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How to Measure and Prove Damages in Wage and Hour Cases

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INTRODUCTION

Counsel on both sides of the docket invariably are faced with the task of measuring, and ultimately proving, damages in wage and hour cases. The first part of this paper briefly focuses on how practitioners should calculate unpaid overtime wages and other damages in wage and hour cases. In this section, we will address the basic principles of how to determine the "regular rate" for employees working under various wage payment systems. The second part of this paper is aimed at how to prove the number of hours worked by their employees in the absence of records accurately reflecting actual work time. The amount of unpaid time is the most common missing element in calculating damages in a wage and hour case. Whether it is a misclassified employee who never recorded his/her hours of work or an individual who worked off-the-clock, both plaintiffs and defendants will want to examine the amount of unpaid work time in order assess damages or recover at trial. As such, the second section of the paper discusses various ways of establishing the number of unpaid hours under the rubric of *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946). The third part of this paper provides insights on damage calculation and proof issues as seen by an expert working in the field. This section highlights the issues frequently seen in assessing damages and identifies how experts address those issues. Finally, the fourth section of this paper discusses measuring and proving damages in independent contractor litigation with a focus on wage deductions and passing employer business expenses on to employees.

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I. CALCULATING UNPAID OVERTIME WAGES AND OTHER DAMAGES – THE SIMPLE (AND NOT SO SIMPLE) MATH.

The overtime provisions of the FLSA require that employers pay their covered nonexempt employees 1½ times their regular rate of pay for all overtime hours worked in any given workweek. 29 U.S.C. § 207. Therefore, in order to comply with the FLSA, an employer must first determine what constitutes an employee's "regular rate of pay" and then pay 1½ times that regular rate for all hours worked over 40 in that workweek.

A. The Regular Rate of Pay Includes All (Almost) Remuneration for Employment.

The Supreme Court has called the "regular rate" of pay the "keystone" to calculating the overtime rate. *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 424 (1945). It is "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed." 29 C.F.R. § 778.108. No matter how an employee is paid—whether by the hour, by the piece, on a day rate, on a commission, or on a salary—the employee's compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460–61 (1948); *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 40 (1944); 29 C.F.R. § 778.109. "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109.

As originally passed, there was no definition of "regular rate" in the FLSA. Congress amended the FLSA in 1949 to define the "regular rate" to include "all remuneration for employment paid to, or on behalf of, the employee," excluding specific types of payments briefly identified *infra*. 29 U.S.C. § 207(e). There is a statutory presumption that remuneration in any form must be included in the regular rate calculation, and the burden is on the employer to establish that any payment should be excluded. *Madison v. Resources for Human Development Inc.,* 233 F.3d 175, 187 (3d Cir. 2000). Thus, determining the regular rate starts from the premise that all payments made to an employee for work performed generally are included in the base calculation unless specifically excluded by statute.

Payment exclusions from the regular rate are covered in detail in the FLSA. 29 U.S.C. § 207(e)(1)-(8). There is a body of law concerning each of the statutory exclusions, but an extensive discussion of each of the exclusions is beyond the scope of this paper. The exclusions can be summarized categorically as follows: (1) extra compensation for overtime work; (2) discretionary bonuses, prizes and awards; (3) gifts and special occasion bonuses; (4) profit sharing or trust and thrift or savings plan contributions; (5) stock option grants; (6) benefit plan payments; (7) payments made when no work is performed; (8) reimbursements for work-related expenses; (9) "other similar payments" not based on hours of work such as "show up pay" and "call back pay" and, (10) talent fees.

So, one of the first tasks creating any damage model is to identify all payments made to an employee and delineate which payments must be included in the regular rate of pay. The next

step is to calculate the regular rate of pay – a process which varies depending on what payment system is in place for employees.

B. Calculating Regular Rate under Various Methods of Payment

Once the total amount of an employee's compensation is calculated, "the determination of the regular rate becomes a matter of mathematical computation." *Youngerman-Reynolds Hardwood Co.*, 325 U.S. at 425. The regular rate must be expressed as an hourly rate because, although any method of compensating an employee is permitted, the FLSA imposes its overtime requirements in terms of hourly wages. Thus, if necessary, an employer must convert an employee's wages to a rate per hour to determine compliance with the statute. 29 C.F.R. §778.109. The DOL's interpretative bulletins provide the appropriate method of computation: "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109; s*ee also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.16 (1942). The DOL interpretations also provide a number of examples that illustrate the regular rate computation in particular instances. *Id*.

1. Payment of Wages Based on an Hourly Rate

a. Employees Paid at One Hourly Rate

As the DOL regulations make clear, for employees paid entirely by the hour, the hourly wage is the regular rate. 29 C.F.R. § 778.110. The employee is also entitled to an extra 1½ times the regular rate for each hour worked in excess of 40.

b. Employees Paid at Two or More Hourly Rates

Employees paid two or more different hourly rates for different types of work during the same workweek require a bit more calculation. Under these circumstances, the employee's regular rate is the "weighted average" of such rates. 29 C.F.R. § 778.115. That is, the total earnings (except statutory exclusions) are computed to include the compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. *Id*.

2. Payment of Wages Based on Non-Hourly Rate Payment Systems

a. Piece Rates Generally

In certain jobs, employees may be paid on the basis of how many units they produce—these employees are referred to as piece-rate workers, or pieceworkers. Calculation of overtime for a piece-rate worker requires the preliminary calculation of the worker's regular rate, which may vary from week to week. The DOL regulations set out the calculation of the regular rate for pieceworkers at 29 C.F.R. § 778.111 as follows:

> When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation

> was paid, to yield the pieceworker's "regular rate" for that week. For overtime work the pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, *see* §778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, for example, if the employee has worked 50 hours and has earned $491 at piece rates for 46 hours of productive work and in addition has been compensated at $8.00 an hour for 4 hours of waiting time, the total compensation, $523.00, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay—$10.46. For the 10 hours of overtime the employee is entitled to additional compensation of $52.30 (10 hours at $5.23). For the week's work the employee is thus entitled to a total of $575.30 (which is equivalent to 40 hours at $10.46 plus 10 overtime hours at $15.69).

DOL regulations require that an employer must compensate pieceworkers for nonproductive waiting time. 29 C.F.R. § 778.318(a). The parties may agree, however, that the pay the employee will earn at piece rates is intended to compensate them for all hours worked, both productive and nonproductive. *Id*. at § 778.318(c). In such a case, the regular rate is calculated by dividing the total piece rate compensation by the total hours worked, whether productive or nonproductive. *Id*.

b. Piece Rate with Hourly Guarantee

In some cases, the pieceworker is guaranteed a minimum hourly wage. If the piece rate falls below the guaranteed rate, the pieceworker is paid the difference between the hourly guarantee and the piece rate. Under such an arrangement, the regular rate of pay is determined by reference to the minimum hourly guarantee, because the piece-rate worker has actually become an hourly worker during that week by virtue of the guarantee. *Id.* at § 778.111(b). If the pieceworker is paid at a different hourly rate for waiting time, the overtime rate is based on the weighted average of the two wages. 29 C.F.R. § 778.111(b). The actual hourly wage paid to the pieceworker governs the amount of wages to be included in the calculation of the regular rate.

c. Day Rates and Job Rates

The DOL regulations concerning employees paid on day rates and job rates provide:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

29 C.F.R. § 778.112.

d. Commission Employees

The DOL regulations provide that commissions are to be included in the regular rate:

> Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

29 C.F.R. § 778.117.

1. Commissions Paid on a Workweek Basis.

Where a commission is paid on a weekly basis, the commission is added to the total of other wages earned. This total is then divided by the total hours worked during the week to obtain the regular rate. 29 C.F.R. § 778.118. The employee is then paid an additional one-half times the regular rate for all hours worked in excess of 40. *Id*.

2. Deferred Commission Payments.

Commission payments are frequently deferred. If the amount of commission cannot be ascertained by the regular payday, then commission payments are excluded from the regular rate until they can be determined. 29 C.F.R. §778.119. Under these circumstances, wages paid must be at least 1½ times the hourly rate, exclusive of the commission, for overtime hours. Once the commission is ascertained, it is apportioned back to each week in which it was earned. *Id*. In order to do this, the regular rate for each workweek must be recalculated, and the employer must pay any additional overtime wages that are due. This additional compensation must not be less than one-half times the increase in the regular rate that can be attributed to the commission payments. *Id*. This method of determining wage payments is only used when the commission payment can be apportioned to the proper week.

Occasionally, deferred commission payments cannot be properly identified as earned within a particular workweek. When it is not possible or practicable to allocate commission payments, some other reasonable and equitable method must be adopted. 29 C.F.R. § 778.120. The DOL's interpretative regulations set out two methods for calculating the regular rate with respect to commission payments in these circumstances.

