LITIGATING WAGE & HOUR DISPUTES IN MARYLAND

A SURVEY OF RELEVANT STATUTES, REGULATIONS, & THEIR APPLICATION

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INTRODUCTION

In Maryland, there are three primary statutes that protect employee rights to receive lawful wages. These include: the Maryland Wage and Hour Law, Md. Code Ann., Lab. & Empl. §§ 3-401 *et seq.* ("MWHL"); the Maryland Wage Payment & Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-501 *et seq.* ("MWPCL"); and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). Together, these statutes provide powerful tools for employees, including liquidated damages, attorney's fees, the ability to join multiple plaintiffs (Collective Actions) and the potential to bring a class action when the violations concern the MWHL or the MWPCL. The current status of the case law also makes it easier argue that employees who are classified as independent contractors are really employees who are subject to the statutory coverage. And, the case law on the joint employer issue is now very favorable to joint employment.

I. THE MARYLAND WAGE & HOUR LAW

A. MWHL MINIMUM WAGE

The MWHL requires employers to pay minimum wage for employees, subject to certain exemptions. Lab. & Empl. § 3-413. Under the MWHL, an employer is "a person who acts directly or indirectly in the interest of another employer with an employee." *Id.* § 3-401(b). Regarding payment of minimum wage, a government unit is included within the definition of "employer." *Id.* § 3-413(a). Any agreement between employee and employer to work less than minimum wage is void. *Id*. § 3-405.

An employer is required to pay employees who are subject to both the FLSA and the MWHL, the greater of the state or federal minimum wage. *Id.* § 3-413(b). For employees subject to only the MWHL, the employer must still pay the greater of the two or "a training wage under regulations that the Commissioner adopts that include the conditions and limitations authorized

under the federal Fair Labor Standards Amendments of 1989." *Id.* § 3-413(b)(2)(ii). In essence, if the federal minimum wage increases to a level higher than Maryland's minimum wage, the higher federal minimum wage will be enforceable under Maryland law, even when the FLSA does not apply to the specific employer.

The MWHL has increased the minimum wage over time beginning January 1, 2015. For the period of January 1, 2015 to June 30, 2015, the minimum wage rate was $8.00 per hour. From July 1, 2015 to June 30, 2016, the minimum wage was $8.25 per hour. *Id.* § 3-413(c)(1)-(2), for the period of July 1, 2016 to June 30, 2017, the minimum wage was $8.75 per hour, from July 1, 2017 to June 30, 2018, the minimum wage was $9.25 per hour. It increased to $10.10 per hour, beginning July 1, 2018. *Id.* §§ 3-413(c)(3)–(5).

The Maryland minimum wage is less for an employee under the age of 20 or an amusement park employee. For employees under age 20, an employer is permitted to pay 85% of the Maryland minimum wage. *Id.* § 3-413(d)(1)(i). However, an employer may pay such an employee at the reduced rate for only the employee's first six months of employment. *Id*. For employers that are amusement parks or recreational establishments, the employer is permitted to pay employees the greater of 85% of the Maryland minimum wage or $7.25 per hour, but only if the employer operates for no more than seven months in a calendar year, or if the employer, for any 6-month period during the preceding calendar year, has average receipts that do not exceed one-third of the average receipts for the other 6 months. *Id.* §§ 3-413(d)(2)(i)(1), (2).

B. MWHL OVERTIME

The MWHL requires the payment of one-and-one half times an employee's regular hourly rate for each hour over 40 that an employee works in a particular work week. *Id.* §§ 3-415, 3-420.

The hourly rate for overtime pay is at least 1.5 times the employee's regular hourly rate. *Id.* § 3-415(a).

C. MWHL EXEMPTIONS THAT APPLY TO BOTH THE MINIMUM WAGE AND OVERTIME PROVISIONS

Section 3-403 of the Labor and Employment Article establishes numerous exemptions to both the minimum wage and overtime provisions. Individuals are exempt if they are employed in an administrative, executive, or professional capacity. *Id*. § 3-403(1). The MWHL incorporates the FLSA definitions of executive, administrative, and professional employees. Md. Code Regs. §§ 09.12.41.01; 09.12.41.05; and 09.12.41.17. These exemptions will be discussed in greater detail in the section of this article discussing the FLSA.

Other exemptions to the MWHL include employees who are: employed in a non-administrative capacity at an organized camp, including a resident or day camp; under the age of 16 years and employed no more than 20 hours per week; employed as outside salesmen; compensated on a commission basis; a child, parent, spouse, or other member of an immediate family of the employer; employed at a drive-in theater; employed as part of the training in a special education program for emotionally, mentally, or physically handicapped students under a public school system; employed by an employer who is engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, or horticultural commodities, poultry, or seafood; engaged in the activities of a charitable, educational, not for profit, or religious organization if the service is provided gratuitously and there is, in fact, no employer-employee relationship; employed in a cafe, drive-in, drugstore, restaurant, tavern, or other similar establishment that sells food and drink for consumption on the premises, and has an annual gross income of $400,000 or less; employed in agriculture if, during each quarter of the preceding calendar year, the employer used no more than 500 agricultural-worker days; engaged principally

in the range production of livestock; employed as piece-rate-paid hand-harvesters, provided certain conditions are met. *See* Md. Code Ann., Lab. & Empl. § 3-403.

In addition, the MWHL provides a partial exemption for employees who customarily receive and keep tips as part of their compensation. As long as the tip credit rules are followed, the employer is permitted to meet the overtime and minimum wage obligations by paying the employee a sub-minimum wage along with his or her tips. But, the employer faces liability if it does not precisely follow the tip credit rules. In that instance, the employer cannot use the tips to offset his or her minimum wage and overtime obligations. In other words, an employer could be liable for the difference between the sub-minimum wage and the actual minimum wage and sub-minimum overtime rate and the actual overtime rate (one-and-one half times the minimum wage). Violations occur even if the employee receives (together with tips and a sub-minimum wage) pay that is greater than minimum wage and overtime.

In order to qualify for a tip credit, the following must occur: (1) the employee must normally and customarily receive more than $30 per month in tips; (2) the employer must have informed the employee of the tip credit rules, preferably in writing; and (3) the employee must be permitted to keep all of his or her tips; however, the pooling of tips among those who normally and customarily receive them does not violate the tip credit rules. *Id*. § 3-419(a). The employer may include an amount set to represent the employee's tips, or, if lesser, the actual amount of the tips received. *Id.* §§ 3-419(b)(1)-(2). The tip credit is the difference between the subminimum wage of $3.63 per hour and the actual minimum wage. Essentially, the tips make up the difference. The tip credit utilized by the employer may not exceed the statutory minimum wage (currently $10.10) minus the subminimum wage ($3.63 per hour). *Id.* § 3-419(c). The tip credit tip credit under the current minimum wage must not exceed $6.47 per hour.

D. MWHL EXEMPTIONS THAT APPLY ONLY TO OVERTIME

Under the MWHL, the following employers are exempt from the MWHL overtime rules: non-profit employers (for-profit employers are not exempt, *id*. § 3-420(b)) that are concert promoters, legitimate theaters, music festivals, music pavilions, or theatrical shows, *id*. § 3-415(b)(2); employers that are an amusement or recreational establishment, including swimming pools, are exempt only if they operate for no more than seven months in a calendar year, or if, for any 6 months during the preceding calendar year, the employer has average receipts that do not exceed one-third of the average receipts for the other 6 months, *id.* § 3-415(b)(3).

The MWHL's overtime provisions also do not apply to the following categories of employees: mechanics, parts persons, or salespersons in the automotive industry if they are engaged primarily in the sale of vehicles rather than in their manufacture, *id.* § 3-415(c)(2); taxicab drivers, *id.* § 3-415(c)(3); in the absence of a collective bargaining agreement, employees that are subject to Title II of the federal Railway Labor Act, if: (1) the employer does not require employees to work more than 40 hours per week; and (2) the employee voluntarily trades hours with another employee, and as a result, works more than 40 hours in one workweek, *id.* § 3-415(c)(4); agricultural workers who are exempt from the provisions of the FLSA may be compensated at time and a half for each hour over 60, rather than 40, *id.* § 3-420(c); and employees who work at bowling establishments or institutions that are not hospitals but are engaged primarily in the care of individuals who are aged, intellectually disabled, sick or have a mental disorder, and reside at the institution, may be paid time and a half for each hour over 48. *Id.* § 3-420(d).

Finally, the MWHL contains a Motor-Carrier exemption to the overtime provisions for employees who are subject to the jurisdiction of the U.S. Department of Transportation regarding qualifications and maximum service hours. *Id.* § 3-415(c)(1). Under 49 U.S.C. § 31502, the

Department of Transportation may set qualifications and maximum hours for motor carriers, private motor carriers, and migrant worker motor carriers. *See* 49 U.S.C. §§ 31502(b)–(c). This exemption will be explained more fully in the section regarding the minimum wage and overtime provisions of the FLSA.

E. SPECIAL LIMITATIONS ON OVERTIME FOR NURSES

There are special limitations on overtime requirements for nurses. Generally, an employer may not require a nurse to work more than regularly scheduled hours according to a predetermined schedule. Lab. & Empl. § 3-421(b). However, an employer may require nurses to work additional hours in special circumstances such as emergencies, complete lack of other voluntary workers for a particular time slot, and if the nurse has critical skills and expertise that are necessary for the work. *Id.* § 3-421(c). It does not prohibit a nurse from voluntarily agreeing to work more than the number of scheduled hours. *Id.* § 3-421(e).

F. LIQUIDATED DAMAGES AND ATTORNEY'S FEES UNDER THE MWHL

In the event that an employer fails to abide by the minimum wage or overtime provisions the MWHL, the statute provides for an employee's right of action against the employer. *Id.* § 3-427. In such an action, the employee will be entitled to recover the difference between the wage paid to the employee and the wage required by the statute, *id.* § 3-427(a)(1), and an additional amount (liquidated damages) equal to the difference between the wages paid and the wages required, as well as attorney's fees and costs. *Id*. §§ 3-427(a)(2)–(3). The liquidated damages provision took effect on July 1, 2014. *See* 2014 Maryland Laws Ch. 262 (H.B. 295); prior to that, liquidated damages were not available directly under the MWHL.

Liquidated damages must be awarded unless the employer demonstrates that it acted in good faith and reasonably believed that the wages paid to the employee were not less than the

wage required under this subtitle. Lab. & Empl. § 3-427(d)(2). This is the same standard that the FLSA employs and it will be discussed in greater detail later in this article. However, the state law differs in one material respect – a court may award less than full liquidated damages even if the employer meets its burden of proof on good faith and reasonable belief. *Id.* § 3-427(d)(2)(ii).

Additionally, the MWHL mandates that the court award a successful employee reasonable attorney's fees and costs associated with the action. *Id.* § 3-427(d)(2)(ii).

II. THE MARYLAND WAGE PAYMENT AND COLLECTION LAW

A. GENERAL PROVISIONS

The MWPCL sets forth provisions governing when, how, and in what manner employers compensate their employees. For the purposes of the MWPCL, an employer is defined as "any person who employs an individual in the State or a successor of the person." *Id.* § 3-501(b). While the definition of employer in the MWPCL is narrower than the definitions in the MWHL and the FLSA, the Maryland Courts employ an economic reality test to determine whether a person or entity is an MWPCL employer. *See, e.g.*, *Pinsky v. Pikesville Recreation Council*, 214 Md. App. 550, 588 (2014); *Campusano v. Lusitano Constr., LLC*, 208 Md. App. 29, 38 (2012).

It is important to remember that individual managers, employers, or owners (along with contractors who hire subcontractors that employ the affected employees directly) may be considered employers if they meet the terms of the economic reality test. The economic reality test examines four factors, which include whether the putative joint employer: (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. *Pinsky*, 214 Md. App. at 588. The Maryland Court of Appeals has yet to issue a decision

on this issue. The economic reality test may indeed be much broader than this and involve different factors. The law under the FLSA is much more developed on this point.

The term "wage" is defined very broadly to include "all compensation that is due to an employee for employment," as well as bonuses, commission, fringe benefits, overtime wages, and any other remuneration promises for service. Lab. & Empl. §§ 3-501(c)(1)–(2). Like the MWHL, agreements to pay in contravention of the statute are void. *Id.* § 3-502(f).

Section 3-502 requires an employer to set regular pay periods and pay employees at least once every two weeks, or twice per month. *Id.* § 3-502(a). If the employee's regular payday is a non-work day, the employer must pay the employee on the preceding day. *Id*. But, employers are permitted to pay administrative, executive, or professional employees less frequently. *Id.* § 3-502 (a)(2). Section 502 requires payment in United States currency or in the form of a check convertible to United States currency; however, printing the employee's social security number on the check is prohibited. *Id.* §§ 3-502(c), (d)(2). While the direct deposit into employees' personal bank accounts or the crediting of wages to an employee's debit card are permitted, either method requires the employee's consent and the employer's disclosure of any associated fees. *Id*. §§ 3-502(e)(1)-(2).

Section 3-503 prohibits any deductions from an employee's wages except under certain exceptions, which are: a court order; authorization by the employee in writing; if allowed by the Commissioner of Labor and Industry because the employee received full consideration for the deduction; or if otherwise permitted by law. *Id.* § 3-503. Employers are also required to give employees notice of their wage rates, dates of payment, and leave benefits. *Id.* § 3-503(a)(2).

Section 3-504 requires an employer to give an employee, at the time of hiring, notice of the following: (1) the rate of pay of the employee; (2) the regular paydays that the employer sets;

and (3) leave benefits. *Id.* § 3-504 (a)(1). For each pay period, the employer must give a statement of earnings and deductions made and, at least one pay period in advance, notice of any change in pay. *Id.* §§ 3-504 (a)(2)-(3). However, no advance notice is required for a wage increase. *Id.* § 3-504(b).

Finally, § 3-505(a) requires that an employer pay a separated employee all wages he or she would have entitled to on or before the wages would have been due, had the separation not occurred. *Id.* § 3-505(a). Critically, § 3-505(b) requires that, upon separation and on the date the employee would have received his or her next pay check, the employer pay for any accrued sick, annual or personal leave or paid time off ("PTO"). The exceptions to this rule are as follows: (1) the employer has a written policy that limits the compensation of accrued leave to departing employees; (2) the employer notified the employee of the employer's leave benefits in accordance with § 3-504 (a)(1); and (3) the employee is not entitled to payment for accrued leave at termination or separation under the terms of the employer's written policy. *Id.* § 3-505(b).

B. COMMISSIONS AND BONUSES

Commissions and bonuses are "wages" under the MWPCL. Section 3-501(c)(2)(ii). They are recoverable under § 3-505(a), which provides that: "each employer shall pay an employee . . . all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated." *Id.* § 3-505(a). Under the MWPCL, Commission plans are contracts that must be interpreted in accordance with principles of contract law. *See Medex v. McCabe*, 372 Md. 28, 36–37 (2002).

1. Discretionary Commissions and Bonuses are Not Wages for Work Performed.

When the employer retains discretion to pay a bonus or commission or other remuneration, the failure to pay the remuneration is not enforceable under contract law or the MWPCL. *See Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 419–20 & n. 15 (4th Cir. 2005) (Because the employer always retained discretion in awarding [employee] stock options in exchange for his continued employment, and the grant of the options itself, the options were not promised as compensation for work performed). Thus, where the payment of a bonus or commission by the employer is discretionary, it is not an enforceable right under the MWPCL.

Another way to look at it, is when an employer fails to provide specific details regarding the amount and conditions of payment of a commission, bonus or grant stock options, then it is not wages for work performed under § 3-505. *Mazer v. Safeway, Inc.*, 398 F. Supp. 2d 412, 426 (D. Md. 2005) (finding a year-end bonus was not an inducement to an employee's continuing employment (and therefore not wages under the MWPCL) because the procedures for calculating and administering the bonus were unknown to the employee); *see also Varghese*, 424 F.3d at 419–20 ("Here, there were no such conditions or measurable benchmarks. No matter what Dr. Varghese did in his professional capacity, Honeywell always retained the discretion to not nominate Dr. Varghese to receive stock options").

