AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

FAIR LABOR STANDARDS ACT MANUAL

Office of the General Counsel
In consultation with the Legal Rights Committee of the National Executive Council (NEC)
American Federation of Government Employees
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THE FAIR LABOR STANDARDS ACT[1]

I. INTRODUCTION

This manual provides a working overview and practical guide to investigating, evaluating, and arbitrating overtime pay claims under the Fair Labor Standards Act.

Overtime for general schedule (GS) federal government employees is recoverable under either Title 5 of the United States code (Title 5 overtime) or under the Fair Labor Standards Act (FLSA overtime). Each provision has certain advantages and provides an overtime hourly rate of one and one-half (150%) of the employees basic hourly rate.

Federal employees are entitled to receive overtime pay at the rate of one and a half times their regular hourly rate under the Federal Employees Pay Act (FEPA or Title 5). 5 U.S.C. §§5501-5541 et seq. However, overtime under Title 5 has two principle disadvantages. Overtime pay under Title 5 is capped at the GS-10, step 1 overtime rate.[2] 5 U.S.C. §5542(a)(2). The result of the "cap" is that persons at or over GS-10, step 1 (those earning over $31,800, including overtime) are paid at an overtime hourly rate which is the same as their basic hourly pay rate. In other words, overtime is paid the same as straight time. The second major obstacle is that Title 5 overtime must be approved in advance.

Neither the "cap" nor the need for explicit overtime authorization is applicable to FLSA overtime. However, unlike Title V overtime, FLSA overtime is not available to all bargaining unit GS employees. It is the purpose of this manual to provide guidance in understanding and applying the FLSA.[3]

[1] The following information is designed as a subject outline and is not a substitute for comprehensive legal assistance.

[2] A copy of the current General Schedule pay scale is usually published as a note to 5 U.S.C. §5332 in the United States Code.

[3] Note that certain GS employees (usually those holding positions that require 24 hour coverage such as law enforcement and firefighters) may have special overtime laws that override normal FLSA practice. See 29 C.F.R. §207(k). This manual does not cover these special cases.

II. THE FAIR LABOR STANDARDS ACT (FLSA)

The Fair Labor Standards Act is a piece of "New Deal" legislation codified in the 1930's as part of the American labor movement's press for the 40 hour work week. The FLSA discourages management from working employees over 40 hours in a seven day work period by mandating that all hours worked in excess of 40 hours be paid at one and one-half (150%) of the employee's normal hourly rate.[4] Redman v. U.S. West Business Resources Inc., 153 F.3d 691 (8th Cir. 1998).

29 U.S.C. §207(a)(1) provides in relevant part:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce ... or is employed in an enterprise engaged in commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 7(a) of the Fair Labor Standards Act, 29 U.S.C. §207(a), provides that an employer shall compensate its employees at not less than one and a half times their regular hourly rate for each hour employed in excess of forty hours per week.

It is important to note that the FLSA deals in terms of a seven (7) day work-week and not in terms of the federal government two week pay period. Except in **flex-time** situations (see below) the FLSA test is how many hours an employee works in seven (7) days, not how many hours were worked in a pay period. The federal government operates under an additional set of laws including the Federal Employee Pay Comparability Act of 1990 (P.L.101-509) which allows for FLSA overtime for more than 8 hours in a work-day in some instances. See, FPM Ltr 551-24 (1/14/92)(there are many exceptions to this 8 hour rule including flex-time, firefighters, and other 24 hr. positions).

The humanitarian purposes of the overtime pay requirements of the FLSA are two-fold: (1) to fairly compensate employees for the burden of working extended hours on behalf of their employer; and (2) to spread employment by placing financial pressure on employers to hire more workers. Benshoff v. Cith of Virginia Beach, 9 F.Supp.2d 610 (ED VA. 1998).

The FLSA specifically prohibits retaliation by the employer for filing FLSA claims by employees. 29 U.S.C. §215(a)(3). Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 40-43 (1st Cir. 1999). Valerio speaks directly to retaliation for FLSA claims made internally with the employer rather than via a formal complaint to DoL or OPM. Ib., 173 F.3d at 42.

[4] The hourly rate of a federal GS employee can be obtained by dividing the employee's yearly salary (based upon the employee's GS grade and step at the pay rate published yearly in the Federal Register) by the 2,087 hours in the federal employee work-year.

A. FEDERAL EMPLOYEES ARE COVERED BY THE FLSA

In 1974, after decades of letter writing and intense lobbying, AFGE (which received its labor charter in 1932) was able to have the definition section of the FLSA amended to include, for the first time, federal employees. Federal employees are "employees" of an "employer" under the Fair Labor Standards Act, 29 U.S.C. §203(d). P.L. 93-259, 88 Stat. 55, codified at, 29 U.S.C. §203(e)(2)(A)(ii).

B. FLEX-TIME, COMPENSATORY TIME, AND RELATED PROVISIONS

The **flex-time** provisions of 5 U.S.C. §6128(a) provide a waiver of the 40 hour FLSA workweek to allow for an 80 hour bi-weekly computation period at the employee's option. The first 80 hours in a bi-weekly flex-time period are not subject to FLSA overtime.

5 U.S.C. §6123(a)(1) provides that an employee may elect (with the approval of the Agency) compensatory ("comp.") time in lieu of overtime when working flex-time. The employer cannot legally force an employee to take comp. time in lieu of FLSA mandated overtime. See also, the collective bargaining provisions of 5 U.S.C. §6130. See, AFSCME v. State of LA., 145 F.3d 280 (5th Cir. 1998).

It should be noted that the right to FLSA overtime is independent of the collective-bargaining process (except in the flex-time area) and that FLSA overtime is not waivable and cannot be abridged by contract. Abendschein v. Montgomery County, Md., 984 F.Supp. 356 (D.Md. 1997). But as to home-work see, Gaby v. Omaha Home for Boys, 140 F.3d 1184 (8th Cir. 1998); Henchy v. City of Absecon, 148 F.Supp.2d 435 (D.NJ. 2001)

C. REGULATIONS IMPLEMENTING THE FLSA

Pursuant to law, the Department of Labor (DoL) administers the FLSA for the private sector and for state and local governments. Department of Labor regulations are entitled to substantial deference as to the FLSA. Ingram v. County of Bucks, 144 F.3d 265 (3rd Cir. 1998); Cash v. Conn Appliances, Inc., 2 F.Supp.2d 884 (E.D. Tex. 1997). The definition of terms in DoL regulations is considered to have the effect of binding law while interpretive DoL regulations do not have that force. Shaw v. Prentice hall Computer Pub. Inc., 151 F.3d 640 (7th Cir. 1998). The Office of Personnel Management (OPM) is charged with the responsibility of administering the FLSA for federal agencies. 29 U.S.C. §204(f).

III. EMPLOYEES EXEMPT FROM FLSA COVERAGE

The FLSA does not apply to employees who are exempt from its coverage. Employees are exempt from the coverage of the FLSA if they are employed "in a bonafide executive, administrative or professional capacity." 29 U.S.C. §213(a). An employee is either exempt or nonexempt from

provisions of the FLSA; an employee may not be partially nonexempt from the FLSA. Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995).

In a landmark case, AFGE v. OPM, 821 F.2d 761, 769 (D.C. Cir. 1987), the Court of Appeals agreed with AFGE's position that OPM could not use its regulatory authority to deny FLSA coverage (expand an FLSA exemption criteria) to federal employees to a degree greater than the DoL regulations.

The principle issue in most federal employee FLSA cases is whether a particular position (or group of positions) is "FLSA exempt" and, hence, not entitled to FLSA overtime. The exemption criteria and regulations are first identified below and then the methods of proof as to the exemptions are discussed.

A. THE ADMINISTRATIVE EXEMPTION

The "administrative" exemption is, by far, the basis for exemption most often claimed by the United States as a justification for the denial of FLSA overtime for federal employees. Both DoL and OPM have issued regulations explaining the "administrative" exemption. See, Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000). The administrative exemption is not merely a division of "blue collar" and "white collar" employees. In the modern work environment "white collar" employees may be FLSA non-exempt. FLSA status depends on the actual work of the employee, not the office or factory floor location of the work. Reich v. John Alden Life Ins., 126 F.3d 1 (1st Cir. 1997). An employee only qualifies for the administrative exemption if the primary duty consists of office work requiring the exercise of discretion and independent judgment. Demos v. City of Indianapolis, 126 F.Supp.2d 548 (SD ID 2000).

