THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
November 9, 2011

Recent Developments in Wage-Hour Class Actions and Related Strategic Considerations

I. THE HYBRID ACTION: RECENT CIRCUIT COURT DECISIONS ON THE COMPATIBILITY OF FLSA COLLECTIVE ACTIONS AND RULE 23 STATE-LAW CLASS ACTIONS

A. Recent Circuit Court Decisions Allowing Hybrid FLSA/Rule 23 Actions

1. *Shahriar v. Smith & Wollensky*, --- F.3d ----, 2011 WL 4436284 (2d Cir. 2011)

a. Plaintiff waiters filed suit against defendant employer alleging violations of minimum wage and overtime provisions of the FLSA, as well as New York Labor Law tip-sharing and overtime provisions. *Id.* at *1. The district court granted plaintiffs' motion for Rule 23 class certification, exercising supplemental jurisdiction over plaintiffs' state-law claims. *Id.* at *4. On appeal, defendant challenged the grant of class certification and asserted that the court abused its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims. *Id.* at *5. With regard to supplemental jurisdiction, defendant argued that the Congressional intent behind the FLSA's opt-in requirement was undermined by plaintiffs' hybrid action "because those employees who do not opt-in to the FLSA collective action would very well have their FLSA cause of action extinguished as their FLSA claims will be adjudicated by the dual (state) action." *Id.* at *7. In its analysis, the Court first determined that supplemental jurisdiction was appropriate pursuant to 28 U.S.C. § 1367, where the federal and state claims "form part of the same case or controversy," and the state claims do not raise complicated or novel issues of law, and do not substantially predominate over the federal claims. *Id.* at *8-9. Further, the Court found no compelling reason to decline supplemental jurisdiction where the language of the FLSA does not prevent the exercise of supplemental jurisdiction, its "savings clause" states that the FLSA does not excuse noncompliance with state law, and the legislative history provides no support for precluding the hybrid action. *Id.* at *9-10. The Second Circuit joined the Seventh, Ninth and D.C. Circuits in holding that "supplemental jurisdiction is appropriate over state labor law class claims in an action where the court has federal question jurisdiction over FLSA claims in a collective action." *Id.* at *10.

2. *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 963-74 (7th Cir. 2011)

   a. Plaintiffs, former restaurant employees, brought suit against employer alleging violations of the FLSA, Illinois Minimum Wage Law, and Illinois Wage Payment and Collection Act. *Id.* at 974. The plaintiffs simultaneously moved for conditional certification of an FLSA collective action as well as Rule 23(b)(3) class certification. *Id.* at 974. The district court granted the motion for conditional certification and denied the motion for class certification based on the "clear incompatibility between the 'opt out' nature of a Rule 23 action and the 'opt-in' nature of [an FLSA collective] action." *Id.* at 975. On appeal, the Court held "that there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA." *Id.* a 973-74. The text of the FLSA does not preclude state-law actions and the savings clause preserves them. *Id.* at 977.

3. *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010), *vacated on other grounds*, No. 10-1202, --- S. Ct. ---- (U.S. Oct. 3, 2011)

   a. Plaintiff newspaper reporters sued employer alleging violations of the FLSA and California Labor Code. *Id.* at 748-49. The district court certified the FLSA claim as a collective action and certified the state-law claim as a class action under Rule 23(b)(2). *Id.* at 749. On appeal, defendant challenged, *inter alia*, the district court's Rule 23(b)(2) certification and exercise of supplemental jurisdiction over the state-law claims. *Id.* at 753, 760-61. The Ninth Circuit held that it was within the district court's discretion to exercise supplemental jurisdiction over the state-law class action where the state-law claims did not pose novel questions of state law, were closely related to the FLSA claim, and, though the number of claimants and amount of potential damages in the state-law claims might be higher due to the opt-out nature of the Rule 23 action, the state-law claims did not predominate over the federal claims. *Id.* at 761-62.

4. *Lindsay v. Gov't Employees Inc. Co.*, 448 F.3d 416 (D.C. Cir. 2006)

   a. Plaintiff auto damage adjusters sued employer insurance company alleging violations of the FLSA and New York State Minimum Wage Act. *Id.* at 418. The plaintiffs sought certification of an FLSA collective action, as well as certification of a Rule 23 class action. *Id.* The district court denied certification of the state-law class action on the ground that the FLSA's opt-in requirement precluded supplemental jurisdiction over Rule 23 class members who did not opt-in to the FLSA action. *Id.* The D.C. Circuit

disagreed, holding that the collective action provision of the FLSA does not prohibit the exercise of supplemental jurisdiction over a state-law class action which derives from "a common nucleus of operative fact" such that the FLSA and state-law claims comprise "one constitutional case." *Id.* a 421-25.

B. Circuit Court Decisions Denying Hybrid Actions

1. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003)

a. Plaintiffs, current and former employees at a chicken-processing plant, brought an action against their employer alleging FLSA and Pennsylvania Wage Payment & Collection Law violations. *Id.* at 304. The district court granted the plaintiffs' motion for FLSA conditional certification, as well as their motion for class certification pursuant to Rule 23. *Id.* at 304-05. On appeal, the employer challenged the District Court's exercise of supplemental jurisdiction over the state-law claims. *Id.* at 305. The Third Circuit, in its opinion, noted that "the disparity in numbers of similarly situated plaintiffs" – in that case, 447 opt-in and 4,100 Rule 23 class members – "may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." *Id.* at 311. The Third Circuit declined supplemental jurisdiction over the state-law class claims because novel and complex state contract issues were involved. *Id.* at 312.

b. Note that, in *Shahriar*, the Second Circuit agreed with the Seventh Circuit that *De Asencio* was "a fact-specific application of well-established rules, not a rigid rule about the use of supplemental jurisdiction in cases combining an FLSA count with a state-law class action." 2011 WL 4436284, at *11 (quoting *Ervin*, 632 F.3d at 981).