Commission plans that allow employers discretion in determining the amount to be paid are generally unenforceable and protect the employer from lawsuits. *See Jensen v. Int'l Bus. Machs. Corp.*, 454 F.3d 382 (4th Cir. 2006). In *Jensen*, Plaintiff brought suit against IBM for breach of contract, based on a commission he regarded as less than what he was owed. *Id.* at 385–86. In its commission plan, IBM expressly reserved the right to determine not only the sales on which commissions would be paid, but also the amount of commission that would be paid. The

commission plan also contained the following disclaimer: "[the] program does not constitute a promise by IBM to make any distributions under it." *Id.* at 390. The Fourth Circuit determined that the commission plan could not be enforced in a contract action because it "expressed only the company's desire and intention to reward," but did not create an enforceable promise. *Id*.

However, where an employer's remunerates commissions under a profit-sharing plan that grants an employer some discretion in apportioning "each employee's share of applicable profits" the commission may be wages. *See Blanch v. Chubb & Sons, Inc.*, 124 F. Supp. 3d 622, 635–36 (D. Md. 2015). There, an employer had the discretion to apportion each employee's share of profits under the plan "on the basis of criteria including, but not limited to, business unit or individual performance, job function, length of service and pay band." *Id.* (internal quotations omitted). The Court held that even though the employees' profit-sharing payments were based in part on their individual performance, the fact that such payments "might [also] be based in part on the performance of their business units," such payments were wages under the MWPCL. *See id.* at 636.

2. Commissions, Bonuses and Stock Options Must Be Earned to Be Recoverable

Section 3-505 of the MWPCL provides that "[e]ach employer shall pay an employee or the authorized representative of an employee *all wages due for work that the employee performed* before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated." Lab. & Empl. § 3-505(a) (emphasis added). The Court of Appeals has explained that "[a]n employee's right to compensation vests when the employee does everything required to earn the wages." *Medex*, 372 Md. at 41. Maryland courts have noted that the statute requires wages to be "'promised for

service[.]'" *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 305 (2001) (quoting MWPCL, Lab. & Empl. § 3-501(c)(2)(iv)). Elaborating on this, the Court of Appeals stated:

> The conditions of employment are determined in advance of the employment. What, if anything beyond the basic salary, the employee will receive is a matter for discussion, consideration and agreement. If a bonus is to be made part of the wage package, it can be negotiated and included in what has been promised. Similarly, whether commissions are to be paid or what fringe benefits attach are matters for agreement in advance of the employment or to become a part of the undertaking during the employment. Once a bonus, commission or fringe benefit has been promised as a part of the compensation for service, the employee would be entitled to its enforcement as wages.

Id.

When considering whether an employee has earned commissions or bonuses at the time he or she leaves the employer, it is important to consider some the differences between bonuses and commissions. Bonuses are generally earned at the end of a calendar or fiscal year because, often, the criteria for the bonuses are only ascertainable at the end of the period for which they are calculated. Bonuses are then payable sometime after the year ends. Commissions on the other hand are generally calculated based on a formula and based on a particular sale. They are generally earned when the sale is completed and all or nearly all of the work is performed. They are then payable within some period of time after the sale is completed. These principles are illustrated by the cases below. So, in order for bonuses to be compensable under the MWPCL, the employee must generally be employed through the end of the year for which the bonus is payable. As for commissions, the employee must generally have completed the sale and done all or substantially all of the work incidental to the sale.

One exception to the vesting rule is that if an employer takes action which prevents the employee from completing the sale for the purpose of depriving the employee of a commission, the employer may be liable even if the sale was not completed and therefore earned. *Rogers v.*

Savings First Mortg., LLC, 362 F. Supp. 2d 624, 643–46 (D. Md.2005) (mortgage brokers presented sufficient evidence to raise factual dispute as to whether employer terminated them for pretextual reasons in order to prevent them from earning commissions by precluding presence at loan closings).

a. Bonus Cases

Medex is a bonus case. There, the employee was a sales representative who sold medical supplies. Under an agreement, he was eligible for an end-of-year bonus if he met all sales targets at the end of the fiscal year, was employed at the end of the fiscal year and was employed when the bonus was due to be paid, which was several months after the fiscal year ended. *See* 372 Md. at 33–34. McCabe resigned four days after the fiscal year ended, but was not employed when the bonus was due to be paid, so the employer did not pay the bonus. The Court held that McCabe had earned the bonus because he had done everything necessary to receive it. He met the sales targets and was employed at the end of the period for which the bonus was calculated – the end of the fiscal year. *Id*. at 37–42. The requirement that McCabe be employed at the time the bonus was paid was rendered void, because the bonus was earned before McCabe left the company.

The *Medex* rationale may be extended to encompass "as applied" challenges to a policy that does not explicitly condition payment of commissions on continued employment, but effectively requires it. *See, e.g.*, *Rogers*, 362 F. Supp. 2d at 643–46 (employer's motion for summary judgment denied because mortgage brokers presented evidence that they were terminated in circumstances raising reasonable possibility that employer used termination as pretext to avoid paying commissions and/or supervisor used termination as pretext to redirect commissions to himself, without performing any additional work).

Catalyst Health Sols., Inc. v. Magill, 414 Md. 457 (2010), is a stock option case, which is analyzed in a way similar to a bonus case. In *Catalyst Health*, the employee (Magill) acquired 60,000 stock options from his employer ("Catalyst Health") under an agreement. Catalyst Health granted the stock options subject to a vesting date of April 16, 2006. *Id.* Catalyst Health fired Magill on April 5, 2011. *Id.* at 964–65. On these facts, the Court of Appeals held that "the conditionally granted unvested incentive stock options were not wages under the Wage Act." *Id.* at 961. The Court of Appeals reasoned that Mr. Magill failed to fulfill the continued employment service condition because he was terminated eleven days before the vesting date, and therefore, he did not earn the options at the time of his termination.

In *D'Angella v. Automated Bus. Power, Inc.*, No. 11-CV-487, 2011 WL 4571671 (D. Md. Sept. 29, 2011), is another bonus case, but it is distinguishable from *Medex*. In *D'Angella*, the employee was eligible for an end-of-year bonus provided he was employed through December 31 of each year in which the bonus was paid. *Id.* The employer terminated D'Angella's employment before the end of the fiscal years and did not pay the bonus. *Id.* The Court held, on a motion to dismiss, that D'Angella did not earn the bonus because he did not fulfill one of the conditions – employment through the end of the year. *Id.* at *3–4.

b. Commission Cases

In *Hoffeld v. Shepherd Elec. Co., Inc*., 176 Md. App. 183 (2007), the employee (Hoffled) was a commissioned outside sales representative. Under the agreement, commissioned sales were completed when the goods were shipped and invoiced. In order to be eligible for the commission, the plan required that Hoffeld be employed at the time the sale was completed. *Id.* at 192. Also, Hoffeld had additional and significant duties regarding the sale even after the sale was made but before the goods were shipped and invoiced. *Id.* at 189. Hoffeld left Shepard on January 16, 2003,

before certain products he sold were shipped and invoiced, and he filed suit to recover them. The Court held that Hoffeld had not earned his commission because the sales that had not been invoiced and shipped by the last day of his employment. *Id*. at 200.

In *Abelman v. Wells Fargo Bank, N.A.*, 976 F. Supp. 2d 660 (D. Md. 2013), Abelman was employed as a Mortgage Banker and was entitled to commissions on funded loans that he originated. Wells Fargo credited Abelman with making the loan at the end of the month during which the loan was funded. The plan expressly conditioned eligibility on being employed at the time the loan is credited and through the date of the load closing. The policy also expressly provided that one of the purposes of the plan was to provide an incentive to the employee to remain with the company. The court denied Well Fargo's motion to dismiss, concluding that it had not identified any responsibilities that Abelman had regarding the loans after they were funded, either at or before the closing. *Id*. at 664.

Additionally, where an employer who withholds a terminated employee's deferred compensation, purports to maintain a policy "that payment of [deferred] commissions to terminated employees are at the discretion of management," but acknowledges that the commission was "earned for work already performed, and nothing further needed to be done to receive the funds other than to wait for" a "vesting period to elapse," the employee is entitled to the commission as a wage as a matter of law. *Hausfeld v. Love Funding Corp.*, 131 F. Supp. 3d 443, 461 (D. Md. 2015).

C. REMEDIES UNDER THE MWPCL

1. Remedies Generally

The MWPCL provides for administrative remedies. If the Commissioner determines that the statute has been violated, he or she may try to resolve the issue informally through mediation, ask the Attorney General to bring a claim against the employer with the written consent of the employee, or bring an action on behalf of the employee. Lab. & Empl. § 3-507(a). If a court finds a violation in an action brought under § 3-507(a) and the court finds that there was not bona fide dispute as to the wages, the court may then award the employee up to three times the wage, plus reasonable attorney's fees and other costs. *Id.* § 3-507(b)(1). If the wages are administratively recovered under § 3-507(a) they must be paid without cost to the employee. *Id.* § 3-507(b)(2).

The legal remedy is in § 3-507.2. It provides that: "if an employer fails to pay an employee in accordance with § 3-502 and 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid wages, the employee may bring an action against the employer to recover the unpaid wages." *Id.* § 3-507.2(a). Technically, this means that the action may not be brought unless and until the employee is separated or terminated and two weeks have passed; however, it is common for current employees of an employer to bring actions under the MWPCL without objections from defense counsel.

While the MWPCL states that liquidated damages are available only for violations of § 3-502 or § 3-505, the Maryland Court of Appeals has extended the § 3-507.2 remedies to violations of § 3-503 and § 3-504. In *Marshall v. Safeway Inc.*, 437 Md. 542 (2014), the Court concluded that, "[a] violation of § 3–503 necessarily constitutes a violation also of § 3–502 or § 3–505." *Id.* at 560–61.

2. Bona Fide Dispute Defense

Attorney's fees and costs along with liquidated damages (up to ***two times*** the amount of unpaid wages as liquidated damages) are not recoverable unless the trier of fact (judge or jury) finds the absence of a bona fide dispute. *Programmers Consortium v. Clark*, 409 Md. 548, 558 (2009). A bona fide dispute is: "'a legitimate dispute over the validity of a claim or the amount that is owing []' where the employer has a good faith basis for refusing an employee's claim for unpaid wages." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 657 (2014) (citations omitted). "The inquiry into whether an employer's withholding of wages was the result of a bona fide dispute is one concerned with the employer's actual, subjective belief that the party's position is objectively and subjectively justified." *Id.* (citations and internal quotation omitted).

"The issue is not whether a party acted fraudulently; fraud is certainly inconsistent with the notion of 'bona fide' or 'good faith,' but it is not required to establish an absence of good faith. The question, simply, is whether there was sufficient evidence adduced to permit a trier of fact to determine that the employer did not act in good faith when it refused to pay commissions to [the employee] on the five loans that closed after he terminated his employment." *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 541 (2000).

The employer carries the initial burden of proving the absence of a bona fide dispute. *Peters*, 439 Md. at 657. The burden then shifts back to the employee to refute the employer's evidence. *Id.* In general, an employer's incorrect legal belief may not form the basis of a bona fide dispute for withholding wages under the MWPCL, so as to preclude the award of enhanced damages or attorney's fees. *Id*. at 659. *But see id.* n.12 (distinguishing *Roy v. Cty. of Lexington*, 141 F.3d 533, 548 (4th Cir. 1998), which holds that an employer acts in good faith under the *FLSA* where it relies on counsel's incorrect legal advice).

In *Pinnacle Grp., LLC v. Kelly*, the Court of Special Appeals affirmed the trial court's order granting summary judgment for the employee on the employer's *bona fide* dispute defense. 235 Md. App. 436, 467 (2018), *cert. denied*, 459 Md. 188 (2018). In *Pinnacle*, the employee brought a claim for unpaid overtime. The owner assumed that the plaintiff was exempt under federal law and he was completely ignorant of the state wage laws. The record showed that the employer's owner told his accountant that he knew the rules and the accountant deferred to him and set up payroll as instructed. Based on that record, the lower court granted partial summary judgment, finding that the employer "chose deliberate ignorance over due diligence." *Id*. at 454. On appeal, the Court of Special Appeals adopted the employer's incorrect version of the facts and assumed that the owner had relied upon the advice of an accountant when he determined that the plaintiff was exempt. *Id.* at 467. The Court distinguished the case from *Roy v. Cty. of Lexington, supra*, and held that reliance on the incorrect advice of an accountant, as opposed to an attorney, is insufficient to meet the burden imposed by the *bona fide* dispute defense. *Id*. at 467. That coupled with the fact that: the employer took no action to ensure that its policies were legally correct; it used an outdated handbook; and did not seek advice from their counsel, led the Court to affirm the trial court's grant of partial summary judgment. The Court observed that, in *Roy*, the employer made those efforts because it: (1) relied on an attorney's advice even though it was incorrect; and (2) "it made 'ongoing modifications to its compensation structure to accommodate changes in the [FLSA].'" *Id.* at 467 (quoting *Roy*, 141 F.3d at 549). Given the Court's mischaracterization of the facts, what *Pinnacle* really seems to stand for is that an employer cannot use the *bona fide* dispute defense if it fails to make reasonable efforts to ascertain its legal obligations and remains blissfully ignorant. *Id.* at 467-68.

3. Liquidated Damages Under the MWPCL

The determination of whether to award enhanced damages (up to two times the back pay) is left to the trier of fact's discretion. *Peters*, 439 Md. at 661. Despite the remedial nature of the statute, there is no presumption in favor of an award of enhanced damages; however, trial courts are "encouraged to consider the remedial purpose of the [MWPCL] when deciding whether to award enhanced damages to employees." *Id.* at 662–63. It is our experience that courts are generally reluctant to award enhanced damages except in cases where there are FLSA or MWHL violations, as these statutes have their own nearly automatic liquidated damage provisions. More egregious situations such as an outright failure to pay wages due and more likely to produce a liquidated damage award.

4. Attorney's Fees and Costs

While § 3-507.2 states that attorney's fees remedies are available only for violations of § 3-502 or § 3-505, the Maryland Court of Appeals has extended the § 3-507.2 remedies to violations of § 3-503 and § 3-504. In *Marshall*, the Court concluded that "[a] violation of § 3–503 necessarily constitutes a violation also of § 3–502 or § 3–505." 437 Md. at 560–61.

Section 3-507.2 provides that a court "may" award reasonable attorney's fees and costs. The decision about the award of attorney's fees is for a judge not a jury, *see Cooper*, 357 Md. at 552, and the judge must apply the loadstar approach (the reasonable hourly rate multiplied by the reasonable number of hours expended). *Friolo v. Frankel*, 373 Md. 501, 529 (2003). The Maryland Court of Appeals has read the "may" as "shall" with some caveats. In all practicality, the award of reasonable attorney's fees and costs mandatory when there is no bona fide dispute, with two exceptions. *See Ocean City Md. Chamber of Commerce v. Barufaldi*, 434 Md. 381 (2013); *Friolo v. Frankel*, 403 Md. 443, 457–58 (2008). The Court has said that:

> In light of the purposes of the fee-shifting provision of the statute, this Court has stated that when the factfinder concludes that there was no "bona fide dispute" as to the employer's liability, "***courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case***."

Barufaldi, 434 Md. at 393–94 (citations and quotations omitted) (emphasis supplied). The two exceptions are: (1) "significant misconduct" by the claimant; or (2) rejection of an early settlement offer less favorable than the judgment. *Id*. at 400–01.

5. Legal Remedies under the MWPCL for Failure to Pay Overtime and Minimum Wage

The Maryland Court of Appeals recently held that the treble damage remedy in the MWPCL is available in cases where an employer has failed to pay overtime in violation of the MWHL. *See Peters*, 439 Md. at 654–55. Presumably, the same MWPCL remedies are available for an employer's violation of the minimum wage provisions of the MWHL, as the same rationale would apply. However, as noted previously in this article, effective July 1, 2014, the Maryland General Assembly amended the MWHL to provide for liquidated damages (equal to the amount of unpaid wages) for violations of the minimum wage and overtime provisions, bringing the law in line with FLSA. This may cause the Court of Appeals to revisit the *Peters* holding on the theory that the MWHL now has its own enhanced damages provision and the legislature did not intend for two enhanced damages provisions to apply simultaneously.