The first method allocates of equal amounts to each week covered by the commission period. 29 C.F.R. §778.120(a). If the commission payment is calculated for a specific number of weeks, the commission should be divided by the number of weeks that it is intended to compensate. *Id*. at § 778.120(a)(1). For example, the commission payment for a month is multiplied by 12 (the

number of months in a year) and divided by 52 (the number of weeks in a year) to determine a weekly commission payment. Other units of time—for example, semimonthly pay periods—are computed in the same manner. After the amount of commission allocated to each week is ascertained, the adjusted regular rate is computed by dividing wages, including commissions, by the total number of hours worked during the week. 29 C.F.R. § 778.120(a)(2). Additional wages are due for overtime work at one-half times the difference between the adjusted regular rate and the preadjustment rate, multiplied by the number of overtime hours. *Id.*

The second method identified by the DOL allocates equal amounts to each hour worked. Under the second alternative method, commission payments that are unidentifiable with a particular week may be allocated to each hour worked when this method is more reasonable and equitable. Businesses often prefer this method when the hours worked by an employee vary significantly from week to week. 29 C.F.R. § 778.120(b). For this calculation, an employee's commission should be divided by the number of hours worked within the commission payment period in order to determine the increase in the regular rate. *Id.* To figure the proper additional overtime compensation, half of this increase in the regular rate should be multiplied by the number of statutory overtime hours worked within the commission payment period. *Id.*

3. Delayed Credits and Debits

If there are delays in crediting sales or debiting returns that affect the computation of commissions, the amounts paid to the employee during any commission payment period will be accepted as the total commission earnings during such period. 29 C.F.R. § 778.121. The commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work that actually occurred during a previous period. *Id.*

e. The General Rule for Salaried Employees

A salaried employee's regular rate of pay is computed by reference to the number of hours the salary is intended to compensate. 29 C.F.R. § 778.113(a) (emphasis added). Per 29 C.F.R. §778.113, "If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. §778.213. Practitioners should note that the dispute in many cases is how many hours the salary was intended to compensate. A higher number of hours results in a lower backpay calculation while a lower number of hours results in a higher backpay calculation.

Sometimes a salary covers a period of time that exceeds the workweek. Under these circumstances, the salary must be converted to its workweek equivalent. Thus, a monthly salary is multiplied by 12 (the number of months in a year) and divided by 52 (the number of weeks in a year). 29 C.F.R. § 778.113(b). Similarly, if the employee is paid semimonthly, the wage is translated to its weekly equivalent by multiplying by 24 and dividing by 52. 29 C.F.R. § 778.113(b). Alternatively, the regular rate can be calculated by dividing the monthly salary by the number of working days and dividing again by the number of hours in a regular day. *Id.* Once the applicable workweek salary is determined, the regular rate is computed by dividing the derived workweek salary by the standard number of hours per workweek the salary was intended to cover.

f. Salaried Employees and the Fluctuating Workweek Method

The DOL regulations provide an alternative to the fixed workweek standard for employees who have fluctuating hours. This is commonly referred to as the "fluctuating workweek" method of overtime compensation. 29 C.F.R. § 778.114. This method is also occasionally referred to as the "variable workweek" method, "coefficient method" or the "half time" method. If a worker is employed under a weekly salary that is intended to compensate for all hours worked in the week, regardless of the number, the regular rate can be calculated by dividing the amount of the weekly salary by the number of hours actually worked in the week. Because such a salary already compensates the employee at straight time for all hours worked (including any overtime hours), only one-half times the regular rate for hours worked beyond 40 in the workweek must be added to the salary as overtime compensation. 29 C.F.R. §778.114(a).

Under the fluctuating workweek method, the employee's regular rate will decrease as the number of hours worked increases. Thus, an employee who is compensated under this method will ordinarily be entitled to less overtime pay than an employee who receives a salary for a fixed workweek (assuming, of course, that both receive the same salary and work the same number of hours over 40 in the workweek). As more hours are worked, the fluctuating workweek method becomes more advantageous to the employer, because the hourly overtime premium rate decreases with each overtime hour worked.

The precise requirements of a properly implemented fluctuating workweek plan are beyond the scope of this paper but the DOL regulations outlining the various requirements are found at 29 C.F.R. § 778.114.

Practitioners should be aware of the ongoing debate over the automatic use of the fluctuating workweek "methodology" in assessing damages for cases where employees have been misclassified as exempt. In such cases, employees have typically been paid a salary (as opposed to a fee). The term "methodology" is used because in such cases the specific requirements to use the fluctuating workweek regulation will typically not be met (contemporaneous payment of overtime wages for example). Nevertheless, some courts hold it is proper to use the same mathematical formula used in calculating overtime under the fluctuating workweek and divide the weekly salary by all hours worked. *See Ransom v. M. Patel Enterprises, Inc.,* (5th Cir. 2013); *Urnikis-Negro v. American Family Property Services*, 616 F.3d 665, 681 (7th Cir. 2010); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351 (4th Cir. 2011); This results in a lower unpaid overtime calculation because all of the hours worked have been paid at straight time and only half-time remains to be paid. Other courts look at the factual circumstances and hold that a different divisor is appropriate or that the question is one of fact for the jury to determine. *See Black v. SettlePou, P.C.*, 732 F.3d 492 (5th Cir. 2013); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013); *Thomas v. Doan Const. Co.*, 2014 WL 1405222 (E.D. Mich. Apr. 11, 2014); *Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199 (D. Conn. 2013). This results in a higher damage calculation because none or some of the overtime hours have already been paid at straight time and those that have not are paid as 1 ½ times the regular rate of pay.

g. Bonuses

As explained *supra*, all remuneration paid to an employee must be included in the regular rate. This includes non-discretionary bonuses. Allocating bonus payments to particular workweeks

can be difficult. Although some bonuses are directly attributable to work that is performed in particular workweeks, many bonuses, like production bonuses or profit-based bonuses, cover numerous workweeks. As the DOL regulations set forth, where a bonus can be linked to particular workweeks, the bonus must be allocated to those workweeks, and then the regular rate must be recalculated for each of those workweeks so that the employee receives the full overtime premiums due based on the readjusted regular rates. 29 C.F.R. § 778.209(a). If a bonus cannot be identified with particular workweeks, the employer must adopt "some other reasonable and equitable method of allocation." *Id*. at § 778.209(b). When a bonus plan provides in good faith for the simultaneous payment of overtime compensation by, for example, paying a bonus as a percentage of both straight-time and overtime earnings, no recalculations of rates or additional payments are required. 29 C.F.R. § 778.210.

C. Calculating Gap Time Under the FLSA

Employees who record fewer than 40 hours per week, but who claim to work additional unrecorded hours may or may not have a claim for the unpaid hours they worked which fall below 40 in a workweek. Practitioners refer to the hours between the recorded hours and 40 as "gap time." For example, if an employee records 35 hours in a week and claims to work an additional four hours, the hours between 35 and 39 are gap time. Although some state laws allow for the recovery of unpaid wages for these hours, where the total of the hours is less than 40 per week, these hours are not recoverable under the FLSA. Practitioners often refer to these hours as "true gap time" or "true straight time." However, there is a difference between claims for gap time in weeks where no overtime has been worked and weeks where overtime has been worked. There is a split of authority as to whether straight time wages can be recovered under the FLSA in weeks where the total of the hours worked exceeds 40 per week. *Compare Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982) (permitting recovery); *Monahan v. City of Chesterfield, VA*, 95 F.3d 1293 (4th Cir. 1994); *Schmitt v. Kansas*, 864 F. Supp. 1051 (D. Kan. 1994); *Heder v. City of Two Rivers*, 149 F. Supp. 2d 677 (E.D. Wisc. 2001); *Reich v. Midwest Body Corp.*, 843 F. Supp. 1249 (N.D. Ill. 1994); *Platek v. Duquesne Club*, 961 F. Supp. 835 (W.D. Pa. 1995); *Koelker v. Mayor and City Council of Cumberland*, 599 F. Supp. 2d (D. Md. 2009); *Valcho v. Dallas Co. Hosp.*, 658 F. Supp. 2d 802, 811 (N.D. Tex. 2009); *Gilmer v. Alameda-Contra Costa*, 2011 WL 5242977 (N.D. Cal. Nov. 2, 2011); *Barvinchak v. Indiana Regional Medical Center*, 2007 WL 2903911 (W.D. Pa. Sept. 28, 2007) *with Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 115-17 (2d Cir. 2013).

In jurisdictions where straight time pay is recoverable in weeks where overtime is worked, the parties must make sure to include the gap time hours at straight time rates and not overtime rates. Because the hours worked each week may vary, the calculation of unpaid wages may vary as well. Additionally, in weeks where no overtime is worked the parties should take care to eliminate those weeks from their calculations under the FLSA.