2. Third Circuit to Revisit the Hybrid Issue in *Fisher v. Rite Aid Corp.*

a. *Fisher v. Rite Aid Corp.*, 764 F. Supp. 2d 700 (M.D. Pa. 2011)

(1) Plaintiff assistant store manager initiated action in the Middle District of Pennsylvania against employer alleging that he and other store managers were misclassified as exempt employees in violation of the Maryland Wage and Hour Law. *Id.* at 703. The plaintiff had previously consented to be a party plaintiff in a then-pending action in the Middle District of Pennsylvania alleging misclassification in violation of the FLSA. *Id.* Shortly

thereafter, he filed in the District of Maryland a putative class action alleging violations of the Maryland Wage and Hour Law. *Id.* The Maryland action was dismissed because the Maryland Wage and Hour Law does not govern overtime pay claims, and plaintiff's claims were barred by the first-to-file rule because the Maryland action was substantially similar to the pending FLSA action. *Id.* Only after the dismissal of the Maryland claim did the plaintiff file his Pennsylvania action. *Id.* at 703. In the Pennsylvania action, the defendant filed a motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), arguing that: (1) the action was duplicative of the pending FLSA action to which plaintiff was a party; and (2) the Pennsylvania Rule 23 class action was incompatible with the FLSA action. *Id.* Plaintiff countered that the Maryland court dismissed the action so that the Pennsylvania court could decide both the FLSA and Rule 23 actions. *Id.* at 704. The Pennsylvania district court affirmed its prior ruling that "a Section 216(b) collective action and a Rule 23 class action are 'inherently incompatible,'" and "[t]o allow a section 216(b) action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress's intent in crafting Section 216(b) [to avoid representative action] and eviscerate the purpose of Section 216(b)'s opt-in requirement." *Id.* at 705 (citations omitted). The Court held that this incompatibility extends to separately filed actions. *Id.* at 705-06.

b. *Fisher v. Rite Aid Corp., et al.*, No. 11-1685 (3d Cir. Mar. 17, 2011)

(1) The matter is currently on appeal, pending before the Third Circuit.

(2) Oral argument is scheduled for January 13, 2012.

(3) The United States Department of Labor has submitted an *amicus brief* in support of the appellant.

II. EXEMPTION OF PHARMACEUTICAL SALES REPRESENTATIVES

A. Circuit Split on Exemption Issue

1. PSRs not exempt in the Second Circuit

a. *In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 149 (2d Cir. 2010)

(1) Plaintiffs, current and former PSRs, appealed from district court judgment granting defendant-employer's motion for summary judgment on the ground that plaintiffs are exempt outside salespeople and/or administrative employees. *Id.* at 143. The Secretary of Labor participated as *amicus curiae*, taking the position that PSRs do not fall within the FLSA's administrative or outside sales exemption. *Id.* at 149. The Second Circuit gave "controlling deference" to the Secretary's interpretation of her own regulation, finding that the PSRs in that case were misclassified as exempt. *Id.* According to the Court, it is undisputed that PSRs do not sell pharmaceuticals to wholesalers or pharmacies, but rather promote the drugs to physicians, and "a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale." *Id.* at 153. "The physician is of course an essential step in the path that leads to the ultimate sale of a Novartis product to an end user; a patient cannot purchase the product from a pharmacy without a prescription, and it is the physician who must be persuaded that a particular Novartis drug may appropriately be prescribed for a particular patient. But it is reasonable to view what occurs between the physicians and the Reps as less than a 'sale.'" *Id.* at 154. Further, the Court held that the PSRs did not satisfy the administrative exemption because they fail to meet the "discretion and independent judgment" prong. Specifically, the Court concluded that the PSRs did not satisfy this prong because there was no evidence that PSRs "have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact."

2. PSRs exempt in the Ninth and Third Circuits

a. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 400-401 (9th Cir. 2011)

(1) Plaintiff PSRs brought suit against their employer challenging their exempt status as outside salespeople

under the FLSA. *Id.* at 385. The district court granted defendant's motion for summary judgment and plaintiffs appealed. *Id.* The Secretary of Labor appeared as *amicus curiae*, supporting plaintiffs, and taking the position that they are not exempt employees. *Id.* at 391. The Court analyzed the case "within the framework of how [defendant] sells its 'Rx only' products to an 'ultimate user.' A key, undisputed fact underlying [the Court's] analysis is that the ultimate user—the patient—cannot purchase a prescription drug without first obtaining a physician's authorization." *Id.* The Ninth Circuit concluded that the Secretary's "about face" interpretation of the regulation, "expressed only in ad hoc *amicus* filings, is not enough to overcome decades of DOL nonfeasance and the consistent message to employers" that PSRs are exempt salespeople. *Id.* at 400, 401. When taking into account the "heavily regulated" nature of the pharmaceutical industry, PSRs "share many more similarities than differences with their colleagues in other sales fields" in that "PSRs are driven by their own ambition and rewarded with commissions when their efforts generate new sales[,] . . . receive their commissions in lieu of overtime and enjoy a largely autonomous work-life outside of an office[.]" *Id.* at 400-01. The Court held that PSRs are indeed exempt outside sales employees. *Id.* at 401.

b. *Smith v. Johnson and Johnson*, 593 F.3d 280 (3d Cir. 2010)

(1) Plaintiff PSR filed an action against employer challenging her exempt status under the FLSA. *Id.* at 283. The defendant moved for summary judgment arguing that plaintiff was exempt either as an outside salesperson or an administrative employee. *Id.* The district court held that the outside salesperson exemption did not apply, but that plaintiff was an exempt administrative employee. *Id.* The Third Circuit affirmed, holding that the administrative exemption applied to plaintiff because her position required "independent and managerial qualities," and she "executed nearly all of her duties without direct oversight." *Id.* at 285.