6. Vicarious Liability of General Contractors for Subcontractor Violations of the Statute.

And, effective October 1, 2018, general contractors rendering "construction services" are "jointly and severally liable" for violations of the MWPCL "committed by a subcontractor, regardless of whether the subcontractor is in direct contractual relationship with the general contractor." Lab. & Empl. § 3-507.2(c)(2). Construction services include the following: "(1) building; (2) reconstructing; (3) improving; (4) enlarging; (5) painting; (6) altering; (7)

maintaining; and (8) repairing." *Id*. § 3-507.2(c)(1) (incorporating the definition of "construction services" from § 3-901(b)). In other words, the general contractor is liable for any violations committed by any subcontractor underneath the general contractor, whether 1st tier, 2nd tier, 3rd tier, etc. Because *Peters* allows employees to utilize the MWPCL remedies in cases brought to recover unpaid overtime or minimum wages, you will probably be able to recover some damages against general contractors (attorney's fees and costs along with back wages and discretionary liquidated damages). You will probably not be able to recover the nearly automatic liquidated damages available under the MWHL, because those remedies are not part of the MWPCL.

III. THE FAIR LABOR STANDARDS ACT

A. MINIMUM WAGE & OVERTIME PROVISIONS

Like the MWHL, the FLSA requires employers to pay certain minimum and overtime wages. The current minimum wage (since 2008) is $7.25 per hour. 29 U.S.C. § 206(a)(1)(C). Like the MWHL, the FLSA, requires an employer to pay an individual time and a half for each hour over 40 that he or she works in a particular work week. *Id.*

B. WHICH EMPLOYERS ARE COVERED UNDER FLSA?

An employer is subject to the FLSA if one of the following two pre-requisites is satisfied: (1) the employee is engaged in commerce or the production of goods for commerce; or (2) the employer is an enterprise engaged in commerce or the production of goods in commerce. *Russell v. Cont'l Rest., Inc*., 430 F. Supp. 2d 521, 523-27 (D. Md. 2006). In other words, there are two bases for FLSA coverage: (1) "individual" coverage, which applies to employees that engage in commerce or in the production of goods for commerce; and (2) "enterprise" coverage, which applies to "enterprises" that engage in commerce or in the production of goods for commerce. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 n.8 (1985); *Dole v. Odd Fellows*

Home Endowment Bd., 912 F.2d 689, 693 (4th Cir. 1990); *Brock v. Hamad*, 867 F.2d 804, 807 (4th Cir. 1989). Both are explained more fully below.

1. Enterprise Coverage

The enterprise standard is satisfied where the enterprise: "(i) has employees engaged in 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 (ii) whose annual gross volume of sales made or business done is not less than $500,000.00 (exclusive of excise taxes at the retail level that are separately stated)." 29 U.S.C. §§ 203(s)(1)(A)(i)–(ii). A "plaintiff need not set out a complete description of the interstate activities or the exact gross revenue of defendants." *Farrell v. Pike*, 342 F. Supp. 2d 433, 438 (M.D.N.C. 2004). Courts may turn to employer affidavits, tax returns, and records identifying an employer's gross sale volume to determine whether an employer's annual gross volume of sales made or business done is, in fact, in excess of $500,000. *Russell*, 430 F. Supp. 2d at 524. If the employer meets the $500,000 threshold, the commerce element is very easy to satisfy.

The FLSA defines the phrase "goods" in the following manner: "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i).

Thus, "goods" include wine and beer, when an employer purchases them, they are moved in interstate commerce, and they are "used in the course of [the employer's] employees' employment." *Brock*, 867 F.2d at 807. Indeed, *Brock* is a case decided under "enterprise" standard of 29 U.S.C. §§ 203(s)(1)(A)(i) and (ii). *Id.* at 807–08. In *Brock*, the Defendant managed and

controlled various rental properties. *Id.* at 805–06. There was no dispute that the Defendant purchased goods that were moved in commerce and that the goods were also used in the employees' employment. *Id.* at 807. The Court concluded that the pre-requisites of an enterprise engaged in commerce were satisfied. *Id*. at 807–08. The Court stated that even when the activities of the employer are local in nature, the § 203(s)(1)(A)(i) criteria are satisfied if employees handle goods that were moved in commerce: "local business activities fall within the FLSA when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce." *Id.* at 808; *see also Marshall v. Brunner*, 668 F.2d 748, 751–52 (3d Cir. 1982) (holding that an employer who used trucks, truck bodies, tires, batteries, accessories, sixty-gallon containers, shovels, brooms, oils, and gas that had been manufactured out of state and had moved in interstate commerce was subject to the FLSA).

Similarly, in *Schultz v. Falk*, the Fourth Circuit held that a company fell within the FLSA's definition of an "enterprise engaged in commerce" because its employees regularly "repair plumbing, heating and air conditioning units, and substantial portions of the materials used in those activities moved across state lines." 439 F.2d 340, 348 (4th Cir. 1971). In *Dole v. Odd Fellows Home Endowment Board,* the Fourth Circuit found that defendant was an enterprise engaged in commerce because the defendant's employees "prepared and served food to the residents, washed the residents' laundry and cleaned the home, and performed maintenance tasks, all the time using goods and materials that had traveled in interstate commerce." 912 F.2d at 695.

An employee who helps stock beer and wine for sale after it was delivered by truck is engaged in commerce because he or she is "handling" or "selling" goods that have been moved in commerce. In *Shelton v. Ervin,* the Court explained the rationale:

> Additionally, both the plaintiff and Mrs. Ervin testified that the plaintiff personally ordered and paid for with defendants' funds, much of the inventory of the store

> during both of the periods of his employment. The defendant Ervin also testified that plaintiff assisted in the periodic inventories taken of the stock in the store. ***It is common knowledge, especially concerning liquor, that much of the stock that a liquor store sells is manufactured in liquor producing states such as Kentucky and Tennessee.*** Indeed, some items such as Scotch, Cognac, Gin, and European wines are produced and imported from outside the United States. Section 203(s) plainly states that an "enterprise engaged in commerce" includes a business in which employees are "handling, selling . . . goods that have been moved in . . . commerce . . . ." Therefore, the plaintiff was an employee engaged in commerce.

646 F. Supp. 1011, 1015–16 (M.D. Ga. 1986) (emphasis added).

2. Individual Coverage: Employees Engaged in Commerce

This is a much more difficult element for a plaintiff to meet. It must only be proved for employers that do not meet the $500,000 threshold. *See Russell*, 430 F. Supp. 2d at 524. To determine whether an employee was "engaged in commerce," a court must focus its inquiry on the activities of the employee and not on the business of the employer. *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959).

In *Russell*, the U.S. District Court for the District of Maryland explained the difference between the enterprise engaged in commerce standard and the employee engaged in commerce standard:

> In *McLeod v. Threlkeld,* the Supreme Court found it significant that Congress rejected a proposal to have the FLSA cover employees "engaged in commerce in any industry affecting commerce" in favor of the language, "each of his employees who is engaged in commerce or in the production of goods for commerce." *McLeod,* 319 U.S. at 497 n. 2, 63 S. Ct. 1248 (citing *Kirschbaum v. Walling,* 316 U.S. 517, 62 S. Ct. 1116, 86 L.Ed. 1638 (1942) and *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 63 S. Ct. 332, 87 L.Ed. 460 (1943)). Based on the legislative history, the Court surmised that '[t]he selection of the smaller group was deliberate and purposeful.' *Id.*
>
> The implementing regulations to the FLSA emphasize this point, noting:
>
> Although [the FLSA's definition of "engaged in commerce"] does not include employees engaged in activities which merely "affect" such interstate or foreign commerce, ... coverage of the act based on engaging in commerce extends to every employee employed

> "in the channels of" such commerce or in activities so closely related to such commerce, as a practical matter, that they should be considered a part of it.

29 C.F.R. § 776.9. Therefore the definitive test is not whether the employee's tasks have some remote effect on interstate commerce, but whether the employee participated in the channels of commerce. *Russell*, 430 F. Supp. 2d at 525.

Courts in this circuit have found individual coverage in cases where the employee unloads or stocks goods moved in commerce for sale. In *Shultz v. Blaustein Indus., Inc.*, one of the defendants, Charles Street Development Corporation ("CSDC") owned a commercial building in Baltimore. *See* 321 F. Supp. 998 (D. Md. 1971). CSDC employed 59 persons. *Id.* at 1002. Cleaning Matrons cleaned the restrooms and stocked them with soap, towels, toilet tissue, and sanitary napkins, which are purchased by employees of the tenants. *Id.* Porters carried light bulbs and other supplies from the loading dock to a storage room and help truck drivers unload supplies delivered to the building by truck, such as rugs and other heavy material. *Id.* Once per week, Engineers helped unload trucks delivering supplies to the building and helped carry them to a storage area. *Id.*

This Court found that the Engineers, Porters, and Matrons were all engaged in commerce because they helped unload goods that had been moved in commerce or stocked goods that had been moved in commerce:

> The engineers at the Blaustein Building, who once a week helped unload trucks bringing supplies to the building and regularly and recurrently carried supplies from the dock to the storage area, were engaged in commerce. ***So were the matrons in the Blaustein Building, at least to the extent that they placed sanitary napkins in the containers for sale.*** The porters in the Blaustein Building who regularly and recurrently helped unload heavy materials from trucks, and also lighter material when the trucks could not reach the dock, were also engaged in commerce.

Id. at 1008 (emphasis supplied).

Additionally, "[t]he courts have repeatedly held that an employee may be engaged in commerce or in the production of goods for commerce within the meaning of the Act even though the time he devotes to the interstate activity is small in amount." *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1143 (5th Cir. 1970). Indeed, "[t]he fact that [the employees' interstate] duties are only a slight or small percentage of the total duties performed by the employee is of no consequence." *Id.* at 1144; *see also* 29 C.F.R. § 776.3 ("Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act.").

C. EXEMPTIONS FROM MINIMUM WAGE & OVERTIME PROVISIONS OF THE FLSA

The FLSA outlines numerous exemptions that parallel many of those found in the MWHL, but with several noted distinctions. It is important to note that unless the employee falls within one of the exemptions, paying him or her on a salary basis will not obviate the need to pay extra money – overtime – for each hour over 40 that the employee works in a work week.

1. Administrative, Executive, and Professional Employee Exemptions Generally

Section 213 of the FLSA states that "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt from the minimum wage and overtime provisions of §§ 206 and 207, so long as they are paid on a salary as opposed to an hourly basis. 29 U.S.C. § 213(a). Presently, in order to qualify for the exemption, an employee must be paid on a salary basis and must earn no less than $455.00 per week. *See* 29 C.F.R. §§ 541.100, 200, 300. This means that salaried employees earning less than $455.00 per week are subject to the minimum

wage and overtime provisions of the FLSA. Beginning December 1, 2016 and, until a new rate is published by the Secretary of Labor, an employee must be paid a weekly salary of no less than $913.00, exclusive of board, lodging, or other facilities. 29 C.F.R. § 541.600(a). Beginning on January 1, 2020, and every three years thereafter, the Secretary will update the salary amount pursuant to § 541.607.

In order to qualify for the executive exemption, the employee's primary duties must be to manage the enterprise of employment (or a department or subdivision thereof), direct the work of two or more employees, and have the authority to hire or fire other employees or the ability to make recommendations that are given weight. 29 C.F.R. §§ 541.100(a)(1)–(4).

To meet the "administrative" exemption, one of the employee's primary duties must include "the performance of office or non-manual work directly related to the management or general business operations of the employer" and "the exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a).

Professional employees are ones whose primary duty is the performance of work that requires either knowledge of an advanced, specialized nature, or "invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor." *Id.* § 541.300(a).

These concepts are explained more fully below.

a. Salary Basis Test

In order to qualify for the three exemptions listed in 29 U.S.C. § 213, the employee must be paid on a "salary basis." *See, e.g.*, *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 295–96 (4th Cir. 2007) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining that, given the statutory ambiguity, courts must defer to the Secretary of Labor's interpretation of the statute so long as it is consistent with its plain meaning). Federal regulations posit that an employee is deemed to be

salaried "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a).

In *Auer*, the Supreme Court applied the salary-basis test to police officers who brought suit against the police department for unpaid overtime wages. The Fourth Circuit has explained that the issue before the *Auer* Court "was whether the salary-basis test could be met when the employer had a policy under which the employees were nominally subject to disciplinary deductions in pay." *Gabrielson v. Arlington Cty.*, 141 F.3d 1158 (Table), No. 95-3170, 1998 WL 200324, at *1 (4th Cir. Apr. 27, 1998). *But see Auer*, 519 U.S. at 454–55 ("This case presents the question whether the Secretary of Labor's 'salary-basis test' for determining an employee's exempt status reflects a permissible reading of the statute . . . [and] whether the Secretary has reasonably interpreted the salary-basis test to deny an employee salaried status (and thus grant him overtime pay) when his compensation may 'as a practical matter' be adjusted in ways inconsistent with the test.").

The *Auer* Court determined that the salary-basis test did apply based on the Secretary of Labor's view that "as a general matter, true executive, administrative, or professional employees are not disciplined by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments." *Auer*, 519 U.S. at 456 (internal quotations omitted). Therefore, "[t]he salary basis test is meant 'to distinguish 'true' executive, administrative, or professional employees from non-exempt employees, *i.e.*, employees who may be disciplined by 'piecemeal deductions from . . . pay.'" *Kulish v. Rite Aid Corp.*, No. 11-3178, 2012 WL 6532414, at *7 (D. Md. Dec. 13, 2007) (citing *Yourman v. Giuliani*, 229 F.3d 124, 130 (2d Cir. 2000) (quoting *Auer*, 519 U.S. at 456)).

b. Primary Duty Test

The "primary duty" is the "the principal, main, major or most important duty that the employee performs," "based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700 (a); *See also Morrison v. Cty. of Fairfax*, No. 14-2308, 2016 WL 3409651 (4th Cir. 2016). The primary duty test consists of four nonexclusive factors:

(1) "the relative importance of the exempt duties as compared with other types of duties;"

(2) "the amount of time spent performing exempt work;"

(3) "the employee's relative freedom from direct supervision;" and

(4) "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee."

29 C.F.R. § 541.700(a). As a general rule, the regulation states that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." *Id.* In *Altemus v. Fed. Realty Inv. Trust*, the Fourth Circuit stated that the 50 percent rule is merely "a good rule of thumb," but time alone is not the sole factor. *See* 490 Fed. App'x 532, 536 (4th Cir. 2012) (citing *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003)). The Court concluded that "[i]t is clear from this language that the primary duty is meant to be assessed by the totality of the circumstances." *Id.*

2. Administrative Employee Exemption

In order to qualify for the administrative employee exemption, the employee must satisfy the same salary requirements as the executive exemption. 29 C.F.R. § 541.200. However, an employee's salary is not necessarily the determining factor in whether the employee qualifies for the exemption. *See Darveau v. Detecon, Inc.*, 515 F.3d 334, 338 (4th Cir. 2008) ("Although salary

alone is not dispositive under the FLSA, we note that the 'FLSA was meant to protect low paid rank and file employees' and that '[h]igher earning employees. . .are more likely to be bona fide managerial employees.'") (quoting *Counts*, 317 F.3d at 456).

Whether an employee qualifies for the administrative exemption is primarily determined by the nature of the duties performed by the employee. *See Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688 (4th Cir. 2009). An employee's "primary duty [must] be management of the enterprise in which the employee is employed." 29 C.F.R. § 541.200(a). To meet this standard, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment," *id.* § 541.201(a), and his primary duties must involve the exercise of "discretion and independent judgment." *Id.* § 541.202(a). The phrase implies that the employee has authority to make an independent choice, free from immediate direction or supervision, but it covers employees even if their decisions are reviewed at a higher level and even if they are only recommendations, as long as they are given weight. *Id*. § 541.202(b). The exercise of discretion and independent judgment must involve more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *Id*. § 541.202(e). It does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. *Id.* An employee does not exercise discretion and independent judgment merely because the consequences of his or her performance are significant. *Id*. § 541.202(f).

The phrase must be applied in light of all facts involved in the employment situation. *Id*. § 541.202(b). The nonexclusive factors considered are as follows:

> (1) "whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;"

(2) "whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;"

(3) "whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval;"

(4) "whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives;" and

(5) "whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances."

Id.

Whether the duties fall within the scope of the exemption is a question of law. *See Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 120-21 (4th Cir. 2015) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986)). While the law had been that exemptions to the FLSA overtime and minimum wage provisions, including the administrative and executive exemptions, were to be construed narrowly in favor of the employee against whom the exemptions, the law has now changed. *See Encino Motor Cars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) ("We reject [the principle that exemptions to the FLSA should be construed narrowly] as a useful guidepost for interpreting the FLSA.") Ultimately, the burden rests with the employer to demonstrate that the employee's duties qualify him or her for the exemption. *See Darveau*, 515 F.3d at 337; *see also Desmond*, 564 F.3d at 691.