D. Liquidated Damages in FLSA Cases

Measuring damages under the FLSA should also include an assessment of the additional damages which provided for in the statute. Under the FLSA, employees are entitled to recover an amount equal to the amount of unpaid minimum wages or overtime assessed against an employer. 29 U.S.C.A. § 216(b). These are typically referred to as "liquidated damages." Unless an employer

presents a proper defense, liquidated damages awards are mandatory under the statute. The FLSA provides employer can reduce or eliminate liquidated damages if the employer pleads and proves:

(1) that its act or failure to act was in good faith, and

(2) that it had reasonable grounds for believing that its act or omission did not violate the FLSA.[2]

29 U.S.C. § 260. A discussion of the circumstances under which liquidated damages are awarded or of the criteria for avoiding them is beyond the scope of this paper.

II. DETERMINING HOURS WORKED IN THE ABSENCE OF RECORDS.

Critical to measuring and proving damages in an FLSA case is determining the number of hours worked by employees. An employee who brings suit under FLSA bears the burden to prove that he performed work for which he was not properly compensated. It is the employer, however, that the FLSA charges with keeping accurate records of wages paid and hours worked. Accordingly, where the employer has fulfilled its obligation to keep accurate records, an employee can meet his burden of proof through receipt of those records. Unfortunately, not all employers keep accurate records. This gives rise to the problem of how to determine how many hours have been worked "off-the-clock." Such was the problem in *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946).

A. The *Mount Clemens* Case.

The Mount Clemens Pottery Company employed workers on piece wage basis at its Michigan pottery plant. The company's timekeeping system was a punch clock. The punch clock records, however, did not accurately reflect all compensable time. Because the punch clock was located some distance from where the employees actually began their work, there was a gap of time between when the employees punched in and when they arrived at their work stations. There was also a gap of time between when they left their work stations and when they punched out. To make matters worse, for the purpose of calculating compensable time, the company rounded punch times: The employees' punch-in times were rounded up to the quarter hour and their punch-out times were rounded down to the quarter hour. In light of this, the workers brought suit under the FLSA alleging that the company's timekeeping system deprived them of approximately 56 minutes of compensable per day, resulting in unpaid overtime.

Upon referral from the district court, the special master assigned to the case recommended dismissal because, in relevant part, the employees had not provided reliable evidence from which the amount of unpaid work could be determined with reasonable definiteness. The district court did not dismiss. Instead, the court established an ad hoc formula to compute hours and, in reliance on that formula, entered judgment against the company. The company appealed. The Sixth Circuit ordered dismissal, holding that the employees had failed to show the amount of overtime worked and that estimated averages were insufficient.

[2] 29 U.S.C.A. §260.

The Supreme Court reversed and remanded. The solution to the problem of inaccurate records, the Court held, is not to deny the employee recovery under the FLSA when he cannot prove the precise number of hours worked. As the Court stated, "[I]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts." 328 U.S. at 688 (citations omitted). The Court explained how the employee can meet his burden where the employer's records are inaccurate ***and*** the employee cannot offer convincing substitutes for the records:

> ***First***, the employee must prove that he has in fact performed work for which he was improperly compensated.
>
> ***Second***, the employee must produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Upon completion of these two steps, the employee has met his burden.

"The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness for the inference to be drawn from the employee's evidence." 328 U.S. at 687-688. Where the employer fails to meet this counter-burden, the court may award damages based on the employee's evidence "***even though the result be only approximate***." *Id.*

After setting out the test and summarizing the factual record, the Court remanded, directing the District Court to calculate the hours worked and resultant damages based on the special master's findings of fact gathered from testimony.

B. Applying the *Mount Clemens* test.

Mt. Clemens has provided a valuable mechanism for employees to assert their FLSA rights. Though portions of the decision were superseded by passage of the Portal-to-Portal Act in 1947, the two-part test for establishing hours was not. Numerous courts have acknowledged as much. *See e.g., Arroyave v. Rossi*, 296 Fed. Appx. 835, 835-36 (11th Cir. 2008); *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 594-95 (7th Cir. 2008); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 87-88 (2d Cir. 2003); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779 (6th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994); *Riley v. Town of Basin*, No. 91-8022, 1992 WL 86717 at *5 (10th Cir. April 24, 1992); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1296-97 (3d Cir. 1991); *Brock v. Norman's Country Mkt.*, 835 F.2d 823, 828 (11th Cir. 1988); *Amcor, Inc. v. Brock*, 780 F.2d 897, 900-01 (11th Cir. 1986); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).

Perhaps one of the most useful outgrowths from *Mt. Clemens* is employees' ability to rely on their own good faith estimates to prove hours worked. *See e.g., Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2d Cir. 2011) ("It is well settled among district courts of this Circuit, and we agree, that it is possible for a plaintiff to meet his burden through estimates based on his own recollection."); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009) ("When an

employer keeps inaccurate or inadequate records, for a FLSA plaintiff to show what his or her damages were, a FLSA plaintiff does not need to prove every minute of uncompensated work. Rather, she can estimate her damages, shifting the burden to the employer.").

Courts have also applied *Mt. Clemens* in other ways. As one example, employees have been allowed to prove by just and reasonable inference when they were performing certain duties as opposed to others. *See e.g., Fast v. Applebee's Intern., Inc.*, 638 F.3d 872 (8th Cir. 2011) (tipped duties vs. non-tip-producing duties). As another example, Plaintiffs have been allowed to, at their request, rely on imprecise payroll data to calculate damages. *See e.g., Solis v. Tally Young Cosmetics, LLC*, 2011 WL 1240341 (E.D.N.Y. March 4, 2011) ("To the extent reliance on the Company Payroll produces a damages award that is not entirely precise, the defendants—who did not, in any event, take advantage of their opportunity to participate in the inquest—'cannot be heard to complain…'"). Though not citing *Mt. Clemens* directly, one court went so far as to deny an employer's motion to compel tax records, reasoning that the employer was responsible for keeping that information in the first place. *See Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-00251 (D. Alaska Sept. 14, 2010) ("Defendants were responsible for keeping track of their own expenditures and deductible expenses, whether the counter- parties were considered independent contractors or employees. Employers already have access to records indicating the number of hours their own employees worked, and Plaintiffs' tax returns would simply duplicate their records.").

That said, *Mt. Clemens* does not provide employees a magic bullet in off-the-clock litigation. For example, in applying *Mt. Clemens*, courts have recognized that it does not lessen the employee's initial burden to prove that he worked hours for which he was improperly compensated. *See e.g., O'Brien*, 575 F.3d at 602 ("However, *Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred."). But Mt. Clemens does lessen the standard of proof for showing the amount of damages occasioned from a FLSA violation.

As another example, when employers fight back to "negative the reasonable inferences that can be drawn from the employee's evidence," courts and/or juries are left to evaluate competing arguments by examining credibility and weighing the evidence. This does not always work to the employees' advantage. *See e.g., Ojeda-Sanchez v. Bland Farms, LLC*, No. 11-13835, 2012 WL 6012964 (11th Cir. Nov. 29, 2012). In *Ojeda-Sanchez*, the Eleventh Circuit affirmed the bench trial order that found lower damages than the employee-plaintiffs set out to prove. The Court of Appeals explained that only reasonable inferences were to be credited. In weighing, among other things, the employees' credibility and testimony of the employer's payroll clerk, the Court of Appeals determined that the district court had drawn reasonable inferences from the evidence presented and affirmed the lower damages amount. *Id.*

Cases questioning the employees' actions insofar as those actions relate to inaccurate time records also call into question a plaintiff's ability to utilize *Mt. Clemens*.

C. Establishing the Employee Worked Uncompensated Time

1. No Time Recorded or No Overtime Paid

Prior to the burden-shifting, an employee must establish that he worked uncompensated time; however, an employee may carry his burden with evidence that is anecdotal and imprecise. *See, e.g, Reeves v. International Tel. & Tel. Corp*., 616 F.2d 1342 (5th Cir. 1980); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1322 (5th Cir. Tex. 1985) (affirming FLSA damage award although "hours some of the crew members worked was inexact"). At times this may be particularly straight-forward, such as when an employee was not paid overtime but worked over 40 hours per week or when no hours were recorded and an employee's testimony establishes that his average hourly compensation was less than the applicable minimum.