1. Department of Labor Regulations

The definition of a bona fide administrative employee who is exempt from the FLSA is contained in 29 C.F.R. §541.2.[5]

The courts have interpreted the "administrative" exemption as follows:

> "The phrase, "directly related to management policies of his employer or his employer's customers," is interpreted at 29 C.F.R. §541.205, and "describes those types of activities relating to the administrative operations of a business as distinguished from 'production'."

[5] 29 C.F.R. §541.2 Administrative. A copy of this DoL regulation is attached to this manual at **Appendix A.**

> [The employer's] business is "producing" information for its clients, and the plaintiff's duties consisted almost entirely of gathering that "product." Thus, it appears to the court that the plaintiff was engaged in "production" within the meaning of the regulation."

Gusdonovich v. Business Information Company, 705 F.Supp. 262, 265 (D.Penn. 1985).

The DoL has published a "short test" for the administrative exemption at 29 C.F.R. §541.2[6] that applies to essentially all federal employees over GS-1, step 2. See, Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999)

2. Office of Personnel Management Regulations

The OPM has also published regulations on the "administrative" exemption found in the FLSA at 5 C.F.R. §551.206.[7] Recall that under AFGE v. OPM, OPM regulations must be read so that they do not expand an exemption beyond that of DoL. Thus an OPM regulation which defines an exemption more expansively (broadly) than the comparable DoL regulation is inoperative. However, it is permissible for an OPM regulation to define an exemption more narrowly than DoL. For example, DoL regulations define "executive" as supervising employees, while OPM defines "executive" as supervising three or more employees.

B. THE PROFESSIONAL EXEMPTION

This exemption is used to a far lesser extent by the United States as a defense to the payment of FLSA overtime to AFGE bargaining unit members. Both OPM (5 C.F.R. §551.207(a)) and Department of Labor (29 C.F.R. §541.300-02) have issued regulations on the "professional" exemption. It should be noted that the professional exemption includes the salary (rather than hourly) pay requirement. Danesh v. Rite Aid Corp., 39 F.Supp.2d 7 (D.D.C. 1999). The word "professional" has been expanded in colloquial usage to encompass terms such as "professional secretary" or "professional plumbers." In the FLSA context, however, the "professional" exemption covers only those positions that were historically termed "professions," i.e., doctors, dentists, nurses, medical technologists, attorneys, CPAs (not staff accountants), teachers, engineers, airline pilots, artistic professionals and architects, professional medical technologists, engineers and scientists. See, Fife v. Harmon, 171 F.3d 1173 (8th Cir. 1999); 29 C.F.R. §541.303. Examples of positions that have been found not to qualify for the professional exemption include probation officers, x-ray technicians, and insurance investigators. See, Ragnone v. Belo Corp., 131 F.Supp. 1189 (D.Or.

[6] 29 C.F.R. §541.2(a)-(e). The short test, contained in 29 C.F.R. §541, applies to employees who are paid not less than $250 per week.

[7] 5 C.F.R. §551.205. A copy of this OPM regulation is found in **Appendix B** of this manual. FPM Ltr. 551-7 (FPM Ltr. 551-7(B)(1)(g-i)) also contains an explanation of some of the key terms used in the definition of the administrative exemptions, which helps to clarify administrative work.

201), helicopter pilot non-exempt. Skill not extensive academic training.

It is important to note that this exemption normally requires knowledge in a field of science or learning at least to the level of a bachelor's degree. See 77 ALR Fed. 681 (1986); see also, Debejian v. Atlantic Testing Laboratories, Ltd., 64 F.Supp.2d 85 (ND NY 1999). Recently, the government has been attempting to expand the "professional" exemption to cover technician type positions. The government argues that electrical technicians have the analytical duties and the special education to make them analogous to electrical engineers. AFGE, of course, argues that analytical duties and special training are elements in essentially every white collar federal position and to expand the limited "professional" exemption solely on these qualities would have the exception swallowing the rule. This matter is currently in litigation, and no clear cut answer is available at this time. However, any expansion of the "professional" exemption beyond its traditional boundaries should be resisted and carefully tested by the DoL exemption regulations.

1. Special Problems for Computer Related Positions

Special rules apply to **computer related positions** when referring to the "professional" exemption.

In 1990 Congress expanded the "professional" exemption as it relates to computer related positions. Public Law 101-583, §2, 104 Stat. 2871, reads as follows:

> Section 2 of Public Law 101-583, enacted November 15, 1990, provides as follows:
>
> Not later than 90 days after the date of enactment of this Act [Nov. 15, 1990], the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the Fair Labor Standards Act of 1938 [29 U.S.C. 213(a)(1)]. Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206)[section 206 of this title].

P.L. 101-583, codified at, 29 U.S.C. §213 note; reprinted at, 56 Fed. Reg. 8250 (Feb. 27, 1991) (emphasis added).

As of March, 1996, OPM has issued no regulations implementing P.L. 101-583. The Department of Labor regulations implementing P.L. 101-583 are found at 29 C.F.R. §541.303.[8]

Similarly 29 C.F.R. §541.312 has been modified by DoL for computer related positions.

[8] A copy of DoL regulation 29 C.F.R. §541.303 is found in **Appendix C** attached to this manual.

2. 29 C.F.R. §541.312 Salary basis

The salary basis of payment is explained in 29 C.F.R. §541.118 in connection with the definition of "executive." Usually, for a position to be considered FLSA exempt under the "administrative" or "executive" exemptions the employee must be paid on a salary basis. McGuire v. City of Portland, 159 F.3d 460 (9th Cir. 1998) Pursuant to Public Law 101-583, enacted November 15, 1990, payment "on a salary basis" is not a requirement for exemption in the case of those employees in computer-related occupations, as defined in § 541.3(a)(4) and § 541.303, who otherwise meet the requirements of § 541.3 and who are paid on an hourly basis if their hourly rate of pay exceeds 6-1/2 times the minimum wage provided by section 6 of the Act.

It is clear from both the plain language of P.L. 101-583 (which is the express basis of the DoL regulations titled "§541.303 Computer Related Occupations Under Public Law 101-583") and the legislative history, that only those computer related positions paying over 6 1/2 times the minimum wage, as required by 29 C.F.R. §541.312, are exempted from the FLSA as "professional" employees by P.L. 101-583. It is AFGE's position that only employees at the GS-13, step 8 pay rate, or above, qualify for exemption under P.L. 101-583.[9] No GS-12 pay-rate meets the salary requirement of P.L. 101-583, as the GS-12 pay scale pays a maximum of $52,385.00.

See also, 29 C.F.R. §451.3(a)(4), §451.303.

C. THE EXECUTIVE EXEMPTION

By its terms, the "executive" exemption does not apply to AFGE bargaining unit members who, by definition, cannot be "supervisors."[10] We have never seen a case where an Agency has claimed this exemption for members of our bargaining units. OPM regulations on this exemption can be found at 5 C.F.R. §551.204.

D. NO COLLECTIVE BARGAINING EXEMPTION

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[9]The minimum wage (as of 9/97) is **$5.15** per hour.

$5.15 (minimum wage found in 29 U.S.C. §205(a)(1))
x 6.5 (multiplier in P.L. 101-583)
$33.47 per hour

Federal employees under the General Schedule (GS) are deemed to work **2,087** hours per year. 5 U.S.C. §5501(b)(1) (as amended, P.L. 99-272, §15203(a), 100 Stat. 334 (1986)).

$33.47 (multiplied minimum wage in P.L. 101-583)
x 2,087. (GS hrs. of work per year per 5 U.S.C. §5501(b)(1))
$69,862.32 per year as minimum wage to qualify for P.L. 101-583 professional exemption.

[10] 5 U.S.C. § 7103(a)(4) (labor organization composed of "employees"); §7103(a)(2)(B)(iii) ("supervisor" is not "employee"); §7103(a)(10) (definition of "supervisor").