In *Desmond*, racing officials at a horse racing track brought suit against the track owner for unpaid overtime wages in violation of the FLSA. *Desmond*, 564 F.3d at 688. The track owner

sought to prove that plaintiffs were exempt from the provisions of the FLSA because their status as racing officials made their positions so essential that the race track "could not conduct its business legally without them." *Id.* at 692. The court rejected this argument, stating that the importance of an employee's position is largely immaterial to the analysis of the nature of the employee's duties. *Id.* at 692-93. Relying on *Clark v. J.M. Benson Co., Inc.*, the Court reasoned that "the indispensability of an employee's position within the business cannot be the *ratio decidendi* for determining whether the position is directly related to the employer's general business operations." *Id.* at 692 (citing *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287 (4th Cir. 1986) ("The regulations emphasize the *nature* of the work, not its ultimate consequence.") (emphasis supplied)).

As to the duties of the Racing Officials, the court concluded that:

> Racing Officials have no supervisory responsibility and do not develop, review, evaluate, or recommend Charles Town Gaming's business policies or strategies with regard to the horse races. Simply put, the Former Employees' work did not entail the administration of-the 'running or servicing of'-Charles Town Gaming's business of staging live horse races. The Former Employees were not part of 'the management' of Charles Town Gaming and did not run or service the 'general business operations.' While serving as a Placing Judge, Paddock Judge, or performing similar duties is important to the operation of the racing business of Charles Town Gaming, those positions are unrelated to management or the general business functions of the company.

Desmond, 564 F.3d at 694.

The Fourth Circuit has declined to apply the administrative exemption in cases where the employee's duties were important and essential, but not directly related to general business operations. *See, e.g.*, *Morrison*, 2016 WL 3409651, at *8. By contrast, the court in *Darveau*, held that the Director of Sales for a small telecommunications company was an exempt employee because his duties related to the general business operations of the company. *Darveau*, 515 F.3d at 338–39.

3. Executive Employee Exemption

Under the FLSA regulations, an employee qualifies for the executive exemption if she satisfies each of the following four elements:

> (1) Compensated on a salary basis at a rate of not less than $455 per week . . . ;
>
> (2) [Her] primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) [She] customarily and regularly directs the work of two or more other employees; and
>
> (4) [She] has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a). An employee will also qualify if he "owns at least a bona fide 20–percent equity interest in the enterprise" where he is "actively engaged in its management. *Id.* § 541.101.

a. Element 1: Salary Basis

(See above section regarding the salary basis test.)

b. Element 2: Primary Duty of Management

Whether a particular duty is administrative or managerial is a legal question "governed by the pertinent regulations[.]" *Icicle Seafoods*, 475 U.S. at 714. These regulations define "management" with this non-exclusive list of activities:

> interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

The plaintiffs in *McKinney v. United Stor-All Centers, LLC* were "Primary Managers" of two self-storage facilities. *See* 656 F. Supp. 2d 114, 117 (D.D.C. 2009). They supervised two to four employees and their duties included: marketing; customer service; managing the facilities' cash and balancing the receipts; preparing management or other reports for the District Manager; cleanliness and security inspections; hiring, recruiting, and training subordinates. *Id.* at 118. Yet the Court still found that the relative importance of the plaintiffs' non-executive duties weighed against granting summary judgment against them, because their non-executive tasks – like answering phones, recording payments, assessing late fees – appeared to the court at least as important to the business as training minimal staff or creating marketing strategies. *Id.* at 124. And in *Morgan v. Family Dollar Stores, Inc.*, the plaintiffs were store managers who performed managerial duties, but most of the time did the same non-managerial work as their stock clerks and cashiers. *See* 551 F.3d 1233, 1270 (11th Cir. 2008). The Eleventh Circuit held that Factor 1 supported the jury's finding that the store managers were not exempt.

In *Jones v. Va. Oil Co.*, for example, the Court found that the plaintiff, an assistant manager/manager of a Dairy Queen store, satisfied the executive exemption. He was responsible for "hiring, scheduling, training, and disciplining employees, checking inventory and ordering supplies, handling customer complaints, counting daily receipts, and making bank deposits." 69 Fed. App'x 633, 638 (4th Cir. 2003). Jones was often the only employee in the store and referred to herself as the "captain of the ship" and "in charge of everything[.]" *Id.* at 635. The Court found the plaintiff's managerial duties to be more important than her non-managerial ones because the store "could not have operated successfully unless Jones performed her managerial functions, such

as ordering inventory, hiring, training, and scheduling employees, and completing the daily paperwork." *Id.* at 638.

The same was true in *In re Family Dollar FLSA Litig.* In that case, the representative plaintiff was a store manager who was solely responsible for the store's profits, payroll, supplies, safety issues, the store's appearance, and customer satisfaction. *See* 637 F.3d 508, 515 (4th Cir. 2011). Her district manager came to her store once every two to three weeks, so she had no day-to-day supervision. *Id.* at 517. The Fourth Circuit found the plaintiff's managerial duties to outweigh her non-managerial ones, primarily because she was the only employee responsible for running the store. *Id.*

And in *Kreiner v. Dolgencorp, Inc.*, the plaintiff was a retail store manager, also fell within the executive exemption. He planned the store's layout; managed inventory; selected interviewees for positions; conducted all employee evaluations, counseling, and discipline; scheduled employees' hours within a budget; and was the store's safety officer and loss-prevention monitor. *See* 841 F. Supp. 2d 897, 901–02 (D. Md. 2012). As in *In re Family Dollar*, the District Court found this factor weighed in the employer's favor because, while Kreiner spent most of his time on non-managerial work, he was the only person at the store who could direct others, and he admitted that management was his most important responsibility. *Id.* at 906.

Factor 2 of the primary duty element examines the amount of time an employee spends doing exempt work. The regulations explain that: "employees who spend more than 50 percent of their time performing exempt work" will typically meet this requirement. 29 C.F.R. § 541.700(b). However, the FLSA specifically exempts retail executives from this requirement. 29 U.S.C. § 213(a)(1); *see also In re Family Dollar*, 637 F.3d at 515.

Further, the amount of time an employee spends on non-exempt work is not dispositive because she could perform exempt and non-exempt work concurrently. For example, the store manager in *In re Family Dollar* spent most of her time on non-managerial tasks. The Fourth Circuit nevertheless held that this factor cut against her because she ran the store with little to no supervision at all times. *Id.* at 516 ("[W]hile Grace unloaded freight or swept the floors, she was also the manager, and no one else was directly supervising her work."). Likewise, the *Kreiner* plaintiff spent 75-80% of his time doing non-management work, but "he simultaneously exercised managerial discretion, remained in charge of the store, and was solely responsible for reacting to any issues that arose on a daily basis." *Kreiner*, 841 F. Supp. 2d at 905.

c. Element 3: Supervision

An employer can meet Element 3 if it can show that an employee "customarily and regularly directs the work of two or more other employees" 29 C.F.R. § 541.100(a). The term "customarily and regularly" refers to a "frequency [that is] greater than occasional but ... may be less than constant." 29 C.F.R. § 541.701. "Two or more employees" generally means two full-time employees, but a combination of full- and part-time employees is sufficient if it is at least the equivalent of two full-time employees. *Id.* § 541.104. The Fourth Circuit has stated that this factor requires an employee to supervise subordinates who, altogether, work at least 80 hours per week. *In re Family Dollar*, 637 F.3d at 513. The terms "direct the work of" has been interpreted as synonymous with "supervise." *See McKinney*, 656 F. Supp. 2d at 130.

d. Element 4: Authority to Hire and Fire

The fourth element examines whether the employee:

> has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a)(4).

In the absence of direct authority to hire or fire other employees, the issue is whether the employee's suggestions on hiring, firing, promotion, or "any other change of status" were given "particular weight[.]" *Id.* § 541.105. As the regulations explain, this element contains multiple factors. The regulations provide this non-exclusive list:

- "whether it is part of the employee's job duties to make such suggestions and recommendations";
- "the frequency with which such suggestions and recommendations are made or requested"; and
- "the frequency with which the employee's suggestions and recommendations are relied upon."

Id.

4. Combination Executive/Administrative Exemption

An employee may be exempt under a combination exemption if a combination of her exempt duties under the executive and administrative exemptions, considered together, amount to a primary duty. *See id.* § 541.708. This is so even if the employee's executive or administrative duties, taken on their own, would not be a primary duty. *Id.*; *See also Shockley v. City of Newport News*, 997 F.2d 18, 29 (4th Cir. 1993) ("Employees whose primary duty is neither management nor administration may qualify for a combination exemption based upon both their administrative and management responsibilities."). For example, "an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption." *See* 29 C.F.R. § 541.708. The combination exemption merely replaces a given exemption's primary-duty element; it does not eliminate the need to satisfy the other elements of an exemption. *Bajaj*, 492 F.3d at 295. *See also Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 826 n.2 ("The primary duty component is a necessary, but not sufficient, part of each test."). The exemption does

not apply to a combination of non-exempt work. *See Dalheim v. KDFW-TV*, 918 F.2d 1220, 1232 (5th Cir. 1990) ("[A]n employer cannot tack various nonexempt duties and hope to create an exemption.").

5. Professional Employee Exemption

The FLSA provides for an exemption for employees who are employed "in a bona fide professional capacity." 29 U.S.C. § 213(a)(1). This exemption generally carries with it the same salary and primary duty tests that apply to the executive and administrative exemptions, and it is also subject to the same amendments effective December 1, 2016. *Id.* §§ 213(a)(1), (2).

The applicable regulation first sets forth exemptions for creative professionals who are engaged in the "performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work." 29 C.F.R. § 541.302(a). The requirements of this regulation are meant to distinguish true creative professional employees from employees whose work primarily depends on "intelligence, diligence and accuracy." *Id.* § 541.302(c). For example, "newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals." *Id.* § 541.302(d).

Similarly, the regulation also provides an exemption for learned professional employees whose "primary duty [is] the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." *Id.* § 541.301(a). This primary duty test takes into account three factors of the employee's work:

(1) The employee must perform work requiring advanced knowledge;
(2) The advanced knowledge must be in a field of science or learning; and

> (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Id. §§ 541.301(a)(1)–(3). As an example, the learned professional exemption may apply to "the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry." *Id.* § 541.301(d). The regulation also states that the following professionals may qualify for the exemption: dental hygienists, physician's assistants, accountants, chefs, athletic trainers, and funeral directors or embalmers. The exemption also applies to paralegals who possess advanced degrees and are hired for their unique experience in that particular field. *Id.* § 541.301(e)(7). For example, "if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption." *Id.*

In certain circumstances, the learned professional exemption also applies to nurses and teachers. *See Williams v. Genex Servs., LLC.*, 809 F.3d 103, 110–11 (4th Cir. 2015) (holding that the learned professional exemption applied to a registered nurse whose primary duties "involve[d] the consistent exercise of discretion and judgment as well as the use of her advanced nursing knowledge" regarding the treatment of patients.). *See also Gonzales v. New Eng. Tractor Trailer Training Sch.*, 932 F. Supp. 697 (D. Md. 1996) (holding that instructors at a truck driving career school qualified as learned professional). In order for a teacher to qualify for the learned professional exemption, "he must be engaged primarily in instructing students rather than in simply supervising, directing and training employees who are performing work functions." *Id.* at 702 (citing *Hashop v. Rockwell Space Operations, Co.*, 867 F. Supp. 1287, 1295 (S.D. Tex. 1994); *Wilks v. Dist. of Columbia*, 721 F. Supp. 1383, 1386 (D.D.C. 1989)).

6. Outside Salesperson Exemption

The FLSA holds as exempt from the minimum wage and overtime provisions any

employee classified as an "outside salesman" within the meaning of the regulations. *See* 29 U.S.C. § 213(a)(1). An outside sales employee is one whose primary duty (a) is either (1) "making sales[, exchanges, contracts to sell, consignments for sale, shipments for sale, or other disposition]" or (2) "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer" and (b) while performing either (1) or (2), the employee "is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a) (incorporating 29 U.S.C. § 203(k) by reference); *see also Bajaj*, 492 F.3d at 292. The Outside Sales Exemption does not take into consideration the salary of an employee. *Id.* ("The outside sales exemption. . . does not contain a salary test."). *See also* 29 C.F.R. § 541.500(c) ("The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.").

7. Retail Sales Exemption

The retail sales exemption applies to employees of retail or service establishments if the employees are paid at a rate higher than 150% of the minimum hourly wage and if more than half of their compensation comes from commissions for at least a one-month period. 29 U.S.C. § 207 (i). Federal regulations state that in order to qualify as a "retail or service establishment," the establishment:

> (a) Must engage in the making of sales of goods or services;
>
> (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and
>
> (c) [N]ot over 25 percent of its sales of goods or services, or of both, may be sales for resale.

29 C.F.R. § 779.313. The regulations also contain a non-exhaustive list of examples of establishments that may qualify as "retail or service establishments." *See id.* § 779.320.

Several district courts across the county have struggled with the application of the FLSA provisions and the regulatory framework to cases involving employees who work as cable service installers and who are paid on a "piece rate" basis. *See, e.g.*, *Matrai v. DirecTV, LLC*, 168 F. Supp. 2d 1347, 1358–62 (D. Kan 2016) (holding that satellite television technicians satisfied the retail sales exemption because they were paid on a commission basis that was based on the number of completed sales and was unaffected by number of hours worked). *See also Owopetu v. Nationwide CATV Auditing Servs., Inc.*, No. 5:10-cv-18, 2011 WL 883703 (D. Vt. 2011) (finding that the exemption did not apply to a cable service technician, even though paid on a commission basis and even though the employer was a "retail or service" establishment"). *But see Almanzar v. C & I Assocs., Inc.*, 175 F. Supp. 3d 270 (S.D.N.Y. 2016) (holding that cable service technicians were not paid on a commission basis because employer's compensation plan provided no "performance-based incentives" for the employees to increase their income).

Johnson v. Wave Comm GR, LLC involved a cable television installer who brought a class action suit against his employer Wave Comm for failure to pay overtime wages in violation of the FLSA. *See* 4 F. Supp. 3d 423, 428–29 (N.D.N.Y. 2014). Wave Comm was a cable service provider that entered into a contract with Time Warner to provide cable installation services to Time Warner's customers. *Id*. Johnson and the other cable installers were deemed exempt from the FLSA provisions by Wave Comm and were paid on a piece rate basis for each item of work they performed. *Id.* at 429. The court concluded that Wave Comm did fit the definition of "retail or service establishment" based on the fact that the services provided to the end user were not available for resale. *Id.* at 435–36.

Once Wave Comm satisfied the retail or service establishment requirement, the court inquired as to whether the installers were paid on a commission basis. The court applied the three

factors below:

> (1) the employee's compensation must be tied to customer demand or the quantity of sales;
>
> (2) the compensation plan must provide performance-based incentives for the employee to increase his or her income; and
>
> (3) there must be proportionality between the value of the goods or services sold and the rate paid to the employee.

Id. at 442. It concluded that the installers met all three and were except under the retail sales exemption. *Id*. at 442-46.

8. Motor-Carrier Exemption

The FLSA excludes from its provisions any employee "with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502" of the Motor Carrier Act. 29 U.S.C.. § 213(b)(1). That provision of the Motor Carrier Act, codified as amended at 49 U.S.C. § 31502, grants the Secretary of Transportation the authority to:

> [P]rescribe requirements for –
>
> (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and
>
> (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation."

Id. § 31502(b).