c. *Baum v. AstraZeneca LP*, 372 Fed. Appx. 246 (3d Cir. 2010)

(1) Plaintiff, a former PSR, brought an action against her former employer alleging violation of Pennsylvania's Minimum Wage Act based on the employer's failure to pay her for overtime work. *Id.* at 247. Defendant filed a

motion for summary judgment, and the district court found that plaintiff was an outside salesperson exempt from the overtime requirements of Pennsylvania law. *Id.* at 246-47. The Third Circuit affirmed on a different ground, finding plaintiff to be an exempt administrative employee. *Id.* at 248. Noting the substantial parallel between the Pennsylvania law and the FLSA, the Court looked to federal law regarding the FLSA for guidance in applying the Pennsylvania exemption. *Id.* at n.4. Plaintiff's promotional activities "were directly related to [defendant's] general operations" and her work required the exercise of discretion and independent judgment, thereby qualifying her for the administrative exemption. *Id.* at 248-49 (citation and quotations omitted).

3. Will the Supreme Court resolve the split?

a. *Christopher v. SmithKline Beecham, Corp.*, No. 11-204 (U.S. Aug. 17, 2011)

(1) On August 12, 2011, plaintiff-appellant filed a petition for a *writ of certiorari* before the Supreme Court. On October 17, 2011, defendant-appellee filed its response, taking the position that *certiorari* should be *granted* due to the confusion and uncertainty caused by the circuit split between *Christopher* and *Novartis* and its financial implications to the pharmaceutical industry as a whole.

III. *DUKES* AND ITS PROGENY

A. *Dukes v. Wal-Mart Stores, Inc.*, 222 F. R. D. 137, 188 (N.D. Cal. 2004)

1. The case was filed in the Northern District of California in June 2001. The female plaintiffs, current and former Wal-Mart employees, filed their complaint on behalf of themselves and others similarly situated, alleging that Wal-Mart discriminated against them on the basis of their sex by denying them equal pay and promotions. The Plaintiffs sought injunctive relief, including posting, training and a prohibition on sex discrimination. They also sought monetary damages in the form of back pay, and punitive damages (cap of $300,000 per person). The district court certified the following class: "All women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices." *Id.* at 188. This was a total of 1.5-2 million women or more. *Id.* at 142. According to the district court, a "common feature" was that "in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by

store or district level managers" and this "provides a wide enough conduit for gender bias to potentially seep into the decision." *Id.* at 153. The District Court held that "the predominance test turns on the primary goal of the litigation, not the potential size of a punitive damage award." *Id.* at 171. The Court examined plaintiffs' own affidavits to determine whether injunctive relief was their "primary goal." *Id.* In her declaration, Betty Dukes stated: "My primary goal [in this litigation] is to ensure that the employment practices at Wal-Mart which hinder the progress of women wishing to enter management be changed to ensure fair and equitable treatment of female employees, and to ensure women receive equal pay." *Id.* (quoting Dukes Decl. ¶ 20). The district found that the named class representatives "affirm[ed] that their central motivation for participating in this action [was] to improve opportunities for women at Wal-Mart" and the inclusion of claims for punitive damages did not preclude class certification under Rule 23(b)(2) because the damages did not predominate. *Id.*

B. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 612 (9th Cir. 2010)

1. On appeal, Wal-Mart contended that the district court erred by, *inter alia*, holding that the class met the commonality and typicality requirements of Rule 23(a), and failing to recognize that claims for monetary relief predominated claims for injunctive relief. *Id.* at 579. The Ninth Circuit affirmed class certification, stating that: "Evidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory." *Id.* at 612. The Court also held that "[e]ven though individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices-e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping-the district court did not abuse its discretion by finding that their claims are sufficiently typical to satisfy Rule 23(a)(3)." *Id.* at 613. The Ninth Circuit further found that: "[T]he predominance test turns on the primary goal and nature of the litigation-not the theoretical or possible size of the total damages award. A comparison between the amount of monetary damages available for each plaintiff and the importance of injunctive and declaratory relief for each is far more relevant to establishing predominance than the total size of a potential monetary award for the class as a whole." *Id.* 603 F.3d at 612.

C. *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2557 (2011)

1. Issues:

a. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances.

b. Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).

2. Oral Argument was held on March 29, 2011, and the Court issued its opinion on June 20, 2011.

3. Justice Scalia, writing for the majority, noted that "the members of the class . . . held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit."

On the first issue – whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) – the Court reversed the Ninth Circuit 9 to 0: "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 2557 (emphasis in original).

On the second issue – whether the Rule 23(a) factors were satisfied – the Supreme Court reversed the Ninth Circuit 5 to 4: "The crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.' Rule 23(a)(2). That language is easy to misread, since any competently crafted class complaint literally raises common 'questions.'" *Id.* at 2550-551 (citations omitted). "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551 (citation omitted). Plaintiffs must "demonstrate that the class members have suffered the same injury" not "merely that they have all suffered a violation of the same provision of law." *Id.* at 2551. An alleged policy of "allowing discretion by local supervisors over employment matters" was insufficient to establish commonality where plaintiffs had "not identified a common mode of exercising discretion that pervades the entire company." *Id.* at 2554-55.