There is no collective bargaining exemption to the FLSA. Furthermore, a union cannot bargain away the FLSA rights of the employees. Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 740, 745 (1981); Collins v. Lobdell, 188 F.3d 1124 (9th Cir. 1999); L-246 Utility Workers v. Southern Cal. Edison Co., 83 F.2d 292 (9th Cir. 1996); Featsent v. City of Younstown, 70 F.3d 900, 901 (6th Cir. 1995); Castillo v. Case Farms of Ohio, Inc., 96 F.Supp.2d 578 (WD Tx 1999); Braddock v. Madison County , 34 F.Supp.2d 1098 (S.D. In. 1998); Brooks v. Village of Ridgefield Park, NJ, 978 F.Supp 613 (NJ 1997). Employers and employees may not, in general, make agreements to pay and receive less pay than the FLSA provides for, and such agreements are against public policy and unenforceable. Roman v. Maietta Construction Co., 147 F.3d71 (1st Cir. 1998).

The union may bargain on alternative work schedule (flex-time) for bargaining unit employees. 5 U.S.C. §6130. The flex-time provisions may have an effect on FLSA overtime as flex-time, by its very nature, tends to compress work schedules.

IV. PROVING AN FLSA CASE

A. THE PRIMARY FUNCTION OF A POSITION

A FLSA case will be won or lost on the actual job duties of a particular position.[11] Whether a particular position is FLSA exempt (which is the principal Agency defense in most FLSA cases) is decided solely upon the actual job duties of the challenged position. Whether an employee is exempt from overtime pay is determined by the employee's actual work activities, not by the employer's characterization of those activities through job title or job description. Cooke v. General Dynamics Corp., 993 F.Supp. 56 (D.Conn. 1997). The focus of the inquiry will be on what the job actually entails on a day-to-day basis, i.e., the primary duty of the position. Both OPM and DoL have issued regulations and guidance on the "primary duty" of a position for FLSA purposes.[12]

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[11] **Note**: The Position Description is often not an accurate description of the actual job duties of the position. Albrecht v. Horner, No. 88-1816, slip op. pg. 2 (C.D. Cal., July 10, 1990) (Decision on Summary Judgment).

[12] OPM defines "primary duty" as follows:

FPM Ltr. 551.7(B)(1)(a) (Attachment pgs. 5-6)

a. Primary duty. As a general rule, the primary duty is that which constitutes the major part (over 50%) of the employee's work. However, a duty which constitutes less than 50% of the work can be credited as the primary duty for exemption purposes provided that duty:
   - (1) Represents the most important duty;
   - (2) Controls the classification of the position (i.e. if that duty were removed, the position would be classified at a lower grade level; and
   - (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

The Department of Labor defines the "primary duty" for the administrative employee exemption as follows:

29 C.F.R. §541.206

The Courts have interpreted the definitions by DoL in 29 C.F.R. §541.103 as follows:

> The administrative capacity exemption first requires that the employee's "primary duty" consist in the performance of office or nonmanual work "directly related to management policies or general business operations." The regulations state that "primary duty" means "the major part or over 50 percent" of the employee's time. 29 C.F.R. §§541.103, 541.206(b) (footnote omitted).

See also, 29 C.F.R. §§541.206(b), 304(a).

Clark v. J.M. Benson Co. Inc., 789 F.2d 282, 286 (4th Cir. 1986); see also, Paul v. Petroleum Equipment Tools Co., 708 F.2d 168, 170 (5th Cir. 1983); Sack v. Miami Helicopter Service, Inc., 986 F.Supp 1456 (S.D. FL. 1997).

The Clark Court then used the DoL regulations to fashion the appropriate burden of proof:

> The district court therefore erred in persistently framing the issue as whether Clark met her burden to disprove her administrative status. Its [the district court] error could be harmless, however, if Clark's own testimony demonstrated that her primary duty directly related to management policies or general business operations, and included the exercise of discretion and independent judgement. We are, however, not convinced that Benson [the employer] met this burden.
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> * * * *
>
> Clark's [the employee] testimony does not clearly indicate how her time was apportioned, so we cannot conclude, as a matter of law, that over 50 per cent of her work time was directly related to administrative functions.
>
> * * * *
>
> We must conclude, therefore, that Benson [the employer] did not meet its burden of proving, to the point beyond which reasonable minds could differ, the facts requisite to establishing the first element [the performance of office or nonmanual work "directly related to management policies or general business operations"] of the administrative exemption.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers ...

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in §541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.

Clark, 789 F.2d at 286-87 (emphasis in original).

Thus, the Department of Labor stresses that what an employee does as actual job duties for 50% of his/her time is the controlling element of defining the "primary duty" of a position.

B. BURDEN OF PROOF REQUIRED OF GOVERNMENT TO PROVE EXEMPTION FROM FLSA COVERAGE

Exemptions to the FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. Madison v. Resources for Human Development, Inc., 233 F.3d 175 (3rd Cir. 2000); Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959); Roy v. Country of Lexington, S.C., 141 F.3d 533 (4th Cir. 1998). Employers who claim that an exemption applies to their employees not only have the burden of proof, Corning Glass Works v. Brennan, 417 U.S. 188 (1974);Cowart v. Ingalls Shipbuilding, Inc., 213 F.3d 261 (5th Cir. 2000); Reich v. State of New York, 3 F.3d 581, 586 (2nd Cir. 1993), cert. denied, 510 U.S. 1163 (1994); Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999); Hays v. City of Pauls Valley, 74 F.3d 1002 (10th Cir. 1996); Shaw v. Prentice hall Computer Pub. Inc., 151 F.3d 640 (7th Cir. 1998), but also they must show that the employees fit "plainly and unmistakenly within [the exemption's] terms." Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905 (1997); Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960), reh. den., 362 U.S. 945 (1960); Aaron v. City of Wichita, Kan., 54 F.3d 652, 657 (10th Cir. 1995); Hays v. City of Pauls Valley, 74 F.3d 1002 (10th Cir. 1996). The employer has the burden of establishing by affirmative evidence all the necessary requirements of the exemption. Johnson v. Volunteers of America, 213 F.3d 559 (10th Cir. 2000); Clark v. J.M. Benson Co., Inc., 789 F.2d 282, 286 (4th Cir. 1986); Donovan v. United Video, Inc., 725 F.2d 577, 581 (10th Cir. 1984). An employer must prove that the employee is exempt by "clear and affirmative" evidence, Aaron v. City of Wichita, Kan., 54 F.3d 652, 657 (10th Cir. 1995). While an examination of an employees duties are questions of fact, the ultimate question whether an employee is exempt under the FLSA is an issue of law. Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000)

The Agency should not be allowed to raise an FLSA exemption for the first time late in the proceedings. If an Agency attempts to raise an exemption at the start of an arbitration hearing (or later) the Union should object that the late raising of the defense acts as a waiver of the defense. FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. Fife v. Harmon , 171 F.3d 1038 (5th Cir. 1999); Jones v. Giles, 741 F.2d 245, 248-49 (9th Cir. 1983). Defendants may raise an affirmative defense [such as an FLSA exemption] for the first time in a motion for summary judgement only if the delay does not prejudice the plaintiff. Magna v. Com. of the Northern Mariana Islands, 107 F.3d 1436, 1446 (9th Cir. 1997); citing Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1994).

OPM Regulations provide at 5 C.F.R. §551.202(a): "Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption." At §551.202(b) it provides: "The burden of proof rests with the Agency that asserts the exemption."

At §551.202(c) OPM provides: "All employees who clearly meet the criteria for exemption must be exempted."

OPM Ltr. 551-7 (Attachment, pg. 12) mandates an extremely heavy burden of proof for the Agency to meet in asserting that a position is FLSA exempt. OPM directives in FPM Ltr. 551-7 B. 2. A state as follows:

> (1) FLSA exemptions must be narrowly construed and applied only to employees who are clearly within the terms and spirit of the exemptions; (2) The burden of proof rests with the employer who asserts the exemption. Thus, if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be ruled nonexempt." (Emphasis supplied.)

The Union should take the position that if the Union raises a "reasonable doubt" as to a position's exempt status, the position must be found to be non-exempt [FPM Ltr. 551-7(B)(2)(A)(2)].

C. PROOF REQUIRED TO RECEIVE OVERTIME PAY

To prevail on their FLSA claims for overtime compensation, plaintiffs must prove by a preponderance of the evidence that:

1. they were employed by the defendant in excess of forty hours per week; and,

2. that the work they performed was for the benefit of the defendant; and,

3. that they were not properly compensated for that work.