The Motor Carrier Act grants the Secretary of Transportation authority over interstate transportation by motor carriers and the ability to determine and set the qualifications and maximum hours of services for such employees. *Id.* That statute defines a "motor carrier" as "a person providing motor vehicle transportation for compensation." *Id.* § 13102(14). Any employee who falls within this definition is considered exempt from the provisions of the FLSA, pursuant to

29 U.S.C. § 213(b)(1). The FLSA limits the applicability of the motor carrier exemption to employees who operate vehicles weighing 10,000 pounds or more. *See Avery v. Chariots for Hire*, 748 F. Supp. 2d 492, 498 (D. Md. 2010). Any employee is covered if that person is "a driver, driver's helper, loader, or mechanic." *Id.* There is an exception to this provision for employees who operate vehicles designed to transport more than eight passengers for compensation, more than fifteen passengers not for compensation, or vehicles that transport certain amounts of hazardous materials. *Id.*

The most critical factor in the assessment is whether the employee's activities "'affect safety of operation.'" *Troutt v. Stavola Bros., Inc.*, 107 F.3d 1104, 1107 (4th Cir. 1997) (quoting *United States v. Am. Trucking Assn's*, 310 U.S. 534, 553 (1940)). *See also Levinson v. Spector Motor Serv.*, 330 U.S. 649, 671 (1947) ("The fundamental test is simply that the employee's activities affect safety of operation."). Therefore, if an employee who operates a vehicle over the 10,000-pound limit and – through his duties as a driver, driver's helper, loader, or mechanic – affects the safety of the operation, that employee will be considered exempt from the provisions of the FLSA and the MWHL.

9. Tip Credit Exemption for Employees Who Normally and Customarily Receive Tips

While the FLSA requires an employer to pay all "nonexempt" employees overtime and minimum wage, it permits an employer to pay a tipped employee a subminimum wage of $2.13 per hour and to offset the overtime and minimum wage obligations with tips that the employee receives. 29 U.S.C. § 203(m). *Accord Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 680 (D. Md. 2012). This is called a "tip credit" but, like the MWHL, it only applies if the following two conditions are met:

> [S]uch employee [(1)] has been informed by the employer of the provisions of this subsection, and [(2)] all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

29 U.S.C. § 203(m)(2).

The employer has the burden of proving its entitlement to the FLSA tip credit. *Dorsey*, 888 F.Supp.2d at 681 & n.5. In order to qualify for this exemption, an employer must strictly comply with these requirements. *Id.* This means: (1) informing its employees of the provisions of 203(m), even if the employees are already aware of the tip credit provision and (2) that they have the right to retain all of their tips. *Id.* (citing *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 724 (W.D. Tex. 2010)); *accord* 29 C.F.R. § 531.59(b). A tipped employee means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips. *See* 29 U.S.C. § 203(t).

Thus, the tip credit is an all or nothing proposition: if an employer takes even a small portion of an employee's tips, that employer will not be eligible for claiming the tip credit at all:

> Congress, in crafting the tip credit provision of section 3(m) of the FLSA did not create a middle ground allowing an employer both to take the tip credit and share employees' tips." *Gionfriddo*[*v. Jason Zink, LLC*], 769 F.Supp.2d [880,] 893 [(D.Md. 2011)])] (quoting *Chung*[*v. New Silver Palace Rest.*], 246 F.Supp.2d [220,] 230 [(S.D.N.Y. 2002)]). "[A]n employer is not eligible to take the tip credit, and will be liable for reimbursing an employee the full minimum wage that employee would have earned, if the employer exercises control over a portion of the employee's tips." *Id.* at 894 (quoting *Davis v. B & S, Inc.*, 38 F.Supp.2d 707, 714 (N.D.Ind.1998)). As a result, "[t]o the extent Plaintiffs were not permitted to retain their tips to pay for shortages and unpaid tabs, Defendants disqualif[y] themselves from taking advantage of the FLSA tip credit provisions." *Bernal* [*v. Vankar Enters., Inc.*], 579 F.Supp.2d [804,] 810 [(W.D Tex. 2008)].

Dorsey, 888 F. Supp. 2d at 681.

10. Computer Employee Exemption

The FLSA provides for an exemption to any employee who is "a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker." 29 U.S.C. § 213(17). In addition, the employee's primary duty must be:

> (A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (B) 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;
>
> (C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
>
> (D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills.

Id.

If the employee is compensated on an hourly basis, he must be paid at least $27.63 per hour to qualify for the exemption. *Id*. § 213(17)(D). The computer employee exemption does not apply to employees "engaged in the manufacture or repair of computer hardware and related equipment." 29 C.F.R. § 541.401. Employees are not exempt merely because their work depends upon or is facilitated by computers; if they are not engaged in computer systems analysis or programming, they are not considered exempt. *Id*. Additionally, a computer employee may qualify for the administrative and/or executive exemptions if he is, for example, "a senior or lead computer programmer who manages the work of two or more other programmers", and if he has authority regarding the hiring or firing of other employees. *Id.* § 541.402.

The duties of an employee, not his title, determine whether the exemption applies. *See Clark v. J.P. Morgan Chase Bank, N.A.*, No. 08 Civ. 2400 (CM), 2010 WL 1379778, at *16 (S.D.N.Y. Mar. 26, 2010) (finding that a computer systems analyst and programmer whose duties

included testing software, giving feedback to the engineering department, and handling complicated server-related issues qualified as an exempt computer employee). Highly-skilled computer employees whose expertise is more sophisticated than average support staff may be considered exempt. *See Bobadilla v. MDRC*, No. 03 Civ. 9217, 2005 WL 2044938, at *7 (S.D.N.Y. Aug. 24, 2005) (holding that a computer programmer was exempt "because he had sophisticated knowledge of computing that went beyond that of a non-exempt Help Desk employee").

10. Other Exemptions

Other exemptions to both the FLSA minimum wage and overtime provisions may include the following employees who are: employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center; employed in agriculture (if certain conditions are met); employed in connection with the publication of any weekly, semiweekly, or daily newspaper; employed as a switchboard operator by an independently owned public telephone company which has not more than seven hundred and fifty stations; employed as a seaman on a vessel other than an American vessel; employed on a casual basis in domestic service employment to provide babysitting services; employed as a criminal investigator who is paid availability pay; any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker (provided that have certain duties); employed as a border patrol agent. 29 U.S.C. §§ 213(a)(1)–(18).

Other exemptions to only the FLSA overtime provisions may include the following employees who are: employed by an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49 or the provisions of title II of the Railway Labor Act; employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; employed as a seaman; employed as an announcer, news editor, or chief engineer by a radio or television station;

employed as a salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates; employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit; employed within the area of production by an establishment commonly recognized as a country elevator; engaged in the processing of maple sap into sugar or syrup; engaged in the transportation and preparation for transportation of fruits or vegetables, or in transportation of persons employed or to be employed in the harvesting of fruits or vegetables; employed as a driver by an employer engaged in the business of operating taxicabs; employed by a public agency in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities; employed in domestic service in a household and who resides in such household; employed with his spouse by a nonprofit educational institution to serve as the parents of children who are orphans; employed by an establishment which is a motion picture theater; employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal; employed by an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System; employed as a criminal investigator who is paid availability pay. *Id*. §§ 213 (b)(1)–(30).

D. EMPLOYER'S KNOWLEDGE OF OVERTIME

In order to be liable for overtime wages under the FLSA, an employer must have knowledge, either actual or constructive that an employee is working overtime. *Bailey v. Cnty of*

Georgetown, 94 F.3d 152, 157 (4th Cir. 1996). The burden proving the employer's actual or constructive knowledge of overtime is on the plaintiff. *Id.* And, evidence that the employer was aware of just a few hours of overtime work, is not sufficient for a court to infer that the employer had knowledge of consistent overtime work. *Id*. at 157. *See also Pforr v. Food Lion Inc.*, 851 F.2d 106, 109 (4th Cir.1988) (noting that it was inappropriate for the district court to infer knowledge of the employee's 1350 claimed overtime hours from evidence that supervisor knew employee worked a couple of times off-the-clock, absent some evidence of employer's pattern or practice of acquiescence to off-the-clock work).

E. WHEN DOES A PERSON FALL OUTSIDE OF THE DEFINITION OF EMPLOYEE AND WITHIN THE DEFINITION OF INDEPENDENT CONTRATOR?

The determination of whether an employee is an independent contractor – taking him or her outside of the protections in the FLSA, MWHL and MWPCL – or an employee, who is entitled to those protections, is a question of law. *Schultz v. Capital Int'l Sec., Inc*., 466 F.3d 298, 304 (4th Cir. 2006). The analysis is governed by the economic reality test. *Id.* The central thrust of the economic reality test is "whether the worker is 'economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself. *Id.* The *Schultz* test looks to whether the worker constitutes an employee or independent contractor of the combined entity (if the entities are joint employers) or of each entity (if the entities are separate employers.). *Id.* at 305–07.

The Court should determine "'whether a worker is an employee covered by the FLSA,'" by looking to "'the economic realities' of the relationship *between the worker and the putative employer*' or employers.'" *Id.* (quoting *Schultz*, 466 F.3d at 304) (emphasis in original). To do so, courts examine a distinct set of six factors:

> (1) [T]he degree of control that the putative employer has over the manner in which the work is performed;
> (2) the worker's opportunities for profit or loss dependent on his managerial skill;
> (3) the worker's investment in equipment or material, or his employment of other workers;
> (4) the degree of skill required for the work;
> (5) the permanence of the working relationship; and
> (6) the degree to which the services rendered are an integral part of the putative employer's business.

Schultz, 466 F.3d at 304–05. *Accord United States v. Silk*, 331 U.S. 704 (1947), *abrogated on other grounds by Darden*, 503 U.S. at 325.

While the first factor – degree of control – is the most critical, no single factor is dispositive and all six are part of the totality of the circumstances that are considered. *McFeeley v. Jackson St. Ent'mt, LLC*, 825 F.3d 235, 241 (4th Cir. 2016). The six-factor test allows a "flexible application to the myriad of different working relationships that exist in the national economy." *Id*. A court "must adapt its analysis to the particular working relationship, the particular workplace and the particular industry in each FLSA case." *Id.*

In *McFreeley*, the Fourth Circuit held that exotic dancers who performed at private club and signed agreements stating that they were independent contractors, were in fact employees under the FLSA, the MWHL and the MWPCL. *Id*. at 239, 244. Central to the Court's analysis were the fact that defendants: controlled the plaintiffs' work schedule; imposed rules on the plaintiffs which, if violated, would lead to dismissal; set fees for which the dancers were supposed to charge for private dances and dictated how tips were handled; instructed dancers on proper behavior; and managed the clubs' atmosphere and clientele by making decisions regarding advertising, hours of operation, the types of food and beverages sold, and the handling of lighting and music for the dancers. *Id.* at 241–44. The court concluded that the level of control over the

dancers rose to the level normally exercised over employees rather than the level of autonomy typically given to independent contractors. *Id.*

Schultz also presents a scenario where the two persons who jointly employed five security agents – Capital International Security, Inc. ("CIS") and Saudi Prince Faisal bin Turki bin Nasser Al-Saud ("the Prince") (collectively, "the Employers") – improperly classified them as independent contractors. The agents worked twelve-hour shifts providing security at a residence; they were paid a flat rate for each shift and received no extra pay for overtime. Both CIS and the Prince directed their work. When the court applied the six factors, it determined that the five agents were employees under the FLSA. As to the first factor – control – the Court found that CIS and the Prince exhibited a high degree of control over the manner in which the agents performed their duties. *Schultz,* 439 F.2d at 307. The Court also found that the second factor – whether the opportunities for profit or loss were dependent on the agent's managerial skill – weighed in favor of an employment relationship because CIS and the Prince dictated the number of shifts they would work. *Id*. The third factor – agents' investment in their own equipment – weighed in favor of employment because CIS or the Prince supplied all of it, including liability insurance. *Id.* The fourth factor – longevity of the relationship – also weighed in favor of employment, as some agents worked for the Prince both before and after CIS contracted with him for security services. *Id.* Finally, as to the sixth factor, the agents were an integral part of CIS's business because CIS did nothing but provide security services. *Id.*

F. WHAT IS AN "EMPLOYER" UNDER THE FLSA?

1. Governing Legal Principles

The FLSA's definition of "employer" is extremely broad, and includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

The FLSA defines the term "employ" expansively to mean to "suffer or permit to work." 29 U.S.C. § 203(g); *Darden,* 503 U.S. at 326. This definition is interpreted broadly to achieve Congress's intent to provide a remedy to employees for their employers' wage and hour violations. *Schultz,* 466 F.3d at 304.

Determining whether a person or an entity is an employer under FLSA turns on the "economic reality" of the relationship between the employee and employer. *Id.* at 304. The determination does not depend on isolated factors but rather upon the circumstances of the whole activity. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). Courts assess the economic reality of an employment relationship by examining a number of factors such as the person's job description, his or her financial interest in the enterprise, and whether the individual exercises control over the employment relationship. *Gionfriddo v. Jason Zink, LLC*, 769 F. Supp. 2d 880, 890 (D. Md. 2011).

2. Individual Managers and Owners who Are Involved in the Employer's Operations May be Employers

a. Individual Managers Who are Not Owners or Corporate Officers

Under the "economic reality" framework, individual managers and owners may be personally liable for wage violations under both the FLSA, the MWHL and the MWPCL. Accordingly, individual liability is determined by the more traditional *Bonnette* framework which considers whether a putative employer: "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter v. Dutchess Cty. Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (borrowing factors from *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)); *Roman v. Guapos III, Inc.*, 970 F. Supp.

2d 407, 413 (D. Md. 2013) (applying *Bonnette* to FLSA and MWHL claims); *Campusano*, 208 Md. App. at 39 40 (applying *Bonnette* test to MWPCL claim).

Thus, any manager with power to hire and fire and employee, set his or her pay or change his or her pay may be at risk for liability.

b. Individuals Who Are Owners & Corporate Officers

While courts in the district of Maryland have applied the *Bonnette* factors[1] in determining whether an individual employee is an employer, they have cautioned that "[n]o single factor is dispositive" and that "the totality of the circumstances must be considered." *Roman*, 970 F. Supp. 2d at 416. In *McFeeley v. Jackson Street Entertainment*, the Fourth Circuit stated that "the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case." *McFeeley*, 825 F.3d at 241. And, a court "cannot accept" an analysis "which cherry-picks a few facts that supposedly tilt in" a defendant's favor and "downplay[s] the weightier and more numerous factors indicative of an employment relationship." *Id*. In *Herman v. RSR Sec. Servs.*, an individual liability case like this one, the Second Circuit rejected the notion that a rigid four-factor test should always be applied. 172 F.3d 132, 139 (2d Cir. 1999). Citing *Rutherford*, that Court cautioned that it must consider "all relevant evidence" and that no one factor is dispositive. *Herman*, 172 F.3d at 139.

Although the Fourth Circuit has not addressed this precise issue, the majority of circuits hold that corporate officers and/or owners are employers, when they are involved in some aspect of operations, even when the officer or owner has no direct connection with the employee alleging FLSA violations or the violations themselves. *See, e.g.*, *Irizarry v. Catsimatidis*, 722 F.3d 99, 105

[1] These factors are as follows: (1) the authority to hire and fire employees; (2) authority to supervise and control work schedules or employment conditions; (3) authority to determine rate and method of payment; and (4) maintenance of employment records. *Roman v. Guapos, III, Inc.*, 970 F.Supp.2d 407, 413 (D. Md. 2013).

(2d Cir. 2013); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1310 (11th Cir. 2013); *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965-66 (6th Cir. 1991); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983). *See also Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 48 (1st Cir. 2013). "[A]n ownership stake is highly probative of an individual's employer status . . . as it suggests a high level of dominance over the company's operations" [and] . . . a strong degree of authority over the corporation's finances and, as a corollary, the ability to 'caus[e] the corporation to undercompensate employees and to prefer the payment of other obligations and/or retention of profits.'" *Id*. (quoting *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998)).[2]

However, officer or owner status is not necessary to create employer liability, so long as the individual has significant control over operations related to the employee and/or the violations. To that end, the definition of employer "is designed to include persons who are in fact responsible [in whole or in part] for causing violations of the Act." *See Dole v. Simpson*, 784 F. Supp. 538, 544 (S.D. Ind. 1991) (the FLSA definition of employer "is designed to include persons who are in fact responsible for causing violations of the Act"). As a result, "the courts look to the parties exercising significant control over the employment relationship. *Id*. at 544. Thus, "[i]f directors or officers ***or other employees*** have such control over the corporate entity that their decisions determine whether

[2] The Second Circuit has taken a more conservative approach, holding that corporate officers and/or owners are subject to individual liability under the FLSA when they are involved in management of matters that affect the terms and conditions of the FLSA plaintiff's employment. *See Irizarry*, 722 F.3d at 109 (In order to be an employer under the FLSA, an owner or officer "must possess control over a company's actual 'operations' in a manner that relates to a plaintiff's employment" – *i.e*. "some degree of involvement in a company in a manner that affects employment-related factors such as workplace conditions and operations, personnel or compensation. . .").

a violation occurs, then the Act considers them employers liable for the harm they cause." *Id.* (emphasis supplied). Thus, "[a] person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affects the nature or conditions of the employees' employment." *Irizarry*, 722 F.3d at 110.