D. *Dukes's* Progeny

1. *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 753-55 (9th Cir. 2010), *vacated*, --- S. Ct. ----, 2011 WL 4529957 (Oct. 3, 2011)

   a. Plaintiff newspaper reporters sued their employer seeking allegedly unpaid overtime under the FLSA and California Labor Code. *Id.* at 748-49. The district court certified the FLSA claim as a collective action and certified a state-law class action under Rule 23(b)(2). *Id.* at 749. At trial, Plaintiffs won a verdict of $7.7 million. On appeal, defendant challenged, *inter alia*, the district court's Rule 23(b)(2) certification and supplemental jurisdiction over the state-law claims. *Id.* at 753, 760-61. The Ninth Circuit held that it was within the district court's discretion to exercise supplemental jurisdiction over the state-law class action where the state law claims did not pose novel questions of state law, were closely related to the FLSA claim, and, though the number of claimants and amount of potential damages in the state-law claims might be higher due to the opt-out nature of the Rule 23 action, the state law claims did not predominate over the federal claims. *Id.* at 761-62. The Ninth Circuit affirmed the district court's certification of a Rule 23(b)(2) class that included claims for monetary relief. *Id.* at 754. It found that monetary relief did not predominate where plaintiffs sought to enjoin allegedly injurious employment policies. Further the Court concluded that claims for money and injunctive relief were "closely related." *Id.*

2. *Chinese Daily News, Inc. v. Wang, Lynn, et al.*, --- S. Ct. ----, 2011 WL 4529957 (Oct. 3, 2011)

   a. On October 3, 2011, the Supreme Court granted a petition for a *writ of certiorari*. In its two-sentence opinion, the Court vacated the judgment of the Ninth Circuit awarding $7.7 million to California employees alleging wage-and-hour class claims, and remanded the case to the Ninth Circuit in light of the Court's recent holding in *Dukes*, 131 S. Ct. 2541.

3. *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252-CRB, Dkt No. 767 (N.D. Cal. Oct. 27, 2011)

   a. On October 27, 2011, plaintiffs in *Dukes* filed a Fourth Amended Complaint in the Northern District of California. Plaintiffs' claims of sex discrimination based on pay and promotion are limited to Wal-Mart's California stores. Plaintiffs allege that more than 90,000 women, current and former employees, have been affected by Wal-Mart's discriminatory practices. Plaintiffs' attorneys intend to file similar actions in states across the country.

E. Application of *Wal-Mart v. Dukes* to FLSA Conditional Certification

1. *Ruiz v. Serco, Inc.*, No. 10-cv-394-bbc, Dkt. No. 103, 2011 U.S. Dist. LEXIS 91215 (W.D. Wis. Aug. 5, 2011)

   a. Plaintiffs filed an FLSA action against their employer, challenging their exempt status. Individual managers, with the guidance of the human resource department's labor codes, would assign employees their exempt or non-exempt status. Although *Dukes* addressed Rule 23 class certification, the Court found it to be "instructive" in holding that "it is not enough for plaintiffs to raise a common question as to whether they and other employees with some similar job duties were properly classified as exempt. . . Rather, the answer to that question must be susceptible to proof that can be extrapolated to the class plaintiffs seek to represent. In this case, it would be difficult to generate common answers in light of the individualized inquiries arising from the wide variations in duties, experience, responsibility, discretion and supervisors on the part of the potential class members." Again, citing to *Dukes*, the Court explained that "a company-wide policy giving discretion to local managers or program directors is not a 'policy' capable of evaluation on a class-wide basis." Plaintiffs' motion for conditional certification was denied.

2. *MacGregor v. Farmers Ins. Exchange*, No. 10 Civ. 03088, 2011 WL 2981466 (D.S.C. July 22, 2011)

   a. Plaintiffs filed an FLSA action against their employer alleging unpaid overtime worked. *Id.* at *1. The named plaintiffs moved for conditional certification of the FLSA action. *Id.* Plaintiffs characterized defendant's alleged failure to pay overtime as a "common policy or plan." *Id.* at *3. The Court disagreed: "This is not a policy or plan, but rather a result, which plaintiffs claim is caused by a conglomeration of defendant's policy and practices." *Id.* The Court noted that "[w]hen alleged FLSA violations stem from the enforcement decisions of individual supervisors without a company–wide policy or plan directing those enforcement decisions, collective treatment is not appropriate." *Id.* (citation and quotations omitted). Although an "unwritten policy" could suffice to make plaintiffs similarly situated, no such policy was adequately alleged. *Id.* at *4. The Court found *Dukes* to be instructive, though it addressed Rule 23 certification, because just as in *Dukes*, the plaintiffs alleged a policy of allowing supervisor discretion. *Id.* "[I]f there is not a uniform practice but rather decentralized and independent action by supervisors that is contrary to the company's established policies, individual factual inquiries are likely to predominate and judicial economy will be

hindered rather than promoted by certification of a collective action." *Id.* Plaintiffs' motion for conditional certification was denied.

3. *Troy v. Kehe Food Distribs., Inc.*, No. C09-0785JLR, 2011 WL 4480172 (W.D. Wash. Sept. 26, 2011)

   a. Plaintiffs filed a hybrid action alleging against their employer violations of both FLSA and state-law overtime provisions. *Id.* at *3. Plaintiffs moved for FLSA collective action certification and Rule 23 class action certification. *Id.* at *1. The Court granted the Rule 23 motion where the employer admitted that all plaintiffs had the same job duties and there were common questions of fact and law, including whether the tasks performed by plaintiffs qualified as "making sales," under the state outside sales exemption. *Id.* at *10. In determining whether *Dukes* precluded certification of an FLSA collective action, the Court noted that the FLSA's "'similarly situated' requirement is less demanding than the Rule 23 commonality requirement that was at issue in *Dukes*." *Id.* at *8. Further, unlike in *Dukes*, "no such inquiry into individual supervisors' discretionary decisions [was] required." *Id.* The Court granted plaintiffs' motion for collective action certification. *Id.*