D. BURDEN OF PROOF OF FLSA OVERTIME COMPENSATION

Each employee must prove that "he has in fact performed work for which he was improperly compensated" and "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-688 (1946); DoL v. Cole Enterprises, Inc, 62 F.3d 775,779 (6th Cir. 1995). The fact that a plaintiff is unable to prove the precise extent of the uncompensated work does not preclude recovery. DoL v. Cole Enterprises, Inc, 62 F.3d 775,779 (6th Cir. 1995); Fegley v. Higgins, 19 F.3d 1126 (6th Cir.

1994); Herman v. Palo Group Foster Home, Inc. 976 F.Supp. 696, 701 (WD MI 1997); Reich v. Waldbaum, Inc., 833 F.Supp. 1037 (S.D.N.Y. 1993); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000).

Plaintiffs are not required to produce actual records or logs, but may establish the amount of overtime worked through their own testimony. Bueno v. Mattner, 829 F.2d 1380 (6th Cir. 1987).

Testimony of a relevant sampling of employees may be sufficient to prove the claims of all similarly situated employees. Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000).

Where plaintiffs establish that they performed overtime work for which they were not compensated and the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the plaintiffs' evidence, and if the defendant fails to produce such evidence, the court may then award damages to the plaintiffs, even if the amount is only approximate. Mt. Clemens Pottery, 328 U.S. at 687-688; Metzler v. IBP, Inc., 127 F.3d 959, 965-66 (10th Cir. 1997); Bueno, 829 F.2d at 1387. Under Mt. Clemens Pottery, an employer cannot complain about the employee's calculation method unless it introduces specific evidence to the contrary of the hours actually worked or evidence that undermines the reasonableness of the estimate. Waldbaum, 833 F.Supp. at 1045. The use of representational examples (rather than every overtime employee) is permissible. Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997).

It is certainly in the employee's interests to enter the strongest evidence of time worked. Records such as time logs, desk calendars with work notations, diaries, and other evidence of hours worked are invaluable, as official Agency records (T&A cards) are often lacking.

E. WHAT IS NOT "WORK" UNDER THE FLSA

An employer is not required to pay overtime compensation in regard to "activities which are preliminary to or postliminary to" the principal activities which the employee is employed to perform "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. §254(a)(2). Thus, for example, the changing into sterile clothing before a workshift at NIH would not be compensable time. However, employee activities performed either before or after the regular work shift are compensable under §254(a)(2) if those activities are an integral and indispensable part of the principal activities for which the person is employed. Mitchell v. King Packing Co., 350 U.S. 260 (1956); Steiner v. Mitchell, 350 U.S. 247 (1956). See, also, Preston v. Settle Down Enterprises, Inc., 90 F.Supp.2d 1267 (ND GA 2000). To decide whether an activity is an integral and indispensable part of a principal activity, the court must determine whether the activity is performed as part of the regular work of the employees in the ordinary course of business. Duchon v. Cajon Co., 791 F.2d 43 (6th Cir. 1988). Preliminary or postliminary activities are not compensable under the FLSA's overtime provision if they are undertaken for the employee's own convenience, are not required by the employer, and are not necessary for performance of duties for the employer. Hellmers v. Town of Vestal, N.Y., 969 F.Supp. 837 (ND NY 1997). The term "principal activities" is liberally construed as including any work of consequence performed for an employer, no matter when the work is performed, as well as activities closely related to a principal activity which are indispensable to its performance. 29 C.F.R. §790.8. Whether off-duty conduct is predominantly for the benefit of the employee, for

determining it compensability under the FLSA depends on the degree to which an employees freedom is undermined by the work-related activity. Police officers who were required to pick up squad cars at another location prior to reporting to substation where they began their work were entitled to be compensated under the FLSA for time spent driving in squad car to substation. DeBrask v. City of Milwaukee, 11 F.Supp.2d 1020 (E.D. WI 1998).

A actual "duty free lunch" is not considered hours of work for FLSA purposes. However, to the failure to pay employees for meal time is an exception to the FLSA that must be narrowly construed and the burden is on the employer to show that it is entitled to the exception. Bernard v. IBI Inc. of Nebraska, 154 F.3d 259 (5th Cir. 1998); Roy v. County of Lexington, S.C., 141 F.3d 533 (4th Cir. 1998); Abendschein v. Montgovery County, Md., 984 F.Supp. 356 (D.Md. 1997). The "predominant benefits test" is applied to determine who primarily benefits from a meal period for purposes of determining whether, under the FLSA, employees are entitled to compensation for their meal period. 29 CFR 785.19, Hartsell v. Dr. Pepper Bottling co. of Texas, 207 F.3d 269 (5th Cir. 2000); Summers v. Howard University, 127 F.Supp.2d 27 (DDC 2000).

F. Stand-By Time

The issue of "stand-by" time is becoming more important in the federal work sector as beepers and portable phones become more commonplace. The employer must compensate employees for time spent predominantly for the employers benefit. Aiken v. City of Memphis, Tennessee, 190 F.3d 753 (6th Cir. 1999) The issue of whether on-call employees are engaged in FLSA compensable hours of work is decided as follows:

> Are the employees waiting to be engaged (non-compensable); or;
> Engaged to be waiting (compensable)

Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift & Co., 323 U.S. 134 (1944); Dinges v. Sacred Heart St. Mary's Hospital, Inc., 164 F.3d 1056, 1057 (7th Cir. 1999); Preston v. Settle Down Enterprises, Inc., 90 F.Supp.2d 1267 (ND GA 2000).

Less eloquent (but more useful) is an examination of the freedom of on-call employees. The following are critical questions that need to be answered in any given case:

1. Are there restrictions in movement of on call-employees? Is an employee tied to their phone?

2. Are there restrictions in physical location of on-call employees? Is an employee tied to a specific location during the call-back time?

3. Are there restrictive report or callback requirements for on-call employees? Must an employee report for duty or phone-in within a certain time period after the call-back?

4. What are the penalties, if any, for failure to respond to a call-back?

The more restricted the freedom of the employee during the on-call period the more likely the on-call period may be found to be compensable hours of work. See, Rutlin v. Rime Succession, Inc., 220 F.3d 737 (6th Cir. 2000); Dinges v. Sacred Heart St. Mary's Hospital, Inc.; 164 F.3d 1056, 1057 (7th Cir. 1999); Ingram v. County of Bucks, 144 F.3d 265 (3rd Cir. 1998); Brekke v. City of Blackduck, 984 F.Supp. 1209 (D. Minn. 1997); Bartholomew v. Cith of Burlington, Kansas, 5 F.Supp.2d 1161 (D. Kan 1998). Some cases have held that an employees free time must be severely restricted for off-time to be construed as work for FLSA purposes. Aiken v. City of Memphis, Tennessee, 190 F.3d 753 (6th Cir. 1999). A question should be was the waiting time spent primarily for the benefit of the employer and its business. Ragnone v. Belo Corp., 131 F.Supp.2d 1329 (D.Or. 2001).

See, DoL hours of work regulations, 29 C.F.R. 553.221(c-d); §29 C.F.R. §785.7.

V. DAMAGES AND COMPENSATION

A. DAMAGES UNDER THE FLSA[13]

As a primary matter, upon proof of a violation of §207(a)(1), an Agency is liable for the amount of unpaid overtime compensation. 29 U.S.C. §216(b). Note that if any Title 5 overtime was paid for the challenged work the employee is only entitled to the difference between the Title 5 overtime and the FLSA overtime. Sums paid for occasional periods when no work is performed due to vacation, holiday, illness, payments for traveling and other reimbursable expenses, and other payments to an employee which are not made as compensation for hours of employment are not included in determining an employee's "regular rate" under §207(a)(1). 29 U.S.C. §207(e)(2). For purposes of the FLSA the regular rate of pay, by its very nature, must reflect all payments which the parties have

agreed shall be received regularly during the work week, exclusive of overtime payments. It is not

[13] *If there is an inconsistency between overtime pay under Title 5 and the FLSA, the employees are entitled to the greater benefit. Agner v. U.S., 8 Cl. Ct. 635, 636, affirmed, 795 F.2d 1017 (Fed. Cir. 1986).*

an arbitrary label chosen by the parties, but is instead an actual fact. Herman v. Anderson Floor Co., Inc., 11 F.Supp.2d 1038, 1041 (E.D. WI. 1998).

