.'" 29 U.S.C. § 203(s)(1)(A). *Id.* at *5-6. The language in Section 203(s)(1)(A), "or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person" is referred to as "the handling clause." *Id.* The court stated that the handling clause allows the FLSA "potentially to reach retail and service businesses that were otherwise locally focused." *Id.* at *7. The court noted that under the handling clause the focus is on whether an employer has two or more employees (not necessarily the plaintiffs) handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. *Id.*

B. The "Coming To Rest Doctrine" Is Not Applicable

The court began its analysis by rejecting the applicability of the "coming to rest doctrine" to the handling clause. The coming to rest doctrine would hold that goods or materials can lose their interstate quality if the items have already come to rest within a state before intrastate purchase by a business. The court held that the coming to rest

[3] Section 778.114 provides that for a fixed salary for fluctuating hours there must be "salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest."

doctrine is inapplicable in the enterprise coverage context because the FLSA "was designed to regulate enterprises dealing in articles *acquired intrastate* after travel in interstate commerce." *Id.* at *8-9 (citations omitted, emphasis in original). The court indicated that the proper analysis is to determine where the goods or materials were produced, not where the items were purchased. *Id.* at *9. Under this analysis, an employer that purchases goods or materials from its local Home Depot is covered by the FLSA if it has two or more employees handling, selling, or otherwise working on these goods or materials as long as the goods or materials were produced in another state or produced in the same state for interstate commerce.

C. The Interplay of "Goods" and "Materials"

The court next addressed "the interplay of the terms 'goods' and 'materials' under the handling clause." The court explained that it is necessary to parse out the different meanings of these terms in the handling clause because "goods" is defined expansively under Section 203(i) of the FLSA, but "does not include goods after their delivery into the physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." *See id* at *10, *quoting* 29 U.S.C. § 203(i). This concept is called the "ultimate-consumer exception." *Id.* The court determined that when Congress added the words, "or materials" in the handling clause, Congress meant to differentiate goods, some of which are subject to the ultimate-consumer exception from materials, which are "never" saddled with this exception. *Id.* at *11-12. The court used three different principles of statutory construction to arrive at this result. First, the court noted that Congress included the ultimate-consumer exception in the definition of goods, but not materials and when Congress uses particular language in one section of an act, but not in another, it is presumed Congress did this intentionally. *Id.* at *12. Second, the court noted that it must not ignore the definition Congress gave to goods because it is a court's job to give meaning to all of the enacted language. *Id.* at *13. Third, the court indicated that in determining the correct understanding of "materials," the court should "disfavor the construction that would cause an overlap with the definition of 'goods.'" *Id.*

Because Congress provided no definition of the word, "materials," the court looked to the ordinary definition of this term. *Id.* at *14. The court adopted the definition that "materials" means "the tools or other articles necessary for doing or making something." *Id.* The court noted that the FLSA's legislative history supported this construction in that the Senate Report accompanying the 1974 amendments that added the term, "materials," described materials as being "goods consumed in the employer's business, as e.g., the soap used by a laundry." *Id.* at *17. The court also noted that after the addition of the term, "materials," into the handling clause, several courts of appeals have concluded that service businesses that used interstate goods or materials in their commercial activity were covered by the FLSA and Congress had not acted to overturn these decisions. *Id.* at *19 n. 6. The court also found that the Department of Labor's amicus brief that was filed in this case supported its construction of the term, "materials" and found that the DOL's brief was "persuasive authority" under *Christensen v. Harris Cnty.,* 120 S.Ct. 1655, 1663 (2000). *Id.* at *21.

D. The Definition of "Materials"

The court held that "whether an item counts as 'materials' will depend on two things: 1) whether, *in the context of its use*, the item fits within the ordinary definition of 'materials' under the FLSA [i.e., the item is a tool or other article necessary for doing or making something] and 2) whether the item is being used commercially in the employer's business [i.e. the item must have a significant connection with the employer's commercial activity]." *Id.* at *22. The item must be used "regularly and recurrently" not only on "isolated or sporadic occasions" such that the item is used routinely by the business. *Id.* at *23, n. 7.

E. The Court's Examples

Before applying the adopted definition of "materials" the court gave some examples of how the definition should be applied. The court stated that "where a restaurant uses interstate cooking equipment as an article to perform its commercial activity of serving food, the restaurant is engaged with 'materials' that will subject the business to FLSA coverage." *Id.* at *22. The court explained that when a caterer uses china dinner plates that are produced out of state while providing catering services, the plates are "materials" because the plates have a significant connection to the employer's commercial business. The court contrasted this scenario with an accounting firm that uses the same plates as decorations mounted on the wall of its lobby and stated that the accounting firm would not be using "materials" under the FLSA handling clause because the plates have no significant connection to the employer's accounting work. *Id.* at *24. In the accounting firm scenario, the plates are "goods" that are subject to the ultimate-consumer exception because the accounting firm is the ultimate consumer. *Id.* at *25, n. 8.