4. *Spellman v. Am. Eagle Express, Inc.*, No. 10-1764, 2011 WL 4014351 (E.D. Pa. July 21, 2011)

   a. In a prior order, the Court had granted plaintiffs' motion for FLSA conditional certification of a class of defendant's former and current delivery drivers who may have been owed overtime under the FLSA. *Id.* at *1. Defendant filed a motion to reconsider that order in light of *Dukes*. *Id.* The Court denied the motion. *Id.* "Unlike Rule 23 class actions, the FLSA requires collective action members to affirmatively opt in to the case. *See* § 216(b). To determine whether the proposed group of plaintiffs is 'similarly situated,' and therefore qualified to proceed as a conditional collective action, a district court applies a two-step test. In the first step, which is assessed early in the litigation process, the plaintiff at most must make only a 'modest factual showing' that the similarly situated requirement is satisfied. The Plaintiffs have made this modest factual showing, and this Court's analysis is not affected by *Dukes*. The second step of the collective action certification process will be conducted at the close of class-related discovery, at which time this Court will conduct 'a specific factual analysis of each employee's claim to ensure that each proposed plaintiff is an appropriate party.' At this second stage, [defendant] may argue that *Dukes's* analysis of what constitutes a 'common

question' is persuasive to this Court's analysis of whether an FLSA collective action should be certified." *Id.* at n.1 (citations omitted).

IV. FOCUS ON INDEPENDENT CONTRACTORS

A. The Costs of Misclassification

1. The Department of Labor has recently explained that worker misclassification has been a growing problem, estimating that it has cost the federal government nearly $40 billion in tax revenues since 1996. Statement of Seth D. Harris, Deputy Secretary U.S. Department of Labor Before the Committee on Health, Education, Labor, and Pensions U.S. Senate, June 17, 2010 (available at http://www.dol.gov/_sec/newsletter/2010/20100617-2.htm).

B. Anti-Missclassification Initiatives on the Rise

1. The Senate has introduced:

   a. Payroll Fraud Prevention Act, S. 770, 112th Cong. (2011): amendment to FLSA requiring notice to worker of proper classification and civil penalties for misclassification (in committee).

2. The House has introduced:

   a. Employee Misclassification Prevention Act, H.R. 3178, 112th Cong. (2011): amendment to the FLSA requiring companies to keep records of non-employee workers and presuming employee status where no records are kept (in committee).

C. Recent Federal Enforcement Efforts

1. DOL Memorandum of Understanding

   a. The DOL is finding ways to share information among DOL agencies, and among DOL agencies and other federal and state agencies. On September 19, 2011, the Department of Labor signed a memorandum of understanding with the IRS whereby the two agencies will share data and coordinate enforcement efforts to curtail employee misclassification. Labor agencies of seven states, including Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington, also signed memoranda of understanding with the DOL, and Hawaii, Illinois, Montana, and New York are expected to follow suit. http://www.dol.gov/opa/media/press/whd/WHD20111373.htm.

2. IRS's Voluntary Classification Settlement Program

a. On September 21, 2011, the IRS announced the launch of its Voluntary Classification Settlement Program, pursuant to which taxpayers may "reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes," changing, for example, the prospective classification of an independent contractor to an employee. http://www.irs.gov/businesses/small/article/0,,id=246013,00.html.

(1) Eligibility: To be eligible to participate in the program, the taxpayer must have consistently treated the worker as a nonemployee; must have filed all Form 1099s for that worker for the last three years; must not be under audit by the IRS; must not be under audit by DOL or state agency regarding classification of workers; must have complied with the results of any previous audit concerning classification of workers.

(2) VCSP Agreements: Although the taxpayer is not granted complete immunity, if that taxpayer agrees to prospectively treat the class of workers as employees in the future, the taxpayer will: pay only 10% of the employment tax liability that might have been due on the workers' compensation for the most recent year; not be liable for interest or penalties; not be subject to an employment tax audit regarding the workers being reclassified.

(3) Taxpayers must apply using Form 8952, Application for Voluntary Classification Settlement Program, available at http://www.irs.gov/formspubs/article/0,,id=242970,00.html

b. "Right to Know Under the FLSA"

(1) In the Fall of 2010, in an effort to foster transparency and to ensure employers' compliance, the DOL's Wage and Hour Division proposed to update the recordkeeping regulation under the FLSA with the "Right to Know Under the FLSA," "in order to enhance the transparency and disclosure to workers of their status as the employer's employee" or as an independent contractor, "and if an employee, how their pay is computed." The public will be invited to comment on the proposed revisions and possible alternatives. http://www.dol.gov/whd/regs/unifiedagenda/fall2010/1235-AA04.htm.

c. Congressional hearings

(1) On November 3, 2011, the House Subcommittee on Workforce Protections held a hearing on the topic of "Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act."

(a) At the hearing, legislators expressed concerns about investigatory action by the DOL which "can have a chilling effect on job-creators[.]" Opening comments of Chairman Tim Walberg.

(b) The DOL emphasized that the critical protections provided by the FLSA "cannot be fully realized in the absence of the effective enforcement of these laws by the [DOL]." Testimony of Nancy J. Leppnick, Deputy Wage and Hour Admin., U.S. DOL.

3. Recent State Enforcement Efforts

a. New York's Construction Industry Fair Play Act, *N.Y.* LAB. LAW §§ 861-861-f

(1) Effective October 26, 2010

(2) The New York State Department of Labor has found that 14.8% of New York's construction workers are misclassified as independent contractors at any one time. In response, on August 27, 2010, the Construction Industry Fair Play Act ("Fair Play Act") was enacted, setting out a rebuttable presumption that construction workers are employees, rather than independent contractors, and tests to determine whether the presumption is met. *See* N.Y. LAB. LAW §§ 861-861-f.