Ownership or officer status are often important in the employer calculous because, in the absence of evidence of direct control, a court can infer indirect control based on that status. But, the definition of "employer" does not exclude persons without "high executive positions or ownership interests" when they actually they have "operational control over significant aspects of the business." *See also Lamonica*, 711 F.3d at 1301 (observing that "a supervisor's title does not in itself establish or preclude his or her liability under the FLSA"). The First Circuit made this very clear in *Manning*:

> [the] analysis focuse[s] on the role played by the corporate officers in causing the corporation to undercompensate employees and to prefer the payment of other obligations and/or the retention of profits. In addition to direct evidence of such a role, other relevant indicia may exist as well—for example, an individual's operational control over significant aspects of the business and an individual's ownership interest in the business. ***Such indicia, while not dispositive, are important . . . because they suggest that an individual controls a corporation's financial affairs and can cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA.***

Manning, 725 F.3d at 47 (emphasis in original) (quoting *Baystate*, 163 F.3d at 678).[3]

[3] Also, in *Donovan v. Sabine Irrigation Co.*, the Fifth Circuit determined thatan individual without an ownership interest in the corporate employer could be held liable under the FLSA if he "effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees"—or if he lacked that power but "independently exercised control over the work situation." 695 F.2d at 194–95. Moreover, the court concluded that even if the individual had no authority to direct the plaintiff's activities, "he would remain accountable for violations of the FLSA if he independently exercised control over the work situation." *Id.* at 195. The *Sabine* court found the individual to be a FLSA employer because he "indirectly controlled many matters traditionally handled by an employer in relation to an employee (such as payroll, insurance, and income tax matters)," noting also that the defendant's "financial gymnastics directly affected Sabine's employees by making it possible for Sabine to meet its payroll and keep

3. Persons who Hire a Subcontractor to Provide the Labor May be Employers

Use of contractual relationships to evade wage and hour laws and exploit low income workers has been a long-standing and ever-pervasive problem in many industries. As a U.S. House of Representatives Committee investigation found, as early as 1992, "[a] company which reduces its labor cost through use of illegitimate contractors can readily underbid legitimate competitors." Emp't & Hous. Subcomm. Rep., *Contractor Games: Misclassifying Employees as Independent Contractors*, H.R. Rep. No. 102-1053, at 9, 1992 WL 353996 (2d Sess. 1992). S*ee also* Catherine Ruckelshaus, *Labor's Wage War*, 35 Fordham Urb. L.J. 373, 379–80 (2008) (outsourcing employees to labor intermediaries such as temporary or leasing firms allows companies to dodge responsibility for complying with wage and hour laws). In industries where such subcontracting is common, underpayments are widespread. *See* Matthew Finkin, *From Weight Checking to Wage Checking: Arming Workers To Combat Wage Theft*, 90 Ind. L.J. 851, 853–54 (2015); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 Loy. U. Chi. L.J. 291, 296–99 (2003). *But see In re Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B No. 186, 2015 WL 5047768, at *15, *19–21 (Aug. 27, 2015), *rev'd in part on other grounds sub nom. Browning-Ferris Indus. of Cal., Inc. v. Nat'l Labor Relations Bd.*, 911 F.3d 1195 (D.C. Cir. 2018).

In *Salinas v. Commercial Interiors Inc.*, 848 F.3d 125, 138 (4th Cir. 2018), the Fourth Circuit held that a general contractor was an FLSA employer even though it did not directly employ the workers in the narrow sense of the word, but hired a subcontractor who

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its employees supplied with the equipment and materials necessary to perform their jobs." *Id.* (quotations omitted).

employed them as independent contractors. *Id.* at 130, 141. The District Court (Motz, J.) granted summary judgment for the general contractor and the Fourth Circuit reversed, holding, as a matter of law, that the general contractor was an employer. *Id*. at 150. Regarding the joint employment inquiry, the Court again flatly rejected the four-factor framework in *Bonnette*, as unduly circumscribed. *Id*. at 135-37. And, the Court formulated a unique analytical tool for resolving the two issues before it – joint employment and employee vs. independent contractor status, framing the essential inquiry as follows: Joint employment exists if: (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two or more persons' or entities' combined influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor. *Id*. at 150.

The Court formulated a unique six-factor analytical tool to answer the question of whether two putative joint employers "are not completely disassociated" and whether, therefore, joint employment exists:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tool, or materials necessary to complete the work.

Id. at 141–42. The Court made it clear that these factors are non-exclusive. *Id.* at 142. Significantly, the Court also indicated that one factor may be sufficient to find that two entities "are not completely disassociated" so as to create joint employment if that one factor demonstrates that "the person or entity has a substantial role in determining the essential terms and conditions of the worker's employment." *Id.*

In *Hall v. DirectTV, LLC*, 846 F.3d 757 (4th Cir. 2018), decided after *Salinas*, but on the same day, satellite television technicians, who were hired ***as independent contractors*** by a subcontractor of DirectTV, filed suit for unpaid overtime and minimum wages against, Direct TV and the subcontractor. The trial court (Motz, J.) granted DirectTV's motion to dismiss, finding that DirectTV was not a joint employer of plaintiffs. *Id*. at 761-62. The trial court conducted a two-step analysis, first as a threshold matter separately analyzing (for DirectTV and the subcontractor) whether the technicians were employees or independent contractors and then reaching the second question of whether DirectTV was a joint employer of plaintiffs. *Id*. at 763, 766. The court applied the four-factor *Bonnette* framework and determined that DirectTV was not a joint employer. *Id*. at 764. The Fourth Circuit found that the trial court erred in two ways. First, the district court should not have conducted the employee/independent contractor analysis separately for DirectTV and the subcontractor and second, its application of the four-factor *Bonnette* framework was unduly restrictive. *Id*. at 767.

Relying on *Salinas*, the Court then formulated the proper method for determining employer/employee status when there are two issues presented – employee vs. independent contractor status and joint employment. The threshold issue to be adjudicated is "whether the defendant and one or more of the additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of plaintiff's work." *Id*. at 767. Then, if the answer is yes, the court "must consider whether the two entities' *combined* influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." *Id*. But, "if the two entities are disassociated with regard to the key terms and conditions of the worker's employment", the court "must consider whether the worker is an employee or independent contractor with regard to *each* putative employer separately." *Id.* In this way, if the entities are not disassociated, then their influence over the terms and conditions of the worker's employment must be viewed in the aggregate. *Id*.

The Court applied the non-exclusive six-factor analytical framework developed in in *Salinas* to answer the question of whether the two entities are "not completely disassociated" with respect to the worker:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tool, or materials necessary to complete the work.

Id. at 769-70.

The Court said some interesting things about six-factor framework. First, the factors are non-exclusive and they are merely a guide – a way to think about the problem, "'not an algorithm". *Id.* at 771 (quoting *Reyes v. Remington Hybrid Seed Co., Inc.,* 495 F.3d 403, 408 (7th Cir. 2007)). Second, it is not necessary that a putative joint employer have primary authority over the worker; all that is required is "a role in establishing the key terms and conditions of the worker's employment" and for that reason, to establish joint employment, it is not necessary to show that a majority of the factors weigh in favor of it. *Id*. at 771. In fact, as in *Salinas*, the Court pointed out that even one factor may be enough to establish joint employment. *Id*.

Interestingly, *Salinas* and *Hall* both cite *Reyes v. Remington Hybrid Seed Co., Inc., supra,* with approval. *Salinas*, 848 F.3d at 142, 149; *Hall*, 846 F.3d at 771. In *Reyes*, the Seventh Circuit held that a contractor that hired an undercapitalized subcontractor to supply labor was, as a matter of law, a putative joint employer under the FLSA and the Migrant and Seasonal Agricultural Workers Protection Act ("AWPA").[4] The contractor in *Reyes* hired a subcontractor that alone hired, fired, set the hours and wages of the workers, and supervised them. *Id.* at 405. Despite this,

[4] Both the FLSA (29 U.S.C. § 203(1)) and the AWPA (29 U.S.C. § 1802(2)) have the same definition of "employer" and are interpreted the same. *See Reyes*, 495 F.3d 403, 405 (7th Cir. 2007); *Torres-Lopez*, 111 F.3d at 639; *Antenor v. D&S Farms*, 88 F.3d at 929; *De Leon-Granados v. Eller & Sons Trees, Inc*., 581 F. Supp. 2d 1295, 1303 & n.4 (N.D. Ga. 2008).

Judge Easterbrook found that, because the subcontractor was undercapitalized, holding the contractor liable as a joint employer was essential to ensure that the workers were protected in a manner consistent with FLSA's broad and remedial definition of employer. *Reyes*, 495 F.3d at 409. In *Reyes*, Judge Easterbrook reasoned that "[i]f an independent contractor is a solvent business, then the workers are protected by that contractor's incentive to follow the law (for violations could cripple the business) and his ability to pay damages if he does not." *Reyes*, 495 F.3d at 408. But, "when a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers . . . and then treating the principal firm as a separate employer is essential to ensure that the workers' rights are honored." *Id.* Under these circumstances, that is when imposing joint employer liability "matter[s] most." *Id.* at 409. The *Salinas* Court agreed. 848 F.3d at 149.

This rule – that contractors who hire undercapitalized subcontractors are automatically joint employers of the subcontractor's workers – would not disrupt the contracting industry. The rule does not increase a law-abiding contractors' costs, but simply discourages them from hiring subcontractors which underbid projects and stiff workers: "'If everyone abides by the law, treating a firm . . . as a joint employer will not increase its costs.'" *Salinas*, 848 F.3d at 149 (quoting with approval *Reyes*, 495 F.3d at 409). This is because the subcontractor "must pay any labor contractor enough to cover the workers' legal entitlements." *Reyes*, 495 F.3d at 409. It is "[o]nly when it hires a fly-by-night operator . . . that [the contractor] is exposed to the risk of liability on top of the amount it has agreed to pay the contractor." *Id.* Further, this rule does not impose an unfair hardship on contractors because they have three ways to avoid the risk of liability: (1) deal only with other substantial and appropriately capitalized businesses; (2) withhold enough money from the subcontractor to ensure that its workers are paid in full; or (3) require the subcontractor to post a payment bond. *Id*. When a contractor fails to take any of these three measures, it must be deemed

a joint employer for the purposes of the wage laws because the inevitable result is that workers will not be paid.

G. STATUTE OF LIMITATIONS UNDER THE FLSA AND THE MWHL

1. The FLSA

The FLSA provides for two possible limitations periods. For non-willful violations, a two-year statute of limitations applies. *See* 29 U.S.C. § 255(a). When the violation is willful, a three-year statute of limitations applies. *Id.* In order to establish willfulness, the employee has the burden of showing that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Reckless conduct will only be found where the employer had "notice, actual or constructive-of the existence and general requirements of the FLSA . . . *only* with such notice, actual or constructive, could a defendant form the willful mental state, either by choosing to remain ignorant of legal requirements or by learning of those requirements and disobeying them." *Chao v. Self Pride, Inc.*, 232 F. App'x 280, 287 (4th Cir. 2007) (citing *Elliott Travel*, 942 F.2d at 966–67) (emphasis in original). Therefore, merely negligent conduct is insufficient to show willfulness. *McLaughlin*, 486 U.S. at 133; *see also Desmond*, 630 F.3d at 357 (same).

If the Court concludes that the Defendant's conduct was not willful within the context of 29 U.S.C. § 255(a), then the Plaintiff will only be entitled to overtime pay for the two-year period preceding the filing of the lawsuit under FLSA.

2. The MWHL

"The requirements under the MWHL mirror those of the federal law; as such, Plaintiffs' claim under the MWHL stands or falls on the success of their claim under the FLSA." *Turner v. Human Genome Sci., Inc.*, 292 F. Supp. 2d 738, 744 (D. Md. 2003). The MWHL clearly states that "If an employer pays an employee less than the wage required under this subtitle, the employee

may bring an action against the employer to recover the difference between the wage paid to the employee and the wage required under this subtitle." Md. Code Ann., Lab. & Empl. § 3-427. Under Maryland law, "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code Ann., Cts. & Jud. Proc. § 5-101.

H. COMPUTING BACK PAY – HOW TO DETERMINE THE REGULAR RATE OF PAY AND THE COMPENSATION DUE

If the employee is paid hourly the computation is simple. For example, if the employee is paid at a regular hourly rate of $10.00 per hour, then he must receive $10.00 per hour for the first 40 hours and $15.00 per hour for all hours over 40 that he or she works in a workweek.

If the employee is not exempt, paying him or her on a salary basis will not help the employer escape FLSA liability. But, it will change the way in which overtime is calculated in a way that is more favorable to the employer. The FLSA provides that an employer may not employ an employee for a workweek longer than 40 hours unless it pays its employee one-and-one-half times the employee's "regular rate" for all hours in excess of 40. 29 U.S.C. § 207(a)(1); *Flood v. New Hanover Cty.*, 125 F.3d 249, 251 (4th Cir. 1997); *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1267 (4th Cir. 1996). "The employee's 'regular rate' is the hourly rate that the employer pays the employee for the normal, non-overtime forty-hour workweek." *Flood*, 125 F.3d at 251 (citations omitted).

"If the employer employs an employee on a weekly salary basis, it determines the employee's regular hourly rate of pay by dividing the weekly salary by the number of hours that it intends the weekly salary to compensate." *Id.*; *see also* 29 C.F.R. § 778.113. In *Flood v. New Hanover County*, the Fourth Circuit explained the regular rate computation and the obligation to pay overtime pay in the following manner:

> Thus, the regulations provide that if an employer pays its employee $182.70 per week with the understanding that the salary compensates the employee for a regular workweek of thirty-five hours, the employee's regular rate of pay is $182.70 divided by thirty five hours, or $5.22 per hour. When the employee works overtime, the employer must pay the employee $5.22 for each of the first forty hours and $7.83 (one and one half times $5.22) for each additional hour thereafter.

125 F.3d at 251 n.1.

There is an exception to this rule:

> Section 778.114 of the implementing regulations provides that a salaried employee whose hours fluctuate from week to week can reach a mutual understanding with the employer that he or she will receive a fixed amount of compensation per week, regardless of the number of hours that the employee works in that week, and that he or she additionally will receive a rate of fifty percent of the regular hourly pay for any hours over forty worked in that week. *See* 29 C.F.R. § 778.114(a). The employee must clearly understand that the fixed weekly amount compensates for all of the hours worked in that week, rather than a set number of hours as in the case of a regular salaried employee heretofore described, and that he or she will receive that amount every week regardless of whether he or she actually works a long or a short workweek. *Id.* The employer calculates the regular hourly pay by dividing the employee's fixed weekly pay by the total number of hours that the employee worked during the week. *Id.* The fixed amount must be sufficient to provide compensation at a regular rate not less than the minimum hourly rate, and the overtime premium cannot be less than one-half of the regular rate. *Id.* Since the employer has already paid the employee a regular rate of pay for all of the hours that the employee worked, including the overtime hours, it only has to pay an additional one-half time pay premium for the overtime hours.

Id. at 251–52.

Under 29 U.S.C. § 207(h), any extra compensation – *e.g.*, bonuses – that is excluded from the computation of the regular rate under subsection (e) is not creditable toward overtime compensation owed to an employee:

> (1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward . . . overtime compensation required under this section.
>
> (2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h).

The pertinent portions of subsection (e) exclude the following from the regular rate computation:

> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include–
>
> **(1)** sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> **(2)** payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;
>
> (**3)** Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. . . .

29 U.S.C. § 207(e).

I. REMEDIES UNDER FLSA

1. Liquidated Damages

An employer who violates the terms of the FLSA is "liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). A court may only refuse to award or reduce the amount 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 Fair Labor Standards Act." 29 U.S.C. § 260. The employer "bears the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." *Wright v. Carrigg,* 275 F.2d 448, 449 (4th Cir. 1960).