F. Applying the Definitions to the Consolidate Cases

The court next applied the definitions of "goods" and "materials" to the six consolidated cases. The court noted that three of the courts erred in applying the coming to rest doctrine. *Id.* at *27. In the first case, the employees installed shutters purchased locally that had been made in Columbia. In the second case, the employees installed burglar alarms and other components purchased locally that had been manufactured out of state. In the third case, the employees made home repairs using items that plaintiffs purchased locally that had been manufactured out of state. The court stated that the proper "inquiry for enterprise coverage under the FLSA is whether the 'goods' or 'materials' were in the past produced in or moved interstate, not whether they were most recently purchased intrastate." *Id.* at *29.

Two of the cases involved landscaping companies whose employees used lawn mowers, edger blades, trucks, pencils, and gasoline, which the court indicated might bring the defendants under the FLSA pursuant to the handling clause. On remand, the district courts were instructed to determine whether these items are "goods" that are not subject to the ultimate-consumer exception (because they are sold to a customer) or

"materials" (because they are tools or other articles necessary for doing or making something, even if used in the employer's business).

In the sixth case, the court did not apply the handling clause because it found that the employer did not have an annual gross volume of sales made or business done of not less than $500,000.

II. Comments on the Decision

A. The *Polycarpe* Decision Is A Victory for Workers

First, the court clarified that the "coming to rest doctrine" has no applicability to "goods" or "materials" in the enterprise coverage context. Therefore, the fact that an item is purchased locally is immaterial to the analysis. This means that if an employer purchases an interstate item from a local retail store like Home Depot and that item is then passed on in the routine commercial business to its customers, then enterprise coverage is secured. For example, in one of the cases consolidated in *Polycarpe*, the employer purchased building materials from Home Depot that were used in repairing homes. If the employee establishes that two or more employees regularly used these items and they were acquired by Home Depot from out of state sources or these items were produced within the state for out of state use, then enterprise coverage is achieved. In this scenario, it does not matter whether the items are considered "goods" or "materials" because they are sold to a customer who is not the ultimate consumer of the items.

Second, the court adopted a reasonable definition of "materials." The distinction between "goods" and "materials" becomes important when the interstate items are used in the employer's business, but not sold to an ultimate consumer, i.e. the employer is the ultimate consumer of the item. In this scenario, the employee must establish that the item is a "tool or other article necessary for doing or making something" and is "being used commercially in the employer's business." It should be demonstrated that the item has a significant connection with the employer's commercial activity. The item must be used "regularly and recurrently" not only on "isolated or sporadic" occasions such that the item is used routinely by the business. To establish enterprise coverage for a lawn care business, the employee must establish that two or more employees used interstate items such as the trucks or lawn mowers in the lawn care business' commercial operations. This should not be a difficult task.

B. Suggestions For FLSA Litigation Where Enterprise Coverage Is At Issue

In cases where enterprise coverage is at issue, the first step to achieving coverage is to make sure that enterprise coverage is pleaded properly. The complaint should allege specifically that the employer has two or more employees who handle, sell, or otherwise work on goods or materials that have been moved in or produced for commerce and that the employer has the requisite $500,000 in annual gross volume of sales made or business done for each year of liability. If the employer admits these allegations, the facts should

be confirmed during a Rule 30(b)(6) deposition and/or a stipulation of coverage should be obtained.

If the employer does not admit these allegations and/or pleads an affirmative defense that there is no enterprise coverage, then significant discovery is warranted. First, the discovery should identify what the commercial business is that the employer performs. Second, the discovery should be designed to identify interstate "goods" that are passed on to the employer's customers and interstate "materials" that are used in the employer's business. Plaintiffs' discovery should include broad interrogatories and comprehensive document requests followed by a Rule 30(b)(6) deposition designed to address these issues. Plaintiffs should also consider taking a Rule 34 inspection of land and videotaping the premises of the employer including its vehicles, its computers, and other items that may be interstate items that are used to do something or make something related to the employer's business. One can expect that most employers who meet the $500,000 requirement of gross receipts will also routinely use interstate items such that enterprise coverage will easily be achieved.

C. A Possible Dark Cloud On the Horizon

In *Polycarpe*, the Eleventh Circuit noted that the defendants in two of the consolidated cases had asserted that some of the plaintiffs were "illegal immigrant workers." *Id.* at 32 n. 16. The Eleventh Circuit indicated that it decides "nothing today about the FLSA's application to 'illegal immigrant workers'" because the district courts had made no findings about the plaintiffs' immigration status. *Id.* This issue is likely to be addressed by the Eleventh Circuit soon. In *Josendis v. Wall to Wall Residence Repairs, Inc.*, No. 09-12266, the Eleventh Circuit recently requested that the DOL file a letter brief stating its position regarding "whether an illegal immigrant plaintiff can invoke the rights and protections of the Fair Labor Standards Act under any circumstances, and if so, whether the plaintiffs illegal immigrant status limits his remedies under the Fair Labor Standards Act in any way." The DOL answered this question with a strong letter brief indicating that it is the DOL's longstanding position that undocumented workers are entitled to minimum wages and overtime pay for work performed under the FLSA. *See Patel v. Quality Inn South,* 846 F.2d 700, 703-06 (11th Cir. 1988), *cert. denied,* 489 U.S. 1011 (1989).