2. Compensable Time Excluded

A separate type of violation can be shown where an employer either deducted compensable time (like short breaks) or failed to record compensable time. This was the claim at issue in *Mt. Clemens Pottery*. Normally, a case such as this could be decided at summary judgment as the issue would be simply whether the excluded time was compensable. *See, e.g., Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331, at *24-25 (N.D. Ohio May 5, 2005) (waiting time after employees were required to report to employer's premises was compensable "although employees may have been drinking coffee or socializing while waiting, [because] they could not effectively use this time for their own purpose"), *affirmed by* 11 Wage & Hour Cas. 2d (BNA) 1026, 184 Fed. Appx. 508, 511 (6th Cir. June 9, 2006);_*Donovan v. 75 Truck Stop*, 92 Lab. Cas. (CCH) P34,071, at *4-5 (M.D. Fla. 1981) (finding employees' waiting time between truck washing jobs to be compensable, despite some evidence that employees occasionally left the premises during breaks to "go swimming or out to eat lunch or to perform other personal business"). Similarly, certain automatic deductions practices have been found to violate the FLSA and the employee needs merely to establish that the deductions practice existed (which is often admitted). For example, taking deductions for estimated breaks violates the FLSA. *Brown v. L & P Indus.*, 2005 U.S. Dist. LEXIS 39920, *5-6 (E.D. Ark. Dec. 21, 2005); *see also Chao v. Self Pride, Inc.*, 2005 U.S. Dist. LEXIS 11653, 25-26 (D. Md. June 14, 2005) (finding FLSA violation where employer "made no effort to ensure that employees actually took the breaks before deducting the time from employee wages."). Similarly, records are inaccurate where they "deduct[] hours for lunch breaks that plaintiffs did not take." *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984).

3. Compensable Time Improperly Recorded

Where an employer has underreported hours, the employee's testimony of their own hours worked is the sufficient evidence to establish the underreporting of hours. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co*., 765 F.2d 1317, 1331 (5th Cir. 1985) (reversing district court which had held testimony by three workers was sufficient to show hours worked).

4. Employee Not Recorded on Payroll

Where an employee was not entered on the payroll system at all, plaintiffs can prove unreported time using a combination of overcompensation of another worker and employee testimony. *See, e.g., Aviles v. Kunkle,* 765 F. Supp. 358, 370 (S.D. Tex. 1991) (finding FLSA violations where employer "did not, among other things, keep separate wage records for each employee, mark the exact hours of work for each employee, or provide the net pay for each employee in the pickle harvest.") *rev'd on other grounds*, 978 F.2d. 201 (5th Cir. 1992); *Osias v. Marc,* 700 F. Supp. 842, 844 (D. Md. 1988) (noting employer's "documents did not specify actual hours worked and often grouped two workers' earnings under one person's name."). Because suffered or permitted to work is the standard for compensable hours, the claim that an employment relationship was informal or not official will not defeat the FLSA claim. *Mendez v. Brady,* 618 F. Supp. 579, 581-582 (W.D. Mich. 1985) (rejecting claim "that some of the plaintiffs were not employees of Brady Farms because they were not 'registered,' but rather were only 'helpers' to other employees who were 'registered.'")

D. Inaccurate or Inadequate Records

1. Whose Duty is it to Keep Records?

a. <u>The FLSA's recordkeeping requirements</u>

It is the employer's duty to keep accurate records of wages and hours. The FLSA requires:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C.A. § 211(c). *See Caserta v. Home Lines Agency, Inc.,* 273 F.2d 943, 946 (2d Cir. 1959) (The obligation to comply with the FLSA "is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate record keeping, 29 U.S.C. 211(c), and of appropriate payment, to the employee.").

The FLSA regulation goes on to provide:

> The records may be maintained and preserved on microfilm or other basic source document of an automatic word or data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.

29 CFR § 516.1(a). Generally, these records must contain the employee's full name, home address, date of birth, sex and occupation, time of day and day of week on which the employee's

work week begins, regular hourly rate of pay for any workweek in which overtime compensation is due, hours worked each workday and total hours worked each workweek, total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek (exclusive of overtime compensation), total pay for overtime hours, total additions or deductions from wages paid each pay period, total wages paid each pay period, and the date of the payment and the pay period covered by the payment. 29 C.F.R. § 516.2(a). The employer must also generally keep records of retroactive payment of wages. 29 C.F.R. § 516.2(b). The regulation goes on to provide additional recordkeeping requirements and exceptions for employers with certain categories of employees, as well as duties to preserve records. *See generally* 29 C.F.R. Pt. 516; 29 C.F.R. §§ 516.5, 516.6.

Employers who willfully violate the recordkeeping requirements can be subject to monetary sanctions. 29 U.S.C. § 216(a). In addition to injunctive relief, employees can then gain the ability to rely on their good faith estimates of hours and wages worked as provided under *Mt. Clemens*.

b. Recordkeeping as the employee's burden

Despite the clear dictates of the FLSA, an employer's lack of accurate records can turn into the employee's burden where the employee flouts the employer' recordkeeping system, signs off on timesheets with inaccurate records, or fails to complain to the employer about uncompensated work. The starting point for cases in this vein is generally the requirement that an employer pay its employees for any time the employer knows or should have known the employees are working. 29 C.F.R. § 785.11. However, where the employer does not know and should not have known of the work, there is no duty to compensate.

c. Failure to use the employer's timekeeping system

Where the employee fails to utilize the employer's established timekeeping system, courts are reluctant to hold the employer liable for that off-the-clock work. As the Sixth Circuit stated:

> Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the established process…. When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA.

White v. Baptist Mem. Health Care Corp., 699 F.3d 869 (6th Cir. 2012).

In *White*, meal breaks were unpaid. However, employees were instructed to record all time spent performing work during meal breaks in an "exception log" so they could be compensated for it. This was stated in the employee handbook that employees received and signed. The plaintiff did not do so and brought suit. In affirming summary judgment for the employer, the Sixth Circuit stated, "Without evidence that Baptist prevented White from utilizing the system to report either entirely or partially missed meal breaks, White cannot recover damages from Baptist under the

FLSA." 699 F.3d at 877. *See also Brown v. ScriptPro, LLC*, 700 F.3d 1222 (10th Cir. 2012) (finding no FLSA violation where employee had access to the timekeeping system and did not utilize it and stating, "[W]here the employee fails to notify the employer through the established overtime record-keeping system, the failure to pay overtime is not a FLSA violation."); *Forrester v. Roth's I. G. A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981) (affirming summary judgment for employer where "[I]t is quite obvious that, besides not attempting to notify [employer] of his alleged uncompensated overtime hours, [employee] deliberately omitted the inclusion of those hours from his time sheet even though he admittedly knew that he would have been paid for those hours.").

Importantly, the dissent in *White* discussed the concept of constructive knowledge weighed against the evidentiary record. The employer need not have actual knowledge of time worked in order for that work to be compensable. Rather, constructive knowledge is all that is required. *White*, 699 F.3d at 879-880; *accord Kuebel*, 643 F.3d at 365. Further, the knowledge requirement—and the ability to rely on Mt. Clemens—is satisfied where the employer discourages or prevents the employee from utilizing the timekeeping system. *See e.g., Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306 (11th Cir. 2007) ("[S]everal [employees] in this case testified that they were discouraged from accurately recording overtime work on their time sheets, and were encouraged to falsify their own records by submitting time sheets that reflected their scheduled, rather than actual, hours….Thus, it is clear that the [employer] was not entitled to summary judgment based on [employees'] lack of documentation and inability to state with precision the number of uncompensated hours they worked."); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 827-828 (5th Cir. 1973) ("[T]he trial court found that the employees' immediate supervisors insisted that all work be completed within certain defined time limits and that the pervasive effect of such instructions from defendant's supervisors to its employees was that an employee was limited in the number of hours he could turn in for payroll purposes irrespective of the number of hours actually worked…. Because the immediate supervisors were primarily responsible for the employees' failing to report all overtime, we believe they may have had actual knowledge of the unreported overtime. At the very least they had constructive knowledge, for they had the opportunity to get truthful overtime reports but opted to encourage artificially low reporting instead.").

Notably, whether the employer has actually discouraged or prevented the employee from using the timekeeping system or knew or should have known about off-the-clock work is likely to be a disputed question of fact.

d. Employees signing inaccurate time records

Employers have also advanced the argument that *Mt. Clemens* is inapplicable where employees signed off on or entered inaccurate information on their timesheets. This reasoning is problematic.

First, the idea that, by submitting a timesheet, an employee gives up his right to challenge whether the employer paid him properly under the FLSA amounts to an impermissible waiver of rights. FLSA rights cannot be waived by contract or agreement. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-44 (1981) ("Thus, we have held that FLSA rights cannot be

abridged by contract or otherwise waived."); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the [FLSA]."). Further, even in situations where the employee willingly rejects the protections of the FLSA, the protections remain. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (U.S. 1985) "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections."); *Imars v. Contractors Manufacturing Services, Inc.*, 165 F.3d 27, 1998 WL 598778 (6th Cir. 1998) ("Even if employees freely ***want*** to work for below the minimum wage, or work in statutorily banned work conditions, or work long hours without extra compensation - even if their choices are moral and economically efficient - the FLSA does not allow this.") (emphasis in original).