In the Fourth Circuit, a grant of liquidated damages is the "norm" in cases where the FLSA is violated. *Mayhew v. Wells,* 125 F.3d 216, 220 (4th Cir. 1997). The employer "may not take an 'ostrichlike' approach to the FLSA by 'simply remain[ing] blissfully ignorant of the FLSA requirements.'" *Lockwood v. Prince George's Cty.*, 217 F.3d 839 (Table), No. 09-2487, 2000 WL 864220, at *6 (4th Cir. 2000) (citing *Roy,* 141 at 549). Good faith, therefore, "requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Id.* (citing *Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997).

The District of Maryland has likewise held that good faith implies "some duty to investigate potential liability under the [FLSA]." *Rogers,* 362 F. Supp. 2d at 638 (citing *Reeves v. Int'l Tel. & Tel. Corp.*, 616 F.2d 1342 (5th Cir. 1980)); *see also Williams v. Md. Office of Relocators,* 485 F. Supp. 2d 616, 620 (D. Md. 2007). This Court holds employers to a high standard in proving good faith and reasonable grounds:

> It is not enough, for instance, to plead and prove ignorance of the wage requirements. Knowledge will be imputed to the offending employer. . . . Nor does the complete ignorance of the possible applicability of the [FLSA] shield the employer from liability for liquidated damages. Good faith requires some duty to investigate potential liability under [FLSA].

Williams, 485 F. Supp. 2d at 620 (quoting *Rogers,* 362 F. Supp. 2d at 638) (internal citations omitted).

In *Williams,* the employer argued that it:

> [A]cted with the reasonable belief that Williams, its drivers, loaders and supervisors, were covered by the Motor Carriers' Act and therefore exempt from the payment of overtime wages. The application of the Motor Carriers' Exemption is complex and confusing and could easily lead an employer attempting to act in good faith to the wrong conclusion. As the liquidated damages provision of the FLSA is not intended to be punitive, double overtime allegedly due to Williams would be unfair.

485 F. Supp. 2d at 620. The Court found the "averments" to be entirely insufficient:

> Defendant has cited no authority for the proposition that complexity or uncertainty of an overtime payment issue itself can give rise to a good faith defense. Where a question is complex or uncertain, an employer at the least must show that it made a diligent investigation into the issues and concluded not to pay overtime based upon the results of its investigation. Defendant has presented no such evidence here, and it is therefore liable for liquidated damages.

Id.

2. Attorney's Fees and Costs

As with the MWHL and the MWPCL, a successful Plaintiff is entitled to reasonable attorney's fees and costs. 29 U.S.C. § 216(b).

J. RECORD KEEPING AND THE CONSEQUENCES OF NOT KEEPING TIME RECORDS

Employers under both the FLSA and the MWHL are required to keep, maintain, and preserve payroll and time records for non-exempt employees. *See* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2 (a); Md. Code Ann., Lab. & Empl. § 3-424. The employer must maintain, for at least three years, records that include, but are not limited to, the name, address, and occupation of the employee; the rate of pay of each employee; the amount that is paid in each pay period; and the hours worked by the employee each day and workweek. *See* 29 C.F.R. § 516.5; Md. Code Ann., Lab. & Empl. § 3-424.

An employer "has a duty to keep proper and accurate records of the employee's wages, hours, and other conditions and practices of employment." *McFeeley*, 47 F. Supp. 3d at 276 (citing

Donovan v. Kentwood Dev. Co., Inc., 549 F. Supp. 3d 480, 485 (D. Md. 1982)); *see also Aguilar v. ALCOA Concrete & Masonry, Inc.*, No. 15-0683, 2015 WL 6756044, at *3 (D. Md. Nov. 4, 2015) ("[T]he FLSA and MWHL place the burden to maintain employment records. . .upon the employer rather than the employee."). Thus, while Plaintiff "carries the burden of proof in an FLSA claim for overtime wages," the "burden is light, especially when the employer's records are inaccurate or inadequate. *Randolph v. Powercomm Constr., Inc.*, 309 F.R.D. 349, 362–63 (D. Md. 2015) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946)). A defendant employer cannot shift the burden of proving hours worked to the employee simply because the employer failed to maintain proper records pursuant to the statute. *See Aguilar*, 2015 WL 6756044, at *3. In the event that time records are not available, "[a]n employee's testimony as to his recollection of the hours he worked and the pay he received, if considered credible by the trier of fact, is sufficient to establish a prima facie case of wages owed." *Lopez v. Lawns 'R' Us*, No. 07-2979, 2008 WL 2227353, at *3 (D. Md. May 23, 2008) (citing *Donovan*, 549 F. Supp. 3d at 485).

Although a dispute over wages owed may exist between employer and employee, that dispute is not "bona fide" as to time worked when an employer destroys or fails to keep time records in violation of the statute. *See Marroquin v. Canales*, 505 F. Supp. 2d 283, 298 (D. Md. 2007). In *Marroquin*, defendant employer either failed to properly keep time records or refused to provide the court with those records. *Id.* Accordingly, the court held that because no bona fide dispute existed as to the wages owed, Plaintiff was entitled to enhanced damages and attorney's fees pursuant to the MWPCL. *Id.*; *accord* Md. Code Ann., Lab. & Empl. § 3-507.2.

IV. CLASS AND COLLECTIVE ACTIONS.

A. COLLECTIVE ACTIONS UNDER THE FLSA

Collective actions under the FLSA are very different from class actions under Rule 23. They are often referred to as opt-in classes, because the members must affirmatively enter the case. By contrast, Rule 23 classes are referred to as "opt-out" classes, because the members are automatically part of the case once the Court grants class certification. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). A FLSA class is developed by obtaining preliminary certification, and then sending out court-approved notices to potential class members, who must sign the notice forms and file them with the court, in order to be part of the case. The process is described in more detail below.

In order to pursue a collective action, you must allege it in the Complaint and you must file a motion for conditional certification. Generally, such a motion should be filed as early in the case as possible. Remember, the filing of a complaint asserting a FLSA collective action does not toll the statute of limitations for future opt-in plaintiffs. The statute of limitations for a particular individual is only tolled once the opt-in form is filed. That is why it is important to get your motion for conditional certification filed early in the case.

Generally, when assessing whether to preliminarily certify a collective action pursuant to the FLSA, district courts in this circuit adhere to a two-stage process: (1) preliminary certification at the first stage; and (2) on motion for decertification filed by Defendants after discovery is completed, a more rigorous review. *See, e.g.*, *Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 566 (D. Md. 2012).

1. Preliminary or "Conditional" Certification

In the first stage, when a plaintiff files a motion for conditional certification, the court makes a threshold determination of whether the plaintiffs have demonstrated that potential members of the collective are similarly situated, such that court-facilitated notice to putative class members would be appropriate. *Id*. To warrant certification at the first stage, a plaintiff need only make a preliminary showing that the proposed members of the collective are "similarly situated" within the meaning of 29 U.S.C. § 216(b). *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 519 (D. Md. 2000) (citations omitted). The determination is made using a fairly lenient standard, and application of that standard typically results in conditional certification of the representative class. *Mendoza v. Mo's Fisherman Exch., Inc.*, No. 15-1427, 2016 WL 3440007, at *12 (D. Md. June 22, 2016); *Robinson v. Empire Equity Grp., Inc.*, No. WDQ-09-1603, 2009 WL 4018560, at *2 (D. Md. 2009). Moreover, "[t]his showing need not include evidence of a stated policy of refusing to pay overtime; 'an adequate factual showing by affidavit . . . may suffice.'" *Mancia v. Mayflower Textile Servs. Co.*, CCB-08-0273, 2008 WL 4735344, at *3 (D. Md. Oct. 14, 2008) (quoting *Marroquin v. Canales*, 236 F.R.D. 257, 260-61 (D. Md. 2006)). Under certain circumstances, even a single affidavit may suffice for conditional certification. *Calder v. GGC-Baltimore, LLC*, No. BPG-12-2350, 2013 WL 3441178, at *2-4 & n.1 (D. Md. July 8, 2013) (granting conditional certification on a single affidavit from named plaintiff which contained inadmissible hearsay); *McFeeley v. Jackson Street Entm't, LLC*, No. DKC-12-1019, 2012 WL 5928902, at *3-6 (D. Md. Nov. 26, 2012), *aff'd*, 825 F.3d at 246 (single declaration from named plaintiff sufficient to support conditional certification).

In the FLSA collective context, "similarly situated" simply means that members of the proposed collective are all victims of a "common policy, scheme, or plan that violated the law."

Butler, 876 F. Supp. 2d at 566 (citing *Mancia*, 2008 WL 4735344, at *3). *See also Essame v. SSC Laurel Operating Co.*, 847 F. Supp. 2d 821, 824 (D. Md. 2012); *Marroquin*, 236 F.R.D. at 260.

To meet this standard, it is not necessary to demonstrate that "potential class members have identical positions." *Mendoza*, 2016 WL 3440007, at *17. *See also Bouthner v. Cleveland Constr., Inc.*, RDB11-0244, 2012 WL 738578, at *4 (D. Md. Mar. 5, 2012). Potential plaintiffs can be similarly situated even though "there are distinctions in their job titles, functions, or pay." *Mendoza*, 2016 WL 3440007, at *17 (citations omitted). *See also Jones v. Fidelity Res., Inc.*, No. RDB-17-1447, 2018 WL 656438, at *3 (D. Md. Feb. 1, 2018) (same); *Giegerich v. Watershed, LLC*, No. CBB-15-1728, 2016 WL 1169948, at *4 (D. Md. Mar. 24, 2016) ("The issues particular to individual plaintiffs, such as differing job titles, rates of pay, or time-keeping methods, are insufficient to defeat certification at this stage in the process."); *Robinson*, 2009 WL 4018560, at *2 ("The class members' positions 'need not be identical, only similar.'") (citations omitted).

The necessary factual showing is a modest one and, at the preliminary stage, the Court does not and cannot do any of the following: (1) weigh the merits of Plaintiff's claims or those of the potential class; (2) resolve factual disputes; or (3) make credibility determinations. *Essame*, 847 F. Supp. 2d at 825; *Camper*, 200 F.R.D. at 520. "[A]rguments about the predominance of individualized inquiries and dissimilarities between plaintiff[s] and other employees are properly raised after the parties have conducted discovery and can present a more detailed factual record for the court to review." *Randolph v. PowerComm Constr., Inc.*, 7 F. Supp. 3d 561, 577 (D. Md. 2014) (quoting *Wlotkowski v. Mich. Bell Tel. Co.*, 267 F.R.D. 213, 219 (E.D. Mich. 2010)). *See also Butler*, 876 F. Supp. 2d at 571 ("[C]redibility determinations are usually inappropriate for the question of conditional certification.").

Where a plaintiff's counsel anticipates that a defendant may argue that individual analyses as to whether the plaintiff and similarly situated persons are exempt from the requirements of the FLSA, it should impress upon the court that such merits-based issues are not to be resolved at the conditional certification stage. *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 772 (D. Md. 2008) ("[F]actual disputes do not negate the appropriateness of court-facilitated notice"); *Alderoty v. Maxim Healthcare Servs., Inc.*, No. TDC-14-2549, 2015 WL 5675527, at *10 (D. Md. Sept. 23, 2015) (rejecting Defendant's argument that determination of whether plaintiffs and putative class members met the requirement for exemption under the FLSA prohibits conditional certification).

In rejecting a defendant's argument that plaintiffs' factual circumstances were dissimilar and should be treated individually instead of collectively in *Essame*, the Court said the following:

> The salient flaw in this argument is that it delves too deeply into the merits of the dispute; such a steep plunge is inappropriate for such an early stage of a FLSA collective action. The crux of the matter is whether Plaintiffs have made a modest factual showing that they were victims of a common policy or scheme that contravenes the FLSA.

Essame, 847 F. Supp. at 826–27. Instead, any arguments that defendants might make about exemptions are properly considered in the second stage, following the conclusion of discovery. *Id*.

The opt-in phase usually has a finite time period of 60-90 days. During that time, a plaintiff's counsel will presumably have accumulated some opt-ins and will have entered into an attorney client relationship with them. That brings us to the next stage which is discovery and a potential motion for decertification from opposing counsel.

2. The Decertification Stage

At the conclusion of discovery, defendants may file a motion to decertify the FLSA collective. If they do, then courts engage in a "more stringent inquiry" than at the provisional

collective certification stage "to determine whether the members of the collective 'similarly situated' in accordance with" the statute. *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. 298, 300 (D. Md. 2007) (Nickerson, J.).

It is not a foregone conclusion that the defendants will file a decertification motion. As a practical matter, Defendants may have a disincentive to do so because proceeding as a collective is generally more efficient and proceeding with separate individual cases. It is important to note that once an employee opts-in, the statute of limitations on his or her FLSA claim is tolled. If the Court decertifies all or part of the FLSA collective, then the members of the proposed collective can proceed with their own separate law suits, which would be very expensive for defendants to litigate and very inefficient to adjudicate. Nonetheless, defendants sometimes file these motions for various strategic reasons.

Notably, at this stage, it is not necessary that plaintiffs meet the commonality or typicality standards of Rule 23. The FLSA collective standard – are the members of the collective similarly situated – is far more lenient and much easier to meet.

The Court has broad discretion in determining whether the case should continue as a collective action after discovery. *Gionfriddo*, 769 F. Supp. 2d at 886. Where a motion to decertify the collective alleges dissimilarity among the plaintiffs, "courts have considered three factors: '(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.'" *Id.* (quoting and adopting *Thiessen v. Gen. Elec. Capital Corp.*, 996 F. Supp. 1071, 1081 (D. Kan. 1998)). *See also Randolph*, 309 F.R.D. at 368 (citing and applying *Rawls* with approval). Where "'issues common to the proposed class that are central to the disposition of the FLSA claims and that such common issues can be substantially adjudicated

without consideration of facts unique or particularized as to each class member," courts are disinclined to decertify a FLSA collective. *Randolph,* 309 F.R.D. at 368 (quoting and adopting *LaFleur v. Dollar Tree Stores, Inc.*, 30 F. Supp. 3d 463, 468 (E.D. Va. 2014)).

a. Factor One -- The Disparate Factual and Employment Settings of the Individual Plaintiffs

Under the first factor, courts look first to the plaintiffs' employment settings. *Randolph,* 309 F.R.D. at 368. This inquiry evaluates the plaintiffs' "job duties, geographic location, supervision, and salary." *Rawls,* 244 F.R.D. at 300. Even where the plaintiffs "had different employment settings because they worked under different contractors for different hours at different locations," where there is countervailing evidence that the plaintiffs all allege "that they all worked for [the same employer], [with the same job title], performing the same job functions," and they are all "subject to a single set of standards" irrespective of each's particular work site, courts do not decertify the collective. *Randolph,* 309 F.R.D. at 368 (citing *Rawls,* 244 F.R.D. at 300). Indeed, even where plaintiffs perform "similar," not identical "services," courts find that they are similarly situated. *Rawls,* 244 F.R.D. at 300.