(3) Presumption of Employee Status: The Act sets forth a new Article 25-B in the New York Labor Law that creates the presumption that a person hired by a contractor in the construction industry is an employee unless "three prescribed criteria" are established, or, that person is a "separate business entity" as defined in the Fair Play Act. N.Y. LAB. LAW §861-c. The three prescribed criteria are:

(a) The individual is free from control and direction in performing the job, both under his or her contract and in fact;

(b) The service must be performed outside the usual course of business for which the service is performed; and

(c) The individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

A person is a "separate business entity," and can thus be an independent contractor, if the following criteria are met:

(a) The business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;

(b) The business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(c) The business entity has a substantial investment or capital in the business entity beyond ordinary tools and equipment and a personal vehicle;

(d) The business entity owns the capital goods and gains the profits and bears the losses of the business entity;

(e) The business entity makes its services available to the general public or the business community on a continuing basis;

(f) The business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

(g) The business entity performs services for the contractor under the business entity's name;

(h) When the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;

(i) The business entity furnishes the tools and equipment necessary to provide the service;

(j) If necessary, the business entity hires its own employees without contractor approval, pays the employees without the reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;

(k) The contractor does not represent the business entity as an employee of the contractor to its customers; and

(l) The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

(4) Posting Requirements: The Fair Play Act also requires contractors to conspicuously post an onsite notice (to be published by the Commissioner of Labor) that, among other things, "describes the responsibility of independent contractors to pay taxes required by state and federal law, the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections, and the protections against retaliation and the penalties in this article if the contractor fails to properly classify an individual as an employee." The notice must also include contact information for individuals to file complaints or inquire with the Commissioner of Labor about classification status. N.Y. LAB. LAW § 861-d. A contractor who violates the posting requirement is subject to a penalty of up to $2,500 for the first violation, and up to $5,000 for a "subsequent violation within a five year period." N.Y. LAB. LAW § 861-e.

(5) Retaliation: The Fair Play Act prohibits retaliation against an individual who has made or threatens to make a complaint that rights have been violated under the article, for causing any proceeding to be brought under the article, or for testifying or providing information concerning a violation. N.Y. LAB. LAW §861-f.

(6) Penalties: The Fair Play Act imposes civil and criminal penalties on a contractor who "willfully fails to classify an individual as an employee." Notably, the term "willfully violates" is defined as when "a contractor knew or should have known that his or her conduct was prohibited by this section." The civil penalty for a first-time violation is $2,500 per misclassified employee, and $5,000 for each

subsequent violation within a five-year period, while criminal penalties are misdemeanors. A contractor convicted of a misdemeanor under this section can face debarment and lose the right to bid on certain government projects for one year from the date of any first misdemeanor conviction or five years from the date of a subsequent violation. More importantly, any officer of a corporation or shareholder owning more than 10% of the corporation who knowingly permits a violation of the Fair Play Act is subject to the same civil and criminal penalties as the employment entities. N.Y. LAB. LAW §861-e.

V. CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

A. Recent Supreme Court Cases

1. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

a. On April 27, 2011, the Supreme Court considered "whether the [Federal Arbitration Act] prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744.

Plaintiffs were customers of AT&T Mobility who entered into a contract for cellular phone service. The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Plaintiffs filed suit against AT&T in the U.S. District Court for the Southern District of California, alleging false advertising and fraud. AT&T moved to compel arbitration under the terms of its contract with Plaintiffs. The trial court denied the motion, concluding that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court. The Ninth Circuit held that California's *Discovery Bank* Rule, which deemed a class-action arbitration waiver to be unenforceable when it is part of an adhesion contract, damages are predictably small and the consumer alleges a scheme to cheat consumers, was simply "a refinement of the unconscionability analysis applicable to contracts generally in California."

The Supreme Court concluded that the Federal Arbitration Act preempted the *Discover Bank* rule. "[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA" because it (1) sacrifices informality, transforming arbitration into a slow and costly process; (2) leaves required procedural formalities and due process rights in the hands of arbitrators; (3) increases risks to defendants; and (4) is poorly suited "to the higher stakes of class litigation." 131 S. Ct 1751-52. A 5-to-4 majority concluded that the *Discover Bank* rule disfavors arbitration by allowing a party to a consumer contract to demand classwide arbitration *ex post*. *Id.* at 1750. The Court held that when an agreement is "silent on the question of class procedures, [it] could not be interpreted to allow them because the changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental. This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration," as required by *Discover Bank*, "is inconsistent with the FAA." *Id.* at 1750-51 (citation and quotations omitted).

2. *Sonic-Calabasas A. v. Moreno*, --- S. Ct. ----, 2011 WL 2148616 (Oct. 31, 2011)

   a. On October 31, 2011, the Supreme Court granted a petition for a *writ of certiorari*. The Court vacated a California Supreme Court ruling that an employee with a wage claim against his employer had a right to an informal hearing before the State Labor Commissioner ("Berman hearing") notwithstanding an arbitration agreement between the employee and employer in which the employee waived the option of such a hearing. *Sonic-Calabasas A. v. Moreno*, 247 P.3d 130 (Cal. 2011).

   b. FAA preemption articulated in *Concepcion* may be extended to a state law that deems Berman waivers unconscionable and contrary to public policy.

B. Reconsideration in Light of *Concepcion*

1. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011)

a. The plaintiff brought an FLSA collective action alleging that her employer violated the FLSA and New York laws by failing to compensate plaintiff and others similarly situated for overtime worked. The defendant moved to compel arbitration of the plaintiff's claims on an individual, rather than classwide, basis in accordance with the class waiver provision in the parties' arbitration agreement. The Court denied the defendant's motion and found the arbitration agreement to be unenforceable. Applying the Second Circuit's test set forth in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009), the Court found that "[i]n the totality of the circumstances . . . the class waiver provision is invalid because it prevents [the plaintiff] from vindicating her statutory rights." *Sutherland*, 768 F. Supp. 2d at 551. If her only option were to prosecute her claims on an individual basis, the expenses would "dwarf her potential recovery," and because the arbitration agreement left the award, if any, of attorneys' fees to the discretion of the arbitrators, the court found that the plaintiff would be essentially unable to retain any legal representation to pursue her claim. *Id.* at 551, 553. Further, the Court held that enforcement of the class waiver at issue would bestow upon the employer "de facto immunity from liability." *Id.* at 554. Ernst and Young's motion for reconsideration in light of *Concepcion* is currently pending before the district court.