B. THE "DE MINIMIS" RULE

Under the "de minimis rule," employees generally cannot recover for otherwise compensable time if it amounts to only a few seconds or minutes of work beyond scheduled working hours. Mt. Clemens Pottery, 328 U.S. 680, 692 (1946); Reich v. Monfort, 144 F.3d 1329 (10th Cir. 1998); Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984); Jerzak v. City of South Bend, 996 F.Supp. 840 (ND IN 1998). Factors to be considered in determining whether a claim is de minimis include: 1) the practical administrative difficulty of recording the additional time; 2) the aggregate amount of compensable time; and 3) the regularity of the additional work. Lindow, 738 F.2d at 1062-1063; see also Monfort. Most courts have found periods of approximately ten minutes or less to be de minimis. Lindow, 738 F.2d at 1062; put see, Monfort, 10 minutes compensable; AFSCME, 15 minutes compensable. But see, Bartholomew v. Cith of Burlingto, Kansas, 5 F.Supp.2d 1161 (D. Kan 1998), 15 minutes non-compensable. However, a small but regular daily amount of time aggregated over a period of three years may not be de minimis. Id. at 1063.

C. LIQUIDATED DAMAGES

In addition to recovering the wrongfully withheld FLSA overtime, an award of liquidated damages in an amount equal to the unpaid back wages is mandated in the case of a violation of the statute. The FLSA provides for a doubling of any overtime award. This doubling of the wrongfully withheld overtime is called **liquidated damages**.

It is important to note that the FLSA not only requires proper payment of wages but that it also requires the timely payment of proper wages. Late payment of proper FLSA overtime triggers the liquidated damages provision of the Act. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Calderon v. Witvoet, 999 F.2d 1101, 1107 (7th Cir. 1993).

1. FLSA LIQUIDATED DAMAGES

29 U.S.C. §216 provides:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title [hours of work over 40 per week] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. *(Emphasis added.)*

The trier of fact (such as an arbitrator) must award liquidated damages unless the Agency meets its substantial burden of proof to avoid liquidated damages. See, Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997); See also, Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000).

Thus, the trier of fact's decision whether to award liquidated damages does not become discretionary until the employer carries its burden of proving good faith. In other words, liquidated damages are mandatory absent a showing of good faith. Greene v. Safeway Stores, 210 F.3d 1237 (10th Cir. 2000); Nero v Industrial Molding Corp., 167 F.3d 921 (5th Cir. 1999); Bernard v. IBI Inc. of Nebraska, 154 F.3d 259 (5th Cir. 1998); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 403 (9th Cir.), cert. denied, 474 U.S. 907, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985).

Before a trier of fact may exercise its discretion to award less than the full amount of liquidated damages, it must explicitly find that the employer acted in good faith. Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir. 1984); Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987); see also, L-246 Utility Workers v. Southern Cal. Edison Co., 83 F.3d 292 (9th Cir. 1996). The employer bears the burden of showing good faith and there is strong presumption in doubling the award. Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2nd Cir. 1999); Shea v. Galaxie Lumber & Construction Co. Ltd, 152 F.3d 729 (7th Cir. 1998); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000)

The liquidated damages provision of 29 U.S.C. §216(b) was specifically applied to federal employees in 29 U.S.C. §204(f):

> Notwithstanding any other provision of this chapter [the FLSA], or any other law, the Civil Service Commission [now Office of Personnel Management] is authorized to administer the provisions of this chapter with respect to any individual employed by the United States .... Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation and liquidated damages under section 216(b) of this Act." (Emphasis added.)

Liquidated damages are not meant to be punitive; rather, they are compensatory in nature to provide adequate recompense to employees whose proper wages were illegally withheld.

Under the [FLSA] Act, liquidated damages are compensatory, not punitive in nature. Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2nd Cir. 1999). Congress provided for liquidated damages to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due. Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997); Marshall v. Brunner, 668 F.2d 748, 753 (3rd Cir. 1982); Martin v. Cooper Electric Supply Co., 940 F.2d 893, 907 (3rd Cir. 1991). See also, L-246 Utility Workers v. Southern Cal. Edison Co., supra; Cox v. Brookshire Grocery Co., 919 F.2d 354, 357 (5th Cir. 1990); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094 (11th Cir. 1987); The FLRA has confirmed that arbitrators have the authority to award liquidated damages against the federal government in FLSA situations. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 49 FLRA No. 40, 49 FLRA 483, 489-90 (March 10, 1994), citing, U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 46 FLRA No. 97, 46 FLRA

1063, 1073 (1992) (finding a waiver of sovereign immunity under the Back Pay Act (5 U.S.C. §5596)).

2. AGENCY DEFENSES TO LIQUIDATED DAMAGES

a. 29 U.S.C. §260

Under 29 U.S.C. §260, an Agency may be relieved from payment of liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of the FLSA.[14] However, an award of liquidated damages is discretionary even where the employer shows that he acted in good faith. Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999); McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000).

b. 29 U.S.C. §259

29 U.S.C. §259 provides a defense to the payment of FLSA overtime if an employer's overtime payment actions were approved, in advance, by the Department of Labor. The 29 U.S.C. §259 defense has been found to be unavailable, as a matter of law, to federal agencies who claimed to rely upon the directives of OPM for protection for payment of back-pay. Berg v. Newman, 982 F.2d 500 (Fed. Cir. 1992); U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773, 799 (April 14, 1992); U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 47 FLRA No. 78, 47 FLRA 819, 832 (June 9, 1993). Approval of District Director for Wage and Hour does not provide a safe haven for erroneous advice. Roy v. County of Lexington, S.C., 141 F.3d 533 (4th Cir. 1998). Reliance on oral advice does not provide a safe-haven for the employer. Herman v. Suwannee Swifty Stores Inc., 19 F.Supp.2d 1365 (MD GA 1998).

D. SUFFERED OR PERMITTED OVERTIME

A principle advantage of FLSA overtime as compared to Title 5 overtime is that under the FLSA an Agency must pay for all Agency work that it either ordered or that it "suffered or permitted" employees to work. Thus, if employees come into the office early, work late, work weekends, or work through lunch, the Agency is obligated to pay for this time, providing all of the worktime adds up to more than 40 hours in a week. Advance authorization to work overtime is not required. The only requirement is that the Agency had knowledge that the overtime was being worked and that the work is being done for the benefit of the Agency.

1. WHAT IS "WORK", DEFINITION OF "EMPLOY"

[14] §260 is no defense to the Agency's obligation to pay wrongfully withheld FLSA overtime. It is a defense solely to the liquidated damages portion of the recovery.

To "employ" means to suffer or permit to work. 29 U.S.C. §203(g). Work may be suffered or permitted even if it is not requested in advance. 29 C.F.R. §785.11. Work may be suffered or permitted even if it is performed away from the employer's premises, even at home. 29 C.F.R. §785.12."Work" for purposes of the FLSA is physical or mental exertion, whether burdensome or not, controlled or required by the employer, is necessarily and primarily for the benefit of the employer, and is an integral and indispensable part of the job. Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998); Anderson v., Pilgrim's Pride Corp., 147 F.Supp.2d 556 (E.D. TX 2001). The employee has the initial burden of showing that he/she performed work for which the employee was improperly compensated for by the employer.

2. NEED FOR EMPLOYER KNOWLEDGE OF WORK

In order to show that they were suffered or permitted to work, employees must show that the defendant had either actual or constructive knowledge of the overtime work. Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997); Pforr v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988). An employer who knows or should have known through the exercise of reasonable diligence that an employee is working overtime must comply with the FLSA requirements. See, Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413 (9th Cir. 1981); Brennan v. General Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973) (constructive knowledge found due to knowledge and acts of employees' immediate supervisors). Constructive knowledge may also be established through proof of a pattern or practice of overtime work. Pforr, 851 F.2d at 109. An employer who is armed with the knowledge that an employee is or was working overtime cannot stand idly by and allow the employee to perform overtime work without proper compensation, even if the employee does not make a claim for overtime. Jerzak v. City of South Bend, 996 F.Supp. 840 (ND IN 1998). FLSA overtime may not be denied solely on the grounds that the employee could have completed his or her tasks during scheduled hours thereby avoiding the need for overtime altogether. Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998).