Second, an employee's submission of his own timesheets cannot remove him from the protections of the FLSA or disentitle him to the test in Mt. Clemens where the employer knows of the inaccuracies. For example, in *Kuebel*, the employee admitted to falsifying his own timesheets. He did so, however, because managers instructed him not to record more than forty hours per week. The Second Circuit's in *Kuebel* held "the fact that an employee is required to submit his own timesheets does not necessarily preclude him from invoking *Anderson's* standard where those records appear to be incomplete or inaccurate." 643 F.3d at 363. *Kuebel* is important in that time-shaving at management's instruction is extremely likely to be present in situations where employee-authored time records do not show all hours worked.

e. Employees failing to complain

Employers have advanced the argument that employees' failure to complain to employers about timekeeping or payment failures bars recovery or utilization of the *Mt. Clemens* test. Employees can counter with the waiver argument above. Additionally, employees can attempt to show that, despite receiving complaints, the employer had actual or constructive knowledge of the work. However, in evaluating whether the employer had actual or constructive knowledge, the lack of complaints can be a factor courts consider. *See e.g., Davis v. Food Lion*, 792 F.2d 1274, 1278 (4th Cir.1986) ("In finding that Food Lion had no constructive knowledge of off-the-clock work, the district court noted that no evidence was introduced that any employee, including Davis, had ever complained to management that it was impossible to beat the standards… Upon review of the whole record, we cannot say that the district court's view of the evidence was implausible….This finding is not clearly erroneous.").

2. How to Prove the Employer's Time Records Are Inaccurate

a. Through Testimony of Company-Related Individuals

A number of individuals likely possess information which would show the employer's records are inaccurate. These individuals may be current and former employees or co-workers, supervisors, trainers, payroll clerks, and even clients. Employee testimony alone will normally meet the burden to show uncompensated work. At times this testimony may simply show an employee working more hours than were recorded. *See, e.g., Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1352 (5th Cir. 1980) (affirming judgment where "Reeves introduced what

he termed a 'running total' of hours worked that he apparently kept in his mind . . . he conceded that the totals corresponded to the rough computations of his subconscious mind.").

Other times employee testimony may be used to show more like a policy or practice of underreport hours, requiring off-the-clock work, or backing into hours. *Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1352 (5th Cir. 1980) ("The record supports the magistrate's finding that IT&T did not keep adequate records and that employees were ordered to report incomplete and deflated figures on overtime hours.").

Unfortunately, fear of retaliation often silences third-party employees. Where possible, they may become very convincing witnesses even if it is primarily their pay records that are used as evidence. For example, if a security guard, supervisor, or support person worked the same hours but was subject to different payroll practices that more accurately recorded their hours, their paystubs may be very useful assuming that the comparability of the plaintiff's and the third-party's hours can be established.

Current, or particularly former, payroll employees may be willing to testify truthfully about the firm's payroll practices. *See, e.g., Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950, at *17-18 (S.D. Ga. July 18, 2007) (evaluating third-party witness noting "Rodriguez was no ordinary H-2A laborer, but rather a computer scientist [employed to calculate pay]"). Be careful, though, because many members of the payroll staff will undoubtedly be willing to lie about the employer's practices to either keep their job or gain a promotion.

b. Through Testimony of a DOL Expert About the Indicia of Falsification

Department of Labor employees regularly testify about hours records in cases brought by DOL. *See, e.g., Marshall v. Mammas Fried Chicken, Inc.*, 590 F.2d 598, 599 (5th Cir. 1979) ("The government compliance officer testified that based upon the defendants' weekly payroll journal the defendants' employees had in fact worked overtime."). Accordingly, required Department of Labor officials have the experience to be qualified as experts and can be used to testify about hallmarks of inaccuracy they see in the employer's wage records. This can be particularly useful in front of a skeptical court as a means of further supporting the plaintiff's testimony.

c. Through Documentary Evidence Showing the Time Records are Inaccurate

In addition to testimonial evidence, documentary evidence can also establish that the time recorded on the time records is inaccurate or inadequate. The chief way to show the inaccuracy is to show that the records fail to capture all time the employee works. Practitioners should look for any records which demonstrate plaintiffs performed work that was not recorded. The following is a non-exhaustive list of the more common types of records which will be likely to show the employer's records are inaccurate.

i. Documents Instructing How Time is to be Recorded

One important source of evidence showing the company's records are inaccurate is the company's instructions to its employees on how to record time. While the instructions given by many companies are wholly compliant with the FLSA, other companies implement timekeeping practices that violate the FLSA on their face. Additionally, knowing how individuals are supposed to record their time will enable the practitioner to identify timekeeping practices that vary from the stated instructions. Such a discovery can help to identify the source of the noncompliance.

ii. Documents Explaining How the Timekeeping System Works

If the employer maintains an electronic or other timekeeping system, understanding its operation can reveal the time records being kept are not accurate. For example, electronic time clocks can be set to automatically round in one direction or to automatically deduct specified amounts of time from recorded time. As important, many timekeeping systems keep log files showing when employee time has been modified. These log files may be unknown to the employer but may be discussed in the system's documentation. Such log files record when a change was made, what the change was, and who accessed the system to make the change. This kind of evidence can be the smoking gun needed in a case.

iii. Employer Time Records and Payroll Records

The first place to begin is with the records the employer used to pay the employee. Typically, an employer who is tracking time will have a process for turning those time records into paychecks. The timekeeping records will may show how the employees are keeping their time, but they may also reveal that the company has either instructed that time not be recorded accurately or has altered the records. Matching the time records against the payroll records can be quite instructive. For example, if an employee records 8.5 hours per day as actually work time, but is only paid for 8 hours in a day, this may demonstrate systemic time shaving or one-way rounding.

Once you have the time and payroll records and have confirmed that all hours recorded were actually paid for by the employer, you can compare the time records to other records which may show additional work time which was not recorded on the time sheet. Of course, if there are no time records, other records tending to show the number of hours worked will come into play.

iv. Production Records

Most companies that produce a good and even those that produce services create production records. These records often contain time stamps or other information from which beginning and end of day activities occur. Whether it is a run sheet in a manufacturing plant or ticket information in a call center or mobile workforce environment, many of these records can be used to show an employee is working outside the time for which she/he was paid.

v. Security Records

Defendant companies often employ security systems to control employee ingress and egress into the workplace. One common system uses "swipe cards" or fingerprint to allow an employee to enter a workplace. Other systems use video surveillance or sign in sheets which do not rely on technology. This is particularly true for work done outside normal working hours. Some buildings have third party security companies who maintain these records where other companies maintain them internally. Showing when an employee arrives at work and leaves at the end of the day can be instrumental in showing the time records failed to record all of the employee's actual work time.

vi. Work Calendars and Appointment Sheets

Employees who work in an environment where they keep a detailed calendar (sometimes electronically) or detailed appointment / meeting logs should request these records so they can be cross-referenced against the company's payroll records. Electronic records like Outlook calendar files should be requested and identified for preservation.

vii. Cell Phone Records or Company Phone Records

Whether the company issues the cell phone or the employee maintains it personally, these records can show regular work activities which are not captured by the timekeeping system. The same is true of company phone records for the individual.

viii. Electronic Mail or Text Messages

E-mail and text messages, which usually contain time and date stamps, are a valuable source of evidence to show the company's time records do not record all hours worked.

ix. Parking Records

In some cases, individuals with parking privileges will use electronic access cards to enter a parking area. These parking records can also show when an employee typically arrives at or leaves work. These records should be requested from the company or from a third party parking management company as the case may be.

x. Tollway Records

In the era of tollroads without tollbooths where tolls are paid by getting an individual's license plate or through charging an electronic tollway access tag, information showing when individuals pass through certain tollbooths can be used to show an employee is traveling to or from work or traveling for purposes of work. This data can also be used to show the company's time records are inaccurate.

xi. Computer Login/Logout Data

Many computer networks maintain log files showing when a particular individual accesses the network and when they log off. This may be true even for remote access workers who VPN to their networks or access them in some other way electronically. Such records have been used to establish employee work outside the scope of the recorded or reported work time.

xii. GPS Information, Geo-Coding, and Route Mapping

In cases involving employees who work away from the office or who routinely travel as part of their job duties, it is important to get data which will allow you to reconstruct the individual's routes and travel activities so you can assess whether the company time records are correct. Some companies have installed GPS locating devices on vehicles. Other companies assign a daily route and leave it to the individual to route his day. In this instance, mapping the route used by the employee or having a company use geo-coding technology to recreate routes can establish how long the actual workday took versus what the company allowed the employee to report or assumed.

d. Through the Use of Electronic Discovery Which Reveals Wage Falsification

An inspection of the employer's payroll computers with imaging of the hard drive may be necessary where an employer does not produce the electronic information that shows each step of the wage calculations. Large-scale wage falsification cannot usually be done by hand. *See, e.g., Morales-Arcadio v. Shannon Produce Farms, Inc*., 2007 U.S. Dist. LEXIS 51950, at *18 (S.D. Ga. July 18, 2007) (noting "Rodriguez testified that he came up with a function in Excel, at [Defendant's] request, that calculated the number of hours work that would be required at the minimum pay rate to equal the earnings based on piecework, and then put the calculated number (as opposed to the actual hours worked) on the Laborers' paychecks."). Accordingly, advocates need to push to see the programs that actually performed wage calculations. Frequently these calculations will be hidden and not immediately produced. *Morales-Arcadio v. Shannon Produce Farms, Inc*., 2007 U.S. Dist. LEXIS 51950, at *19 (S.D. Ga. July 18, 2007) ("Shannon, Jr. told Rodriguez to hide the calculations by copying the data from one spreadsheet and using a function called 'Paste Special' to place the data in a second spreadsheet without revealing the underlying calculations."). The calculations at issue will not be revealed on paper payroll records and advocates must push to see the electronic data and the programs which performed calculations on that data. .