2. *Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011)

a. The Court declined to reconsider, in light of *Concepcion*, its holding that an arbitration agreement between employer and employee was unenforceable where it precluded the plaintiff employee from enforcing her federal statutory right under Title VII to be free from a pattern and practice of gender discrimination – a right which the plaintiff could not vindicate individually. The Court distinguished *Concepcion*, in that it addressed preemption of state contract law. *Id.* at *3. Rather, *Chen-Oster*, involved the issue of "whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate." *Id.* The Court noted that "this case implicates federal statutory (Congressionally-created) rights, not the 'judicially-created obstacle to the enforcement of agreements to arbitrate' that was at issue in Concepcion." *Id.* "[T]he right at the center of this case is not the right to proceed on a class basis but rather the right to vindicate a claim that an employer has engaged in a pattern or practice of discrimination. Under the law as it currently stands, the plaintiff may not do so individually." *Id.* "Furthermore, it remains the law of the Second Circuit that an arbitration provision which 'precludes plaintiffs from enforcing

> their statutory rights' is unenforceable. . . To the extent that [plaintiff] has a substantive right under Title VII to bring a pattern or practice claim rather than an individual disparate impact claim, she would be precluded from enforcing that right by the arbitration clause in her employment contract" *Id.* at *4 (citation omitted).

VI. RECENT DEVELOPMENTS IN NEW YORK WAGE-HOUR LAW

A. New York Wage Theft Prevention Act, N.Y. LAB. LAW §§ 195, 215

1. On December 13, 2010, Governor Paterson signed into law the Wage Theft Prevention Act (S.8380 and A.11726). The legislation, which went into effect on April 9, 2011, modifies sections 195 and 215 of the New York Labor Law, and requires employers to provide additional information to employees on wages, enhances penalties for violations of state wage law, and expands the scope of the New York wage statute's retaliation provision, among other things.

2. Additional Content in Wage Notice to Employees: The New York Labor Law previously required employers to provide newly hired employees, both exempt and nonexempt, with written notice of their rate of pay, regular pay date and, if applicable, overtime rate of pay. The Act requires employers to provide the following additional information in the written notice: how the wage payment is calculated (e.g. hourly, salary, commission); allowances, if any, claimed as part of the minimum wage (e.g. tip, meal, or lodging); the employer's name and any "doing business as" names; the physical address of the employer's main office or principal place of business (and, if different, a mailing address); the employer's telephone number; plus other information deemed "material and necessary" by the Commissioner of Labor. For all nonexempt employees, the notice must also contain the employee's regular hourly rate and overtime hourly rate. In addition, the Commissioner has discretion to waive or alter the notification requirements for employers deemed "temporary help firms" under New York Labor Law. N.Y. LAB. LAW § 195.1(a).

3. Frequency of Wage Notice: The Act also changes the frequency with which employers must provide the written notice to employees. Under the Act, notice must be issued not only when an employee is hired (as is currently required), but also (i) on or before February 1 of every subsequent year, and (ii) at least seven days prior to any changes to the information contained in the wage notice, unless such changes are reflected in the wage statement employers must provide with each paycheck. N.Y. LAB. LAW § 195.

4. Language of Wage Notice to Employees: The Act specifies that the wage notice must be provided in English and, if applicable, the primary

language of each employee. The Commissioner of Labor is directed to prepare template wage notices in English and additional languages chosen in the Commissioner's discretion. If an employee identifies as his or her primary language a language for which a template is not available from the Commissioner of Labor, an employer complies with this requirement by providing the notice in English. N.Y. LAB. LAW § 195.1(a), (b), (c).

5. Employee Acknowledgment of Receipt of Wage Notice: Previously, employers had to obtain, and maintain for six years, a signed and dated employee acknowledgment each time a wage notice is provided. The Act adds additional required elements to the acknowledgment--employees must affirm that: (i) they accurately identified their primary language to the employer; and (ii) the employer provided the notice in such language or, if the Commissioner of Labor has not made a template notice available in such language, in English. N.Y. LAB. LAW § 195.1(a), (c).

6. Remedies for Failure to Provide the Written Wage Notice: If an employer fails to provide the written wage notice within 10 business days of an employee's date of hire, the Act permits both the employee and the Commissioner of Labor to bring an action against the employer. An employee may recover $50 for each work week in which a violation occurred, up to a maximum of $2,500, plus costs, reasonable attorney's fees and injunctive relief. The Commissioner, likewise, may recover $50 per workweek per employee, but there is no cap on damages in an action by the Commissioner. The Act provides employers with two affirmative defenses. An employer can avoid liability if it demonstrates that it: (1) paid all wages legally required; or (2) had a good faith, reasonable basis for not providing notice. N.Y. LAB. LAW § 198.1-b.

7. Wage Statements: The Act also requires employers to provide employees with additional information in the mandatory statement issued with every payment of wages. Previously, under New York regulations, the wage statement must list hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages. The Act requires employers to include the following information in every wage statement (some of which was previously required by the regulations): dates of work covered; name of employee; name, address and phone number of employer; rate or rates of pay and basis thereof (e.g. hourly, salary, commission); gross deductions, allowances claimed as part of the minimum wage, and net wages. Under the Act, employers must provide non-exempt employees with the following additional information: regular rate of pay, overtime rate of pay, number of regular hours worked, and number of overtime hours worked. Employers must retain wage statements for six years. N.Y. LAB. LAW § 195.3.