Next, courts evaluate the factual settings of each plaintiff's employment. Where plaintiffs were "all classified as independent contractors by [the defendant], and were all paid hourly," and all "challenge [the defendant's]" unlawful failure to pay overtime, courts have declined to decertify the collective, even when they hold different positions or perform different duties. *See Randolph,* 309 F.R.D. at 368 (citing *Rawls*, 244 F.R.D. at 300). Because "differences in hours worked" are "inevitable," they "do not preclude a finding of a similarly situated collective action." *Id.* (citing *LaFleur,* 30 F. Supp. 3d at 468). *See also Romero v. Mountaire Farms, Inc.,* 796 F. Supp. 2d 700, 705 (E.D.N.C. 2011) (same). The strongest evidence in support of this first factor exists where plaintiffs "provide[] evidence of a company-wide policy which may violate

the FLSA." *Rawls*, 244 F.R.D. at 300. *See also Marroquin*, 236 F.R.D. at 260 ("A group of potential plaintiffs are 'similarly situated' when they together were victims of a common policy or scheme or plan that violated the law."). Indeed, when plaintiffs show "that certain opt-in plaintiffs will be able to offer representative about an employer's policies and practices" because representative testimony is "often used in FLSA actions." *LaFleur*, 30 F. Supp. 3d at 473 (citing with approval *S. New Eng. Telecomm.*, 121 F.3d at 68) ("[D]epending on the nature of the facts to be proved, a very small sample of representational evidence can suffice."). *See also Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) ("[T]he adequacy of representative testimony necessarily will be determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony.").

b. Factor Two – Commonality of Defenses

The second factor is an inquiry into "the various defenses available which appear to be individual to each plaintiff." *Rawls*, 244 F.R.D. at 300. The issue is "'whether potential defenses pertain to the plaintiff class or whether the potential defenses require proof of individualized facts at trial.'" *Randolph*, 309 F.R.D. at 369 (quoting *Rawls*, 244 F.R.D. at 300). Here, the defendant must show that its factual defenses would require "'substantial individualized determinations' such that a collective action would not lead to efficient adjudication." *Id.* (quoting *Gionfriddo*, 769 F. Supp. 2d at 887–88). Thus, where defendants advance mere "procedural defenses," including, *inter alia*, that some of the plaintiffs are "time-barred," missed the opt-in deadline, failed to verify interrogatories, or failed to provide damages calculations, such defenses are generally insufficient to warrant decertification because their individual determination is not "substantial." *Id.*

The most critical counter-argument for plaintiffs to make is that the collective vehicle begets judicial "efficiency" by "grouping 'common issues of law and fact arising from the same

alleged discriminatory activity' into a single proceeding." *Purdham v. Fairfax Cty. Pub. Schs.*, 629 F. Supp. 2d 544, 549 (E.D. Va. 2009) (quoting *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). For example, where plaintiffs demonstrate that "representative testimony will adequately present the claims of all opt-in plaintiffs and will allow [the defendant] to 'dispute allegations made by claimants or to raise substantive defenses,'" adjudicating collective liability is more suitable than individual determinations. *LaFleur*, 30 F. Supp. 3d at 473 (quoting with approval *Gates v. Rohm & Hass Co.*, 655 F.3d 255, 266 (3d Cir. 2011)). As to damages, where issues that would seemingly "differentiate plaintiffs by when and how they performed off-the-clock work" is better established with representative testimony than with individualized evidence. *Id. See also Baden-Winterwood v. Life Time Fitness, Inc.*, 729 F. Supp. 2d 965 (S.D. Ohio 2010) (Whether representative testimony is proper to prove damages in a FLSA collective action turns on whether the court can reasonably conclude that, in the totality of the record, there is sufficient evidence to show the amount and extent of damages). Even where the individualized defense factor weighs in favor of individual action, courts have maintained collective actions by "dividing the Plaintiff class" into different groups, such that there is no substantial individuality within each group. *See, e.g.*, *Rawls*, 244 F.R.D. at 302 (dividing the collective into two distinct groups based on their work site).

c. Factor Three – Fairness and Procedural Considerations

Under the fairness and procedural considerations factor, courts examine "the primary objectives" of FLSA collective actions generally. *Rawls*, 244 F.R.D. at 302. Specifically, those objectives are "'(1) to lower costs to the plaintiffs through the pooling of resources; . . . (2) to limit the controversy to one proceeding which efficiently resolves common issues of law and fact that arose from the same alleged activity[; and (3)] whether [the court] can coherently

manage the class in a manner that will not prejudice any party.'" *Id.* (quoting and adopting *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000)). These factors can be stated as: (1) cost of the litigation; (2) judicial efficiency; and (3) manageability.

First, where "[e]ach individual plaintiff would be unlikely to pursue his or her claim alone due to the costs involved relative to the damages sought," courts find that the cost factor weighs in favor of maintaining a collective action. *LaFleur*, 30 F. Supp. 3d at 475 (citing with approval *Russell v. Ill. Bell Tel. Co., Inc.*, 721 F. Supp. 2d 804, 823 (N.D. Ill. 2010) ("Because of the modest amounts [of recovery] likely involved, many of the plaintiffs would be unable to afford the costs of pursuing their claims individually."). Second, courts consider it "'an extreme step to dismiss a suit simply by decertifying a class, where a potentially proper class exists and can be easily created.'" *Id.* (quoting *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984)). *See also Rawls*, 244 F.R.D. at 302 (Where plaintiffs establish the "commonality" factor discussed in Section A *supra*, it is presumed that determination of the issues collectively "would allow the litigation to proceed efficiently."). The third factor tends to collapse into the first two factors: if the claims are common, the defenses are common, and it would be more efficient to adjudicate the claims collectively rather than individually, the collective action must necessarily be manageable. Thus, where a defendant "contends that if th[e] action is not decertified, it will need to prepare mini-trials for each" plaintiff, courts have summarily rejected the argument, citing to the "common issue[s]" factor. *Randolph*, 309 F.R.D. at 369. *See also Rawls*, 244 F.R.D. at 302 (same); *LaFleur*, 30 F. Supp. 3d at 475.

B. RULE 23 CLASS ACTIONS

While wage and hour litigants cannot bring a Rule 23 action under the FLSA, they are free to do so in state or federal court under the MWHL and the MWPCL because Maryland law permits

Rule 23-type class actions. *See* Md. Rule 2-231. There are advantages and disadvantages to bringing Rule 23 actions in wage cases. First, it significantly broadens that number of affected employees and it overcomes the problem in collective actions that present employees or those who fear retaliation in an industry often do not opt-in. On the other side of the coin, meeting the requirements necessary to get a Rule 23 class certified are far more onerous.

When litigants bring MWHL an MWPCL claims in federal court alongside FLSA claims, they may thus exercise supplemental jurisdiction the state law claims. *Reed v. Code 3 Sec. & Prot. Servs., Inc.*, No. AW-09-1162, 2009 WL 5177283, at *3 (D. Md. Dec. 18, 2009). While federal courts may decline to exercise supplemental jurisdiction in their discretion, the Fourth Circuit has long presumed that where a plaintiff brings additional state claims that arise out of "a common nucleus of operative fact," it is "expected" that the claims will be tried "in one judicial proceeding." *White v. Cty. of Newberry*, 985 F.2d 168, 171 (4th Cir. 1993) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1996). *See also* 28 U.S.C. § 1367(a) (same).

Once a federal court accepts supplemental jurisdiction of a properly pled claim under the MWHL or the MWPCL, plaintiffs can move to certify a class under Fed. R. Civ. P. 23. For pleadings purposes, two sections of the Rule are relevant: (a) and (b). Rule 23(a) lists the prerequisites to certify a class: a moving plaintiff must establish each one. Rule 23(b) lists the "types" of class action suits: a moving plaintiff need establish only one "type." The "Rule 23 class action device" is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). There is a presumption against class certification, requiring plaintiffs "to justify a departure from" the individual litigation rule. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

Generally, in wage cases, plaintiffs typically proceed under Rule 23 (b)(3), which provides as follows:

> (b) . . . A class action may be maintained if Rule 23(a) is satisfied and if:
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > **(D)** the likely difficulties in managing a class action.

Id. Rule 23 (a) imposes four requirements on the prospective class: (1) numerosity; (2) common questions of law and fact; (3) that claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class. *Id.* In the Fourth Circuit, a moving plaintiff must also clear "an implicit threshold requirement that [(5)] the members of a proposed class will be 'readily identifiable.'" *Adair*, 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). Plaintiffs who are seeking class certification must plead all elements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation omitted) (emphasis in original).

In addition, in the Motion to Certify Class itself, a moving plaintiff "must also satisfy *through evidentiary proof* at least one of the provisions of Rule 23(b)." *Id.* (emphasis in original). Rule 23(b) establishes the cognizable theories of a class action suit, addressed below. The Supreme Court has repeatedly instructed that it "may be necessary for the [trial] court to probe behind the pleadings before coming to rest on the certification question" and that class certification is proper

"only if 'the trial court is satisfied, after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied.'" *Dukes*, 564 U.S. at 350–51 (quoting *Gen. Tele. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)).

Still, courts are prohibited from "engag[ing] in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) (distinguishing *Dukes*, 564 U.S. at 373 n.6). A court's decision whether to certify a class will not be disturbed unless it materially misapplies the requirements of Rule 23. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003).

The various factors listed in Rule 23 (a) are discussed in more detail below.

1. Rule 23(a) Threshold Factors

a. Factor One: Numerosity

Rule 23(a)(1) requires that the proposed class be so large as to make joinder impracticable. *See, e.g., George v. Baltimore City Pub. Schs.*, 117 F.R.D. 368, 370 (D. Md. 1987). Absolute numbers do not drive the inquiry. *See, e.g., Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). Indeed, the fourth circuit has found that a class of as few as 18 members was sufficient to meet the numerosity requirement. *See Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). In this District, it is firmly established that classes consisting of as few as 25 to 30 members raise the presumption that joinder will be impractical. *See Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 477 (D. Md. 2014); *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 458 (D. Md. 2014); *Stanley v. Cent. Garden & Pet Corp.*, 891 F.Supp.2d 757, 770 (D. Md. 2012); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1991);

Dameron v. Sinai Hosp. of Balt., Inc., 595 F. Supp. 1404, 1408 (D. Md. 1984), *aff'd in part and rev'd in part on other grounds*, 815 F.2d 975 (4th Cir.1987).

b. Commonality

Rule 23(a)(2) requires a plaintiff to show that "there are questions of law or fact common to the class." The Supreme Court has recognized that the commonality, typicality, and adequacy of representation prongs "tend to merge." The commonality and typicality prongs "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13. Those prongs "therefore also tend to merge with the adequacy-of-representation requirement." *Id.* Still, each of these prongs is distinct, and each should be addressed and analyzed in a Motion to Certify Class.

As to commonality, in *Dukes*, the Supreme Court explained that "even a single common question" is sufficient to establish this element. 564 U.S. at 359 (alterations deleted). *Accord Adair*, 764 F.3d at 366. This "single question," however, "must be of such a nature that its determination 'will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Adair*, 764 F.3d at 360 (quoting *Dukes*, 564 U.S. at 350). Thus, the language of Rule 23(a)(2) is misleading. "What matters to class certification is not the raising of common questions . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

c. Typicality

Rule 23(a)(3)'s typicality prong address whether the "representative parties" are able to represent the class. *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). A class

representative's claims and those of other members need not be "perfectly identical or perfectly aligned." *Id.* at 467. Still, the class representative's pursuit of his or her own interests "must simultaneously tend to advance the interests of the absent class members." *Id.* at 466. The analysis requires courts to compare "the [named] plaintiffs' claims or defenses with those of the absent class members" and entails (1) a review of the *prima facie* elements of the plaintiffs' case; (2) a review of the facts upon which the named plaintiffs would rely to prove the *prima facie* elements; and (3) a determination of the extent to which "those facts would also prove the claims of the absent class members." *Id.* at 467. *See also Soutter v. Equifax Info. Servs., LLC*, 498 Fed. App'x 260 (4th Cir. 2012) (same).

d. Adequacy of Representation

Rule 23(a)(4)'s adequacy of representation prong is two-fold. It is satisfied where (1) the named class representative has a sufficient interest in the case to represent all class members adequately and where (2) the attorneys representing the class are qualified and competent to conduct the litigation. *See Windsor*, 521 U.S. at 625. At the class certification stage, defendants bear the burden to demonstrate the inadequacy of plaintiffs' counsel or of the class representative. *See, e.g.*, *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982), *cert. denied*, 459 U.S. 880 (1982). Specifically, where defendants challenge class certification on adequacy grounds, their challenge "must be 'genuine' and go to the heart of the controversy." *German v. Fed. Home Loan Mortg. Corp.*, 168 F.R.D. 145, 154 (S.D.N.Y.) (quoting *Gates v. Dalton*, 67 F.R.D. 621, 630 (E.D.N.Y. 1975)).

Thus, there is a "general rule . . . that [a class representative's] unrelated unethical or even criminal conduct is not sufficient to support a finding of inadequacy." *Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 315 (N.D. Ohio 2009). "For an assault on the class representative's credibility

to succeed, [the defendant] must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) (quoting *Dubin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990)).

e. Identifiability

Finally, a plaintiff must demonstrate that the proposed class is "identifiable." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *abrogated on other grounds by Windsor*, 521 U.S. 591 (1997). This requirement is known in other Circuits as "ascertainability." *See, e.g.*, *Marcus v. BMW of N. Am., LLC*, 687 F.3d, 583, 593 (3d Cir. 2012). At bottom, a court must be able to identify the class members in reference to objective criteria. *See Adair*, 764 F.3d at 358. Plaintiffs are not required to identify every conceivable class member at the time of certification, but where class members cannot be identified "'without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate.'" *Id.* (quoting and adopting *Marcus*, 687 F.3d at 593).

Thus, to demonstrate that a proposed class is identifiable, the moving plaintiff must establish that (1) it is administratively feasible for the parties to determine whether a particular individual is a member of the class; (2) class members will be defined by objective criteria; (3) sufficient trial management tools exist to ease the process of identifying class members. *See id.* at 359–60. For good measure, the moving plaintiff should also offer alternative proposed class definitions so that the court may determine whether such alternatives would "avoid or mitigate" and administrative challenges presented in identifying class members. *Id.* at 360.

2. Rule 23(b)(3) Factors

In order to meet the requirements of Rule 23(b)(3), the plaintiff must convince the court that: "common questions of law or fact common to the class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods . . . for adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These are known as the "predominance" and "superiority" requirements. And, in the Fourth Circuit, the party seeking class certification must establish "through evidentiary proof" that each of these elements is met. *Adair*, 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). The Rule lists four "matters pertinent" to the analysis, but these "matters" are not dispositive.

a. Predominance

Rule 23(b)(3) actions are "framed for situations in which class-action treatment is not clearly called for" but "may nevertheless be convenient and desirable." *Windsor*, 521 U.S. at 615. Even though FLSA and MWPCL claims necessarily require an individualized inquiry as to each class member's damages, "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys . . . predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations." *Gunnells*, 348 F.3d at 427–28. Accordingly, where "common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied." *Id.* at 428 (internal quotation and citation omitted).

b. Superiority

The more difficult prong of Rule 23(b)(3) is the "superiority" requirement. Still, the Fourth Circuit has "expressly 'embraced the view that mass tort action for damages," like FLSA and MWPCL violations, "may be appropriate for class action, either partially or in whole.'" *Gunnells*,

348 F.3d at 424 (quoting *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1992)).

The Rule lists four nonexclusive factors to ascertain whether a class action is superior to myriad individual actions. Those factors are: (1) each class member's interest in individually controlling his own arguments; (2) whether and to what extent any litigation concerning the claims has already begun by or against class members; (3) whether the particular forum is desirable to the parties; and (4) the likelihood of administrative difficulties. Fed. R. Civ. P. 23(b)(3)(A)–(D).

The first factor is satisfied when the class members do not show a great deal of interest in individual litigation. Where, for example, no other member of the proposed class has commenced litigation, there is a strong indication that there is no risk to such a class member in certifying the class in his or her absence. *Accord Gunnells*, 348 F.3d at 425; *see also Cent. Wesleyan*, 6 F.3d at 183–85 ("Significant economies may be achieved by relieving [a defendant] of the need to prove over and over again" the elements of its defense).

The second factor is satisfied even where a defendant has previously settled with members of the class or has otherwise been involved in litigation with members of the class. *Cf. Cent. Wesleyan*, 6 F.3d at 185. Indeed, because class certifications are likely to induce settlement discussions, and because "[c]ourts should foster settlement in order to advantage the parties and promote great saving in judicial time and services," a fact scenario in which a defendant is in the midst of litigating with other class members cuts in favor of, not against, Rule 23(b)(3) class certifications. *Id.* at 186 (citing *In re A.H. Robins, Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989), *abrogated on other grounds by Windsor*, 521 U.S. at 591).

The third factor – the desirability of the forum – is rarely an issue, so long as there are otherwise no jurisdictional impediments. *Cent. Wesleyan*, 6 F.3d at 184. Since FLSA claims are

universally "federal questions" under 28 U.S.C. § 1331, there is often no dispute that this requirement is satisfied.

Most Rule 23(b)(3) class certification litigation turns on the fourth factor – whether there are likely to be difficulties "in the management of a class action." Fed. R. Civ. P. 23(b)(3)(D). Some Circuits, such as the Eleventh Circuit, have a strong presumption against denying a class certification for these reasons. *See, e.g.*, *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 363 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1443 (11th Cir. 1997). While the Fourth Circuit has not explicitly articulated this presumption, it has explained that even where a potential class action presents "the possible need for individualized damage determinations" and "a 'daunting number of individual issues' necessary to 'establish liability,'" including "with respect to differently positioned defendants, and the necessity of application of the laws of different jurisdictions." *Gunnells*, 348 F.3d at 426 (quoting *Cent. Wesleyan*, 6 F.3d at 188–89).

CONCLUSION

We hope that this helps and good luck with your mission of fighting for the rights of employees who are victims of wage theft.