E. Proving The Amount of Work Through The Use of Convincing Substitutes.

Under *Mt. Clemens*, the burden-shifting framework outlined therein is invoked where the employer's records are "inaccurate or inadequate" and the employee cannot offer "convincing substitutes" for those time records. *Mt. Clemens Pottery*, 328 U.S. at 687. Where there are no accurate time records, there are very rarely documents which would be convincing substitutes. This is because most of the records from which an employee's time would be reconstructed were designed for other purposes and contain enough gaps or analytical holes, that they cannot be used

as a complete substitute for missing time records. Further, to the extent convincing substitutes may exist, they can be used to prove the employee's hours under the "just and reasonable inference" prong of the test. Because the hours claimed based on these documents are given presumptive weight, it is a strategic advantage to offer them under the "just and reasonable inference" prong rather than solely as convincing substitutes.

Depending on the specifics of the case, the categories of documents listed earlier in this paper may be sufficient to offer as convincing substitutes and will not be repeated here.

F. The Amount and Extent of Work as a Matter of Just And Reasonable Inference

1. Proving the Amount and Extent of Work Through Non-Expert Testimony

Employees can prove the amount and extent of work through their own testimony.[3] Employees' own testimony can be very convincing to a judge or jury because employees are the ones with firsthand knowledge of how long it takes them to perform a given task, their customary meal breaks, the direction given by managers, and the like.

Additional testimony that can be persuasive to show hours by just and reasonable evidence can come from employees' spouses or roommates, who can recall when the employee would arrive to and leave from home. Similarly, parking lot attendants and security guards can testify as to when employees arrived and left work. Co-workers can testify to carpools to and from work and shared meal breaks. Workers in the cafeteria or nearby restaurant frequented by employees can also offer their observations on the length of breaks. The right former or current managers, too, may be able to offer honest testimony on recordkeeping practices and hours worked, as may payroll and other accounting staff. *See e.g., Leonard v. Carmichael Properties & Management Co., Inc.*, 614 F. Supp. 1182 (D.C. Fla. 1985) ("Plaintiff's testimony is further bolstered by former co-worker and [defendant apartment complex] resident… who stated that he witnessed plaintiff changing light bulbs and responding to emergency calls during the evenings and on weekends."); *Francois v. Mazer*, No. 09 Civ. 3275(KBF), 2012 WL 653886 (S.D.N.Y. Feb. 28, 2012) (considering testimony of doormen); *Williams v. R.W. Cannon, Inc.*, No. 08-60168, 2009 WL 2834955 (S.D. Fla. Aug. 27, 2009) (the testimony of Joel Morales, Plaintiff's co-worker who also carpooled with him to work, bolstered Plaintiff's testimony that he arrived at work early and worked through lunch on occasion.").

[3] In collective actions, courts have allowed employees to meet their burden to prove damages as a matter of just and reasonable inference through representative employee testimony. *See e.g., Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58 (2d Cir. 1997); *Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995) ("Under *Mt. Clemens*, the Secretary can present testimony from representative employees as part of his proof of the prima facie case…. The court can award back wages under FLSA to non-testifying employees based on the 'fairly representational' testimony of other employees."); *Donovan v. Bel-Loc Diner, Inc*, 780 F.2d 1113 (4th Cir. 1985); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988); *but see Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) ("We have found no case, and the Secretary cited none at oral argument, holding that one employee can adequately represent 244 employees holding a variety of positions at different locations…. Usually, an employee can only represent other employees only if all perform substantially similar work.").

That said, plaintiffs should take note that credibility issues can seriously undermine favorable testimony. Guarding against impeachment is critical. Plaintiffs' counsel should make sure to request, compel, and review all relevant documentary evidence in advance of putting an employee on the stand to testify. For example, if in reviewing an employer's payroll, the employee learns that some but not all overtime was paid, he will know not to testify that he was ***never*** allowed to record overtime hours.

Plaintiffs can also guard against impeachment by mentally or actually noting and/or measuring such things as: the time it takes to perform the work in questions; usual meal or rest breaks and their lengths, the time it takes to walk to and from the lunch room; and the daily workplace customs regarding recording time worked. After reviewing these notes and measurements, plaintiffs should adjust or confirm that their estimates so they are reasonable in light of reality.

Plaintiffs should also take note of the line between testimony that is too specific and testimony that is too vague. For example, testimony that is too vague is unlikely to provide a just and reasonable inference of hours worked. *See e.g., Daniels v. 1710 Realty LLC*, No. 11-3674-cv, 2012 WL 4354494 (2d Cir. Sept. 25, 2012). On the other hand, testimony that is too specific runs the risk of being impeached through documentary evidence that slightly or largely contradicts the testimony.

2. Using Experts to Show the Amount of Work as a Matter of Just and Reasonable Inference

An extensive discussion of expert testimony is beyond the scope of this paper. Nevertheless, using expert testimony to establish the amount of work performed is an important tool for plaintiffs. Experts can take a variety of forms and can use a variety of tools to render an opinion. In some cases (like donning and doffing cases), the use of time/motion studies can show how long particular tasks take on average. Experts can then use various models to extrapolate the averages to other participants in the case.

Some experts will work with counsel to develop a questionnaire or survey to issue to the class so the results can be summarized for the jury. Other experts will develop questions to be asked during depositions and will review the responses in order to render an opinion. Still other experts develop interview scripts and interview the case participants at random as the basis for opinions.

In short, expert testimony concerning the amount of work performed can be crucial in showing how much unpaid work was performed. Many of these issues are covered in more detail in Section three of this paper.

3. Inspection of Premises and Payroll Computers

It may be necessary either to establish evidence about the work site or to image the payroll computers to better understand how payroll calculations are made. Inspection can also be used to review originals, not copies, and examine whether whiteout, different color inks, or other corrections were made to original time records. *Digital Control, Inc. v. Charles Mach. Works,*

2004 U.S. Dist. LEXIS 29319 at *40 (W.D. Wash. Mar. 22, 2004) ("the production of true originals (not photocopies) was critical because notations, interlineations, and additions to certain drawings and schematics had been made in different colored pens, possibly indicating that the notations had been made at different times, in particular at times other than that indicated by the date on the document"), *subsequent opinion rev'd on other grounds*, 437 F.3d 1309 (Fed. Cir. 2006). Fed. R. Civ. P. 34 permits inspection pursuant to a written discovery request, but frequently a motion to compel will be necessary. *Cuno, Inc. v. Pall Corp.*, 116 F.R.D. 279, 281 (E.D.N.Y. 1987) ("Inspection is permitted, and indeed anticipated, by Rule 34(a), to be governed by the scope of Rule 26(b).").

4. Actual Demonstrations or Recorded Work Activities

In some cases, it may be beneficial to conduct a demonstration of the work activities in question so the jury can see how long particular activities take to perform. For example, in a donning and doffing case, it may be worthwhile to demonstrate the donning and doffing of heavy chain mail. Similarly, if you are able to inspect the premises and video the activities in question, this may assist the jury in crediting plaintiff's estimate. For example, in a call center case where the claim is that 10-15 minutes of preparatory work is required before being able to take phone calls, a video showing what those activities are and how long they take could be instructive. Be careful, however, as you do not want to suggest a demonstration only to have it damage your case if it does not go as planned.