3. NON-DEFENSE OF "NO OVERTIME WORK" DIRECTIVES

An employer cannot take shelter in an instruction to employees not to work more than forty hours per week knowing the employee actually works more. Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997); Wirtz v. Bledsoe, 365 F.3d 277 (10th Cir. 1966). Even where an employer has not specifically ordered an employee to work, an employee must be compensated for time spend working on the employer's behalf if the employer accepts the benefits of such work and does not act to stop performance of the work it does not want performed, regardless of whether the employee demands overtime compensation. Mumbower v. Callicott, 526 F.2d 1183 (8th Cir. 1975). An employer must pay for work suffered or permitted notwithstanding an agreement to obtain authorization to work beyond a specified work period. Burry v. National Trailer Convoy, Inc., 338 F.2d 422 (6th Cir. 1964); Majchrzak v. Chrysler Credit Corp., 537 F.Supp. 33 (E.D. Mich. 1981). The mere promulgation of a policy or instructions not to work overtime, standing alone, does not

establish that the employer did not suffer or permit the work where the nature of the work required overtime or the employer pressured the employees to work overtime. Reich v. Dept of Conservation & Nat. Resources, 28 F.3d 1076 (11th Cir. 1994); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984). In a "duty free lunch" scenario the issue is whether employees are required to "work" during their "free" lunch period. This is a question of fact revolving around the duties the employees are required to perform. See, 29 C.F.R. §785.19; Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997).

Under 29 C.F.R. §785.13 there is an affirmative duty of the management to exercise its control and see that the work is not performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

F. Attorney Fees and Costs

The FLSA grants the prevailing party reasonable attorney fees and costs. 29 U.S.C. §216(b). The Act orders that the court:

> [s]hall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." *[Emphasis added.]*

29 U.S.C. § 216(b).

The Courts have held that the attorney's fee provision is mandatory and that the prevailing plaintiffs shall be awarded their attorney's fees.

> Section 216 provides for an award of attorney's fees, as opposed to granting the court discretion in awarding such fees, to the prevailing plaintiff in FLSA cases. In consideration of the language of section 216(b) and its underlying purpose, we hold that attorney fees are an integral part of the merits of FLSA cases and part of the relief sought therein.

Shelton v. Ervin, 830 F.2d 182, 184 (11th Cir. 1987); Gary v. Health Care Services, Inc., 744 F.Supp. 277, aff'd, 940 F.2d 673 (5th Cir. 1991).

The "good faith" of an employer is irrelevant to the mandatory award of attorney's fees and costs and provides no defense to the employer to the award of costs and fees. Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185 (5th Cir. 1979). See also, Luther v. Wilson, 528 F.Supp. 1166, 1176 (S.D. OH. 1981).

Such awards may include fees for appellate and post-remand services. See, Perkins v. Standard Oil Co., 399 U.S. 222 (1970); Newhouse v. Robert's Ilima Tours Inc., 708 F.2d 436, 441 (9th Cir. 1983).

In a suit against the federal government (or its agencies) for FLSA back pay, attorney fees may also be recovered against the United States pursuant to the Back Pay Act. The Back Pay Act, 5 U.S.C. §5596(b)(1)(A)(ii), reads as follows:

> An employee...is entitled...to receive...
>
> (ii) reasonable attorney fees related to the personnel action, which, with respect to any decision relating to an unfair labor practice, or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title [5 U.S.C.],....shall be awarded in accordance with standards established under section 7701(g) of this title; and [emphasis added]

5 U.S.C. §7701(g)(1) reads as follows:

> (g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge, or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

Until relatively recently there has been disagreement over the appropriate hourly rate for union or other non-profit attorneys under various fee shifting statutes. Previously, defendants have argued that salaried non-profit attorneys should receive only their salary plus an amount (usually a 100% multiplier) for their overhead expenses under the various fee shifting statutes. This type of fee calculation is identified as a "cost plus" or "cost basis" attorney award.

The "cost plus" calculation method for non-profit (such as salaried Union) attorneys was rejected by the Supreme Court in Blum v. Stenson, 465 U.S. 886 (1984), which held that both private and nonprofit counsel fees:

> [a]re to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.

Id., 465 U.S. at 895.

Hence, the Supreme Court specifically mandated that private counsel and public service counsel should have identical hourly rates based upon their skill, not their salary. A fee award should be calculated in accordance with prevailing market rates and the fee award should not vary according to whether the prevailing party was represented by private counsel or a nonprofit legal services group. Dameron v. Sinai Hospital of Baltimore, Inc., 644 F.Supp. 551, 557 (D.Md. 1986), citing Blum, 465 U.S. at 892.

Until recently the Federal Labor Relations Authority retained its use of the "cost plus" or "cost basis" for awards of attorney's fees for union salaried attorneys. AFGE challenged the FLRA's use of the "cost plus" method of ascertaining attorney's fee and urged the adoption of "market rate" fees. In AFGE L-3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991), AFGE's General Counsel's Office was successful in overturning the FLRA's use "cost plus" fee computations and the Court ordered the use of "market rate" fees.

> As the Supreme Court has noted, "[t]here are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorneys's fee be 'reasonable'" 142/ We are constrained to follow our earlier decisions equating "reasonable" with market-rate fees. *(emphasis added)*
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> * * * *
>
> 142/ Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 478 U.S. 546, 562, 106 S.Ct. 3088, 3096-3097, 92 L.Ed.2d 439, 454 (1986).

AFGE L-3882 v. FLRA, 944 F.2d at 937.

Pursuant to the decision of the Court of Appeals in AFGE L-3882 v. FLRA the FLRA has adopted "market rate" attorney's fees as the appropriate measure of "reasonable fees" to be awarded to members of the staff of the American Federation of Government Employees General Counsel's Office. United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York and American Federation of Government Employees, AFL-CIO, Local 3882, 46 FLRA No. 89; 46 FLRA 1002, 1007, 1008 (1992)(adopting "market rate" rather than "cost plus" fees and specifically approving the AFGE

Legal Representation Fund). See also, U.S. Customs Service and NTEU, 46 FLRA No. 98 46 FLRA 1080, 1095-96 (1992)(award of "cost-plus" fees by ALJ erroneous. Remand to ALJ and order to use market-rate fees).

Attorney fees are recoverable for time spent attempting to recover fees. Attorney fees include a determination whether the hours claimed to have been expended on the fee request bear a rational relation to the number of hours spent litigating the merits. Batt v. Micro Warehouse, Inc., 241 F.3d 891 (7th Cir. 2001)

VI. THE CLAIMS PERIOD

A. BACK PAY PERIOD

A separate FLSA violation accrues for each pay period that an employee was wrongfully paid (exempted). Henchy v. City of Abscon, 148 F.Supp.2d 435 (D.N.J 2001). The government has argued that the limitations found in arbitration agreements should limit the back pay period. At least one court has decided that the back pay period of the FLSA takes precedence over contract language concerning the filing of a grievance. Louis v. Geneva Enterprises, Inc., 128 F.Supp.2d 912 (N.D.CA. 2000). The limitations period in an FLSA action is contained in 29 U.S.C. §255(a). An FLSA claim must be filed within **two years** of the accrual of the claim, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. The use of the term "continuing violation" (a FLSA pay violation occurs at every pay period of erroneous pay) as used in the statute of limitations context is a misnomer in the case of failure to pay overtime compensation, since each failure to pay overtime constitutes a new violation of the FLSA from which a new limitations period runs. Knight v. Columbus, 19 F.3d 579 (11th Cir. 1994); Arnold v. State of Arkansas, 910 F.Supp. 1385 (E.D. Ark. 1995).

The employer bears the burden of proving that a violation was not willful so as to avoid the benefit of the three-year recovery period. Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000). Proof of willfulness requires a showing that the employer either knew, or showed reckless disregard for whether, its conduct was prohibited under the FLSA. Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991). Willfulness cannot be found on the basis of mere negligence or on a completely good faith but incorrect assumption that a pay plan complied with the FLSA, and an employer who does not act recklessly in determining its legal obligation does not act willfully. McLaughlin v Richland Shoe Co., 486 U.S. 128 (1988).

> **NOTE**: The Courts have been almost universal in refusing to find the United States, as an employer, "willful" in its disregard of the FLSA. The Courts have therefore applied the two (2) year backpay period found in 29 U.S.C. §225(a). This is a primary reason to utilize the negotiated grievance procedure (arbitration) rather than federal court.