8. Remedies for Failure to Provide Wage Statement: The Act also allows employees to bring civil actions against employers who do not furnish the

requisite wage information with each pay stub. The Act calls for employers to pay $100 damages for each week the law is violated, up to $2,500, plus costs, attorney's fees and injunctive relief. The Commissioner of Labor may also bring such an action and assert claims for the same relief, except there is no similar cap on damages. In defending such actions, the Act affords employers the same two affirmative defenses that are available when defending wage notice claims. N.Y. LAB. LAW. § 198.1-d.

9. Increased Damages for Failure to Pay Wages: The Act increases damages available for failure to pay wages. Previously, employees could recover, as liquidated damages for failure to pay wages due, 25% of unpaid wages. The Act increases liquidated damages to 100% of wages owed. The Act also clarifies that employees may recover prejudgment interest on unpaid wages. N.Y. LAB. LAW § 198.1-a; N.Y. LAB. LAW § 663.

10. Expanded Retaliation Provision: The Act also expands the retaliation provision of New York's wage statute. Previously, an employee could bring a claim for retaliation against an employer that "discharge[s], penalize[s], or in any other manner discriminate[s] or retaliate[s] against an employee" that complains to the employer or the Department of Labor "that the employer has violated any provision of" New York's wage statute.

    Under the Act, the provision is amended to prohibit retaliation against an employee (i) who complains to the employer, the Department of Labor, the New York Attorney General, "or any other person," that an employer "engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of" the New York wage statute or any order by the Commissioner of Labor, or (ii) "because such employer . . . believes that such employee has made a complaint to his or her employer, or to the [Commissioner of Labor], or to the attorney general . . ., or to any other person, that the employer has violated any provision of this chapter, or any order issued by the" Commissioner of Labor. N.Y. LAB. LAW § 215.1(a).

11. Additional Retaliation Remedies: The Act clarifies and expands the remedies available to employees asserting retaliation claims under New York's wage law. Previously, an employee bringing an action for a violation may seek "all appropriate relief," including "lost compensation," "damages," reinstatement to the employee's former position, and reasonable attorneys' fees. Under the Act, an employee may also seek an order "enjoining the conduct of any person or employer," liquidated damages of no more than $10,000, and an award of front pay in lieu of reinstatement. N.Y. LAB. LAW § 215.2(a).

12. Criminal Liability for Partnerships and LLCs: The Act expands criminal liability to partnerships and limited liability companies. The Act calls for criminal penalties of up to one year in prison and a $20,000 fine for failure to keep or furnish proper records or pay minimum wage or overtime compensation in accordance with New York Labor Law. N.Y. LAB. LAW § 215.3.

13. Postings of Wage Violations: The Act also empowers the Commissioner of Labor to require employers to post a summary of the employer's wage violations in the workplace and, for willful violators, to affix violations in an area visible to the general public. N.Y. LAB. LAW § 219-c.

14. Tolling Statute of Limitations: The Act does not alter the six year statute of limitations for wage suits, but does adds a tolling provision whereby the statute of limitations is tolled from the earlier of either the date an employee files a complaint with the Department of Labor or the date the Commissioner commences an investigation. N.Y. LAB. LAW § 198.3.

B. Recent Decisions

1. *Kuebel v. Black & Decker Inc.*, 2011 WL 1677737 (2d Cir. May 2, 2011)

a. Plaintiff-employee, a retail specialist, sued under both the FLSA and the New York Labor Law on behalf of himself and a class of employees. Defendant won summary judgment, and Plaintiff appealed. Before the Second Circuit, the following two claims were at issue:

(1) whether the time the plaintiff spent commuting between the job site and home was compensable for employee working out of his home and several job sites; and

(2) whether he should have been paid for overtime hours worked that he did not record.

The first claim, the commute time issue, rested on a theory that based on tasks plaintiff performed at home before and after commuting, the commuting was "integral and indispensable" to his principal job activities, and thus should have been compensated. *Id.* at *5. The court found this argument to be "largely beside the point" since it is well-established in the law that normal home to job site travel time is not compensable. *Id.* at *6. The tasks he performed at home did not affect his home to job site travel, particularly as he was not bound to perform the home tasks immediately before or after his travel time. *Id.*

On the second claim, the court felt that plaintiff's recollected estimates of the time he worked were sufficient to meet the burden

of showing hours worked to the employer, and that there should not be a heightened standard just because the plaintiff allegedly falsified his timesheets. *Id.* at *8-9. Further, despite the fact that there were written policies suggesting all time worked should be recorded, this was an insufficient basis for summary judgment where, as here, there was testimony that plaintiff was instructed not to record more than forty hours per week. *Id.* at *10. On the issue of employer knowledge of the plaintiff working overtime, the fact that the plaintiff claimed he complained to his supervisor raised a sufficient question of material fact to avoid summary judgment. *Id.* at *11. The Court also overturned the district court's finding of a lack of willfulness, finding it premature. *Id.* at *11.

2. *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010)

   a. The Second Circuit decided three issues, the most pertinent of which being whether New York Labor Law § 191, which governs the timing of wage payments, provides an independent, substantive right to unpaid wages. The Court found that § 191 "only involves the timeliness of wage payments, and does not appear to afford to plaintiffs any substantive entitlement to a particular wage." *Id.* at 545. Since the New York Labor Law provides substantive protection for overtime under a different set of statutes, the § 191 claim was "nothing more than an alternative method of seeking redress for an underlying FLSA violation." *Id.* at 546. It did not create any new substantive rights.