5. Rule 1006 Summary Exhibits to Present Wage Damages

A summary witness may be appropriately used to present damages in a FLSA action. *See Arias v. United States Serv. Indus*., 80 F.3d 509, 512 (D.C. Cir. 1996) (holding that summary exhibit and testimony was "sufficient to establish an amount and extent of work and wages as a matter of just and reasonable inference as contemplated by Mt. Clemens."). The benefit of a 1006 summary witness is that it is not necessarily an expert and, does not need to be designated as such, and is merely someone summarizing the large amount of payroll data for the jurors or the bench. *Harold Levinson Assocs. v. Chao,* 37 Fed. Appx. 19, 21 (2d Cir. 2002) ("[T]he plaintiff needs merely to offer an estimate of damages . . . a 'representative sample' of employees can provide a foundation for assumptions about the overall employee pool[.]") Summary testimony in general should be sufficient to meet an employee's burden. *See, e.g., Beliz v. W.H. McLeod & Sons*.

6. Training Documents

Depending on the particular case, a company may have training documents which set forth how long particular tasks take to accomplish. For example, if the individuals have been trained to spend 5 to 10 minutes getting ready before they clock in, the training documents will result in admissions the company will have difficulty in addressing. Training documents often contain scripts and norms for tasks and may even suggest when the tasks are to be accomplished.

G. Dealing With The Company Trying To Negate Employee Estimates

1. Testimonial Evidence

There may be occasions where the company calls co-workers to refute estimates of how long a particular task took. You may be able to buttress plaintiff testimony with testimony of former supervisors or co-workers. Ideally, in addition to co-worker testimony, there will be some external indications that make the claim that a two hour task took five minutes refutable.

2. Use of Corporate Representative Testimony

Many attorneys do not adequately prepare corporate representatives to address the subject matters on which they have been noticed for deposition. Moreover, even well-prepared witnesses often make important mistakes. One tactic which may be effective in some cases is to use the corporate representative deposition to force the company to present an official position on how many hours it contends class members worked. Because the corporate representative is not likely to have worked alongside each individual or to have talked to someone who has, effective cross-examination can substantially limit the company's ability to negate the employee's estimate.

3. Company-Sponsored Studies

Even apart from studies companies may commission during litigation, some companies have studied how long particular tasks take or how long people actually work as part of other internal corporate efforts. For example, in determining whether or not a particular task or set of tasks was so *de minimis* as to not be counted as work time, the company may have taken video of the tasks or otherwise reviewed the activities and recorded the results. Further, as part of OSHA or environmental compliance directives, companies may have conducted time/motion studies of the very activities at issue in a case.

4. Information Provided to Obtain a Legal Opinion

Depending on the particular case, the company may well have provided information to its counsel about the amount of time particular tasks take to accomplish. The FLSA provides that the Court may exercise its discretion to deny liquidated damages if a company can satisfy the Court that its violations of the FLSA were in good faith and that it had reasonable grounds to believe its actions did not violate the Act. 29 U.S.C. § 260. The company therefore has a *substantial* burden to show both (1) good faith and (2) reasonableness. *Mireles v. Frio Foods,* 899 F.2d 1407, 1415 (5th Cir. 1990). The determination can turn on whether there is evidence that a company subjectively suspected that it was not in compliance. *Heidtman v. County of El Paso,* 171 F.3d 1038, 1042 (5th Cir. 1999). The defense cannot be established merely by professed ignorance of the FLSA, and requires that the employer met a duty to at least investigate potential liability. *Barcellona v. Tiffany English Pub, Inc.,* 597 F.2d 464, 468-69 (5th Cir. 1979). Thus, where a company relies on advice of counsel (and even when it does not), the information provided to the attorney to obtain the advice is discoverable. *See Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999); *Cox v. Administrator U. S. Steel & Carnegie*, 17 F.3d 1386,

1418-20 (11th Cir. 1994) (assertion of good faith defense, *even in absence of reliance on attorney advice*, constitutes waiver of privilege for all information bearing on party's knowledge; good discussion citing many cases). This source of information can easily handcuff the company in its litigation efforts as it relates to the amount of time worked.

III. THE ROLE OF AN ECONOMIC EXPERT IN MEASURING AND DEMONSTRATING DAMAGES IN WAGE AND HOUR CLASS ACTIONS

When confronting the challenge of measuring and proving damages in wage and hour class action matters, an expert Economist can provide assistance in at least three areas: collecting and organizing electronic and non-electronic source data; analyzing working data from raw sources; and presenting/testing of results, including generating exhibits and offering testimony at mediations or at trial. In the text below, some of the issues that involve damage calculations—such as the use of regular rates of pay and/or employing a methodology based on the fluctuating work week, including work arrangements where no explicit time in/time out records are maintained (as is often the case with piece rate work)—are discussed.

We address the topic of estimating economic damages with a focus on class action matters brought under the FLSA, including the collection and analysis of source data on wages and hours. We also discuss approaches to demonstrating damages at a mediation or trial, with an emphasis on situations where no, or only indirect, measures of off-the-clock work activities exist.

A. Calculating FLSA Damages From Weekly Compensation and Work Hours Data

i) Regular Rate of Pay

Under the FLSA, an overtime premium is to be paid to employees for each hour of work performed after 40 hours in a week. This premium payment is to be applied to the employee's "regular rate of pay", as opposed to the employee's straight hourly rate of pay, and the regular rate of pay must be a least as high as the hourly minimum wage.

Computing a regular rate of pay for overtime damages is not conceptually difficult—the analyst divides total compensation paid to an employee each week by the total number of hours worked in that week[4]--ensuring that all potentially relevant compensation has been included in the weekly regular rate computation. In addition to earnings from regular and overtime compensation, payments such as non-discretionary bonuses, shift differentials and (some) other earnings are to be included in the weekly regular rate calculations.[5]

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[4] In some cases, such as under California state law, the regular rate calculation is based on an assumed 40-hour work week; thus, even if 50 hours were regularly worked per week in a positon found to be misclassified as exempt, weekly damages under California law would require that all 10 hours worked between 40 and 50 hours would also be paid a premium of 1.5 times the regular rate per hour.

[5] See the U.S. Department of Labor Fact Sheet #23, which delineates the types of earnings not to be included in a regular rate calculation:

> "The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays,

Non-discretionary bonus payments may be made at regular or irregular intervals during the work year and constitute a lump sum for payment in recognition of a number of past weeks' work. Computing the portion of such compensation to allocate week-by-week therefore requires an assumption about which weeks preceding the payment contributed to its total amount. Typically, one can assume an annual bonus amount should be divided equally over the number of weeks an employee worked in the preceding year, or up to the number of weeks since a previous bonus payment was received if more than 52 weeks has passed.

Relevant weekly hours of work and compensation components are commonly found in electronic payroll files and reside in a machine-readable format from company sources. An economic expert familiar with large data handling can assist with the extraction process of company data and ensure the data is complete and consistently maintained across the full class period prior to computing regular rates for damages[6]. The same need for data verification exists for Plaintiffs presented with data purportedly covering all relevant employees during the class period.

As noted, overtime premium payments under the FLSA are due in the case of non-exempt employees for each hour above 40 worked in a week, but the appropriate premium will differ between employees who work a fixed number of base hours per week and those whose weekly hours can be expected to fluctuate. A central issue in computing overtime damages in FLSA class matters is whether the analyst should apply an overtime premium based on a standard, fixed hour assumption, or whether damages should be based on the Fluctuating Work Week basis.

ii) Fluctuating Work Week Employees

In the case of Fluctuating Work Week ("FWW") employees, the FLSA allows payment of an overtime premium factor of "0.5"—rather than "1.5" (as would be appropriate for fixed-weekly hour employees)—to be applied to an employee's regular rate per hour for all hours worked in excess of 40 in a week. In order to qualify as an FWW employee, the Department of Labor requires that the employment relationship meets five criteria:

1. The employee's hours must fluctuate from one week to the next;
2. The employee must receive a fixed weekly salary, regardless of how many hours are worked within each week;
3. The fixed salary must be sufficient to provide compensation every week at a regular rate that meets, or exceeds the minimum wage;
4. The employee must also receive at least 50% of his hourly regular rate for all hours worked above 40 in a week; and
5. The employer and employee must share a clear, mutual understanding the fixed salary paid to the employee is not affected by the number of hours worked within the week.

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and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness". *U.S. Department of Labor, Wage and Hour Division, Fact Sheet #23 (Revised July 2008).*

[6] It is not uncommon for company data to reside in different payroll and human resource systems and to change formats over time within a purported class period. Ensuring the electronic/non-electronic data is reliable, and generating litigation-quality data that may be provided to Plaintiffs should be among the most critical contributions of the expert economist.

In matters where employees, originally classified as exempt and salaried, bring a class Complaint alleging they were misclassified and should be receiving overtime premiums for hours worked above 40 each week, defense counsel might argue that an appropriate remedy would involve the re-classification of employees as being FWW. Assuming the employees meet the five necessary conditions above, potentially extensive pay and hours data may need to be collected, verified and damages computed[7] for an FLSA class. Damages under this scenario would be measured by the unpaid overtime premiums (of 0.5 times the regular rate of pay[8] multiplied by the number of hours worked over 40 in each week) owed to each class member.