The theory of laches does not apply in FLSA cases. Herman v. Swannee Swifty Stores, Inc., 19 F.Supp.2d 1365 (MD GA 1998).

B. ARGUING FOR A SIX (6) YEAR BACKPAY PERIOD

Note: For a number of years the General Accounting Office held that a six year statute of limitations applied to FLSA claims against the federal government. In the Matter of Transportation Systems Center, B-190912, 57 Comp. Gen. 441 (1978). The GAO recently changed its analysis of the back-pay period and now holds that a two year limitations period applies. Joseph M. Ford, B-250051 (May 23, 1994). The implementation of the Ford decision was slowed by the passage of AFGE sponsored legislation. On September 30, 1994, P.L. 103-329, 108 Stat. 2432, was signed into law. Section 640 (the "Sarbanes Amendment") of that act reads as follows:

> Sec. 640. In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201, et seq) for claims filed before June 30, 1994.

On Nov. 19, 1995, §640 was amended by Title I of P.L. 104-52, 109 Stat. 468, (the "Sarbanes Amendment") as follows:

> Provided, That section 640 of title VI of the Treasury Postal Service and General Government Appropriations Act, 1995 (Public Law 103-329, 108 Stat. 2432) is amended by adding at the end thereof the following new sentence: "This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station."

Subsequent to the passage of P.L. 103-329 and P.L. 104-52, legislation has removed most GAO jurisdiction in the FLSA area. These legislative changes in GAO jurisdiction leave a large question mark as to the current limitations period. At the very least, however, the GAO decision in Ford appeared to have been overruled by legislation. §640 was, itself, modified by Congress in P.L. 104-52, 109 Stat. 468. This modification essentially neutered the "Sarbanes Amendment. The law on the back-pay period is currently in flux. See, Adams v. Hinchman, 154 F.3d 420, 423-4 (D.C. Cir. 1998). It is suggested that the Union argue for a six year back-pay period and let the Arbitrator and FLRA (on exceptions) make a final determination. Be aware, however, that the Union's six year back-pay period position has not been finally approved under the current law by the FLRA. For settlement purposes the Union representative should be aware of this uncertainty should he/she be faced with a settlement offer. The argument made below should be used as (at least) the Union's

starting position on the back-pay period issue.

Congress has mandated that claims against the Federal government are controlled by 31 U.S.C. §3702(b)(1),[15] which provides a six-year claim period for administrative pay claims against the United States submitted to GAO. GAO regulations are clear on this point.

4 C.F.R. §31.5 (1992):

> (a) Statutory limitations relating to claims generally. All claims against the United States Government, except as otherwise provided by law, are subject to the 6-year statute of limitations contained in 31 U.S.C. §3702(b). To satisfy the statutory limitations, a claim must be received by the General Accounting Office, or by the department or Agency out of whose activities the claim arose, within 6 years from the date the claim accrued. The burden of establishing compliance with the statute of limitations rests with the claimant. (Emphasis in original.)

The GAO held that Federal employees are entitled to a six-year claims period for FLSA claims against the Federal government. In the Matter of Transportation Systems Center, B-190912, 57 Comp. Gen. 441 (1978).[16]

Before the recent changes in GAO interpretation of the back-pay period the FLRA has affirmed a six year backpay period running from the date of the filing of the grievance. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 49 FLRA No. 40, 49 FLRA 483, 488-89 (March 10, 1994).

VII. THE AVAILABILITY AND APPROPRIATENESS OF INTEREST ON THE FLSA OVERTIME AWARD

Although interest is usually not recoverable against the United States, there is an explicit waiver of sovereign immunity for backpay interest under the Backpay Act, 5 U.S.C. §5596(b)(2)(A).[17]

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[15] 31 U.S.C. §3702(b)(1):

> A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the Comptroller General within 6 years after the claim accrues except--
>
> (A) as provided in this chapter or another law ... .

[16] But see In Re Ford, B-250051 (May 23, 1994).

[17] The Backpay Act specifically mandates the payment of interest on backpay awards for federal employees. 5 U.S.C. §5596:

> 2(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.
>
> (B) Such interest—

The FLRA has found that payment for wrongfully withheld FLSA overtime is made pursuant to the Back Pay Act.

> The Back Pay Act requires backpay for the amount of pay or differentials lost by an employee due to an Agency's unwarranted or unjustified personnel action. 5 U.S.C. §5596(b)(1)(A). The failure of an Agency to pay employees monies to which they are entitled constitutes an unwarranted personnel action within the meaning of the Back Pay Act. See Federal Employee Metal Trades Council and U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 39 FLRA 3, 7 (1991). An arbitrator can properly award backpay to remedy an unjustified or unwarranted personnel action that resulted in the loss of a differential, such as overtime pay, that employees otherwise would have received. See generally U.S. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina and Federal Employees Metal Trades Council, 39 FLRA 987, 993 (1991). Backpay is authorized for violations of the overtime provisions of the FLSA. See, International Association of Firefighters, Local 13, and Panama Canal Commission, General Services Bureau, Balboa, Republic of Panama, 43 FLRA 1012, 1026 (1992). See also, 29 U.S.C. §216(b).
>
> Arbitrators have found that grievants have been affected by the Agency's unjustified personnel action that improperly classified them as exempt from coverage under the FLSA. He ruled that the grievants were entitled to backpay for the amount of overtime pay that they would have received "but for the Agency's illegal designation that they were exempt from coverage under the FLSA, for a back pay period and in a manner to be determined." Award at 32. Therefore, we conclude that the Arbitrator made the proper findings for an award of backpay and there is no basis on which to find the award deficient under the Back Pay Act.

U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773, 798 (April 14, 1992) (emphasis added).

> **Note**: Federal employees cannot be actually awarded and paid both liquidated damages and interest on the backpay award, as this would amount to double payment. Parker v. Burnley, 703 F.Supp. 925, 927 (N.D. Ga. 1988); see also, Braswell v. City of el Dorado, Ark., 187

> (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;
>
> (ii) shall be computed at the rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and
>
> (iii) shall be compounded daily.
>
> (C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection. (Emphasis added.)

F.3d 954 (8th Cir. 1999). The Union should press for the award of both liquidated damages and interest and request the arbitrator to require the Agency to calculate the backpay due employees under both systems and actually pay the higher (liquidated damages (usually) or interest).

Appendix A
29 C.F.R. §541.2

29 C.F.R. §541.2 Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity in section 13 (a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bonafide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or
(2) Who, in the case of academic administrative personnel, is compensated for

services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, that an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

Appendix B
5 C.F.R. §551.206

5 C.F.R. §551.206

Administrative exemption criteria:

An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that-

(1) Significantly affects the formulation or execution of management policies or programs;

or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly non-manual work which is-

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

5 C.F.R. §551.205 has been further interpreted by the OPM as follows:

FPM Ltr. 551-7(A)(2)

2. Administrative Employees: An administrative employee is an advisor, assistant or representative of management, or a specialist in a management or general business function or supporting service whose position meets the criteria in subsections a. through e., below:

a. The employee's primary duty consists of work that:

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

b. The employee performs office or other predominantly non-manual work which is:

(1) Intellectual and varied in nature, or

(2) Of a specialized or technical nature that requires considerable special training, experience and knowledge.

c. The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

d. The employee's position is classified no lower than GS-7 or the equivalent level in other white collar pay systems.

e. In addition to the primary duty criterion that applies to all employees, General Schedule employees below GS-10, or the equivalent in other salary systems, must spend 80% or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

FPM Ltr. 551-7 (FPM Ltr. 551-7(B)(1)(g-i) also contains an explanation of some of the key terms used in the definition of the administrative exemptions, which helps to clarify administrative work:

FPM Ltr. 551-7(B)(1)(g-i) states:

g. Formulation or execution of management policies or programs:

Management policies and programs range from broad national goals that are expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that

are acted on by others. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations in furtherance of the operation of programs and accomplishment of program objectives.

Administrative employees engaged in formulation or execution of management policies or programs typically perform one or more phases of program management (i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls). Some of these employees are classified in occupations that reflect these functions (e.g., program analyst) but many are classified in subject matter occupations.

h. General management, business, or supporting services: This element brings into the administrative category a wide variety of specialists who provide general management, business, or other supporting services as distinguished from production functions. The administrative employees in this category provide support to line managers by:

(1) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts;

(2) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management;

(3) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or

(4) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies.

Neither the organizational location nor the number of employees performing identical or similar work changes general management, business or servicing functions into production functions. However to warrant exemption, each employee's work must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

i. Participation in the functions of a management official; This element includes those employees (variously identified as secretaries, administrative or executive assistants, aids, etc.) who participate i
in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such assistants must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures.

Typically, these employees do not have technical knowledge of the substantive work under the supervisor's jurisdiction. Their primary knowledge are of administrative procedures, organizational relationships, and, more importantly, the policies, plans, interests and views of the supervisor. They apply such knowledge with substantial discretion in performing varied duties such as:

- personally attending to or redirecting calls and visitors;
- scheduling or rejecting invitations and requests for appointments;
- representing or arranging for another staff member to represent the supervisor in meetings or conferences;
- locating and assembling information, compiling reports and responding to technical inquiries;
- composing varied correspondence on own initiative and in response to incoming correspondence, or
- similar actions which significantly affect the supervisor's effectiveness.

Appendix C
29 C.F.R. §541.303

29 C.F.R. §541.303 Computer related occupations under Public Law 101-583.

(a) Pursuant to Public Law 101-581, enacted November 15, 1990, § 541.3(a)(4) provides that computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals under section 13(a)(1) of the Act. Employees who qualify for this exemption are highly-skilled in computer systems analysis, programming, or related work in software functions. Employees who perform these types of work have varied job titles. Included among the more common job titles are computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, applications systems analyst, applications systems analyst/programmer, software engineer, software specialist, systems engineer, and systems specialist. These job titles are illustrative only and the list is not intended to be all-inclusive. Further, because of the wide variety of job titles applied to computer systems analysis and programming work, job titles alone are not determinative of the applicability of this exemption.

(b) To be considered for exemption under § 541.3(a)(4), an employee's primary duty must consist of one or more of the following:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
>
> (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The exemption provided by § 541.3(a)(4) applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field. While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption, nor are

there any requirements for licensure or certification, as is required for the exemption for the learned professions.

(d) The exemption does not include employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, e.g., engineers, drafters, and others skilled in computer-aided design software like CAD/CAM, but who are not in computer systems analysis and programming occupations, are also excluded from this exemption.

(e) Employees in computer software occupations within the scope of this exemption, as well as those employees not within its scope, may also have managerial and administrative duties which may qualify the employees for exemption under § 541.1 or § 541.2 (see §§ 541.205(c)(7) and 541.207(c)(7) of this subpart).

Appendix D
ARBITRATION PROCEDURE TIPS

ARBITRABILITY OF GRIEVANCE:

FLSA issues may be litigated through the negotiated grievance procedure unless the contract explicitly excludes FLSA claims. Following Carter v. Gibbs, it is clear that arbitrators have the authority to decide FLSA issues based on the application of pertinent law and regulations. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773, 793 (April 14, 1992). New legislation in 1996 provides that overtime claims may also be brought in the United States trial courts (Claims Court or Federal District Court). See, 5 U.S.C. §7121.

FLSA GRIEVANCES DO NOT INVOLVE THE CLASSIFICATION OF POSITIONS:

Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied, sub nom, Carter v. Goldberg, 498 U.S. 811 (1990), establishes that FLSA backpay matters do not fall under the classification exception contained in §7121(c)(5) or under most standard form Contract exclusions. The Court of Appeals in Carter specifically rejected the proposition that the 5 U.S.C. §7121(c) statutory exceptions to grievance procedures make a matter non-arbitrable. Carter v. Gibbs, 909 F.2d at 1455. The Carter case held that the federal courts were no longer available to federal employees[18] seeking FLSA backpay (covered by a collective bargaining agreement) and that the employees must use the contractual grievance procedure.

PREPARING WITNESSES:

Arbitration and hearing presentation is an art, not a science. The following procedures are ones that have been successful over a long period of years. It is not suggested that this is the only way, the "right" way, or the only successful way to win an FLSA case. It has proved useful in gaining awards of almost $40,000,000.00 to AFGE bargaining unit members. **However, there is simply no substitute for case and witness preparation. No matter who you are, you are not doing your job if you don't prepare your case and prep your witnesses.**

[18] Later legislation has restored the concurrent jurisdiction of the federal courts in federal employees FLSA cases. See, 5 U.S.C. §7121 (1996).

In preparing witnesses (assuming the Agency is asserting the "administrative" exemption) to testify (if these are the actual facts) you should emphasize the following:

1. Have the employee testify as to what he/she actually does during a normal day.

2. The employees do not make policy for the Agency. They carry out Agency policy.

3. The employees strive for consistency of result in any decisions made.

4. The employees carry out duties which are the purpose of the employing Agency. Link the employees duties to the mission of the Agency.

5. Examine the Position Description (PD) carefully and have the employee testify if the PD (as is often the case) is inaccurate or does not accurately reflect the actual major job duty of the position.

6. Examine the GJT (General Job Tasks [performance appraisals] for the critical elements of the position. The critical elements usually more accurately describe the primary duty of a position than does the PD.

7. Prepare the witness for cross-examination. Discuss anticipated questions and possible points of concern. Stress the need for the witness to be terse to the point of rudeness on cross-examination.

CASE PRESENTATION:

It is a huge plus for the union for the Agency to put on its case first, trying to prove its FLSA exemption. Suggest to the Agency that it is the Agency's obligation to prove that an FLSA exemption is applicable to a group of employees. Therefore, the Union expects the Agency to put on its case first for each position. This is not the usual order of proof in a Union grievance, but the FLSA puts the burden of proof on the Agency to prove its case,[19] not (as is usual) the Union to prove its grievance.

If the Agency does not agree to put on its case first (for each position), then immediately bring the matter before the Arbitrator for his/her determination of the order of the hearing. Do not save this argument for the day of the hearing. Confirm your demand that the Agency proceed first (and any subsequent agreement) in writing via a letter to the Agency with a copy to the Arbitrator.
Order the hearing so that both the Agency and the Union deal with a particular position (assuming

[19] The Agency clearly has the legal obligation to prove an FLSA exemption and unquestioningly has the legal burden of proof to go forward with the evidence. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960), reh. den., 362 U.S. 945 (1960).

that more than one position is at issue) before moving on to the next position. Have the Agency put on its case as to the exempt status of a particular position, and then have the Union factually attack (if necessary) the Agency presentation. If you deal with all of the positions at once, the transcript and the Arbitrator's recollection as to who testified as to what for which position will become hopelessly muddled.

Appendix E
FLSA EVIDENCE GATHERING CHECKLIST

Note: If it can't be read it's useless. Print clearly and do not highlight or make notes on documents that could be used as evidence unless there are clean copies readily available.

Never send or submit originals of any document unless specifically required to do so (such as at a hearing).

[ ] **1.** A mission statement for the Agency and all subordinate sub-components that are in the challenged position chain of command/production.

[ ] **2.** The current Position Description (PD) of the position and any predecessor PDs for the current position. Make sure that you get the current PD-you may be given out-of-date documents.

[ ] **3.** Any internal pay & classification records, notes, reports having to do with the exemption determination of the challenged position. Include entry for position found in the OPM "Handbook of Occupational Groups & Series" (available at your personnel office).

[ ] **4.** The current GJT (performance appraisal-critical elements work-sheet) of the position and any predecessor GJTs for the current position. Make sure that you get the current GJTs-you may be given out-of-date documents.

[ ] **5.** A current organizational chart and organizational charts that cover the entire backpay period.

[ ] **6.** At least two (2) witnesses for each challenged position. Include their names, addresses (work & office), **and** their work & home telephone numbers (including area codes).

[ ] **7.** Copies of all time sheets or any other documents which could support a claim for suffered or permitted overtime.

[ ] **8.** A copy of the filed grievance and relevant grievance documentation showing escalation of the grievance through the invocation of arbitration and the timely choosing of the Arbitrator. Include a copy of the Arbitrator's CV (resume) if available.

[ ] **9.** The name (with full official title), complete office address, and office telephone number (including area code) of the Agency official that is responsible for the grievance arbitration. Include the same information for the Agency representative's immediate supervisor.

[ ] **10.** The name, address (work & office), **and** work & home telephone numbers (including area codes) of the local union official who is responsible for the case.