A related claim in wage and hour class actions arises when employees previously classified as FWW employees claim they were improperly classified and that their proper treatment requires a premium factor payment of "1.5", and not "0.5", applied to each weekly work hour above 40. The expert in this situation can collect, verify and analyze the data as described directly above, but in addition, may offer advice/potential testimony about whether or not the statistical evidence of weekly fluctuation of hours reaches a level consistent with point #1 above—that the hours fluctuate from week to week at more than an insignificant level.

iii) Aside: Piece Rates and Overtime Damages

The FLSA directs that overtime premium payments for piece rate workers are required for hours worked in a week that exceed 40, even though the employee is not paid directly by the hour. The regular rate for piece rate workers under the FLSA is computed by dividing an employee's total weekly compensation by the number of hours worked in the week (i.e. an hourly regular rate) multiplied by 0.5 times the regular (hourly) rate multiplied by the number of hours above 40 in the week. The approach recognizes that weekly compensation from piece rate work is earned over all of the hours spent producing the total output in a week, but that an additional "0.5" factor should be applied to all hours worked in a week above 40. The FLSA requires that the regular rate of piece workers must be at least as high as the minimum wage.

While class actions for piece rate workers can allege damages due to the payment of regular rates that are below minimum wage, an alternate claim is that piece rate workers have been misclassified (perhaps as independent contractors), when in fact the workers are company employees. As a non-exempt piece rate employee, the FLSA dictates that the weekly pay to such employees must not only include the compensation for all pieces produced in a week, but 0.5 times the regular rate for all hours worked over 40[9].

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[7] Note that the regular hourly rate of pay in an FLSA-based FWW case would be based on all hours worked in the week (and not 40, or another fixed number of hours).

[8] The rationale for using an "0.5" premium factor under the Fluctuating Work Week arrangement is that the fixed salary paid had presumably already compensated the employee for all hours worked above 40 at "straight" time, but no premium pay for hours above 40 had been added. Thus, adding an additional factor of "0.5" to the already-paid factor of "1.0" yields a total payment of 1.5 times the appropriate (hourly) regular rate of pay for each hour worked above 40 in a week.

[9] This result can also be accomplished by paying a piece rate worker 1.5 times the value of each piece produced after 40 hours have been worked in a week. See the U.S. Department of Labor Wage and Hour Division, *Handy*

An expert economist engaged in estimated damages in a piece rate matter will generally not have access to time records that capture weekly hours worked. If such records are available, the steps of collecting, verifying and analyzing the pay and hours data can be accomplished directly. Damages can also be estimated on a level of weekly hours testified to by Plaintiff or Defense witnesses. In either case, the analyst compares earnings actually received under the piece rate system versus what payments would be under on overtime premium factor of "0.5" paid on weekly hours that exceed 40, week-by-week.

B. Demonstrating Damages at Mediation/Trial When Data is Entirely Lacking

In some FLSA wage and hour class actions, plaintiffs claim to have performed work for which no time records exist. An example of this might be home health care workers who complete paperwork in their own homes after their last visit of the day, and perform the work without using a telephone, computer or other device that could potentially record time stamps. In order to make, or defend, claims of this nature, estimates of time worked off-the-clock can only be created retrospectively.

In an attempt to provide the Court with a reasonable basis for assigning damages, at least three methods of generating off-the-clock estimated time can be employed[10]. Each has inherent potential flaws, but in the absence of any contemporaneously-recorded time measures for use in estimating unpaid time damages, the methods can provide an empirical basis for assigning damages.

i) Testimony

Plaintiff and Defense Declarations, Affidavits or Deposition testimony can provide estimates of time that may be "typically" worked off the clock on a daily or weekly basis. From these estimates of the total hours typically worked each week, overtime compensation under the FLSA can be computed and economic damages generated. The potential for bias from both plaintiff and defense witnesses is obvious with this approach; in response to either side's claims, it is likely cross-examination can highlight some, but not all, inconsistent or non-credible claims. The instability associated with testimony about the number of work hours is partly due to the retrospective nature of testimony—even witnesses attempting to give entirely honest answers may remember a past experience differently, and increasingly differently the further in the past the testimony concerns. Thus, only in rare cases will there be a consensus on the "correct" number of hours worked in each week of the liability period.

From the economic expert's perspective, data based on testimony alone must be viewed with an abundance of caution. While using an "average" level of work hours for employees within a purported class would form a straightforward basis for estimating damages, the data derived by testimony must yield internally reliable evidence that suggests each worker is describing a "common-enough" work experience throughout the class period that statistical averaging of

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Reference Guide to the Fair Labor Standards Act, Computing Overtime Pay (subsection 2) on regular rates and piece rate compensation.

[10] In the section immediately following this one, we argue that *indirect data sources* should be considered before deciding that only the construction of new data can provide a basis for damages.

reported weekly work hours is appropriate. At the same time, an economic/statistical expert may be asked to evaluate whether data generated by testimony from the opposing side instead demonstrates that, in fact, simple mathematical averaging of work hours is not statistically sound[11].

ii) Surveys

Like direct testimony, survey responses about off-the-clock work are retrospective and respondents are likely to have an interest in exaggerating reported hours (either upward or downward), introducing at the least concerns about intentional or unintentional biases. Equally important, surveys that purport to be scientifically valid must be based on a statistically reliable sampling methodology and be the respondents must be representative of the experiences of the full class at issue.

To be fully credible, a survey submitted in a class action setting should also allow for testing of potential sub-class differences in hours worked; the nature of these differences (including potential differences in work hours over time) will vary according to the allegations of a specific case. Surveys which are too small to yield reliable estimates, or which cannot support testing of differences within the class offer the opponent an avenue to argue the results of the survey are not only potentially inaccurate, but do not properly address the claims made by all plaintiffs within the purported class.

In matters where survey data is presented by either side as the basis for estimating damages, the role of the expert economist can be expected to expand into the areas of statistical analysis and testing of the data presented as being representative of the full class and for the entire class period at issue.

iii) Time and Motion Studies

Like surveys, time and motion studies offer the potential advantage of generating empirical data that can serve as a basis for estimating class damages. Additionally, and unlike surveys, work time measurements are not based on recollections and presumably should provide unbiased measures of a given activity.

Great care must be taken in time and motion studies, however, to ensure the activity at issue is being reproduced reliably. Changes in work activity over time (within the liability period) or differences in work activity across the class members must be recognized and accounted for to allow a statistician to extrapolate time and motion results to all class members. Failure to account for relevant factors that affect work times, whatever their cause, introduce potential measurement error into the analysis data and can serve as a central attack point to challenge estimates of off-the-clock work time from time and motion studies.

[11] While beyond the scope of this paper, divergent testimony about the number of hours worked in a week can form strong evidence that the purported class demonstrates too much variability in work behavior to treat the group of employees on a class basis. The expert economist can play an important role in this area—generally as a witness for the defense, through analysis and statistical testing of variability present in work hours testified to by purported class representatives.

The expert economist, just as with direct testimony and survey results, may offer opinions and statistical expertise in questioning whether an opposing time and motion expert has constructed a statistically reliable sample and whether his/her data are representative of the full class. If desired, the expert economist can also run alternate scenarios of damages based on the data generated by time and motion studies provided by either defense or plaintiff experts to determine the range of potential damages at issue.

C. Demonstrating Damages at Mediation/Trial When Indirect Data is Available

In some instances, an apparent lack of directly measured data to address wage and hour class claims may cause decision-makers to prematurely steer a case away from a full review of available information contained in company records. This failure to explore all company-recorded time sources can cause attorneys to overlook valuable resources in forming their arguments about unobserved work time. Admittedly, an indirect measure of the time associated with off-the-clock work will include a mixture of non-work and off-the-clock work times, but such measures can sometimes offer valuable insight into questions of how much unpaid and previously unmeasured time are at issue.

Some indirect measures of activity times come from devices or systems that are incidental to the work activity of interest, such as cell phone records that are related to an inside sales person. Other sources, such as GPS data—with time stamps that can recreate a work day for truck drivers or repair vans, etc.—can inform even though the purpose of the data was primarily collected for another purpose (perhaps for assessing mileage).

Other indirect measures of an employee's activities, such as a clocking system that records a time stamp when an employee enters or exits a building, or garage, can provide reasonable estimates of off-the-clock work time if employees doing common work in the same location is recorded day after day. Although time stamps that are not at the worksite will include non-work time, an economic expert may be able to analyze this kind of data to provide guidance at mediation as to probable ranges of time in work activities and/or can tailor a presentation of the results for trial testimony to buttress other time measures or testimony.

Note that indirect time measures have two major advantages over the data collection efforts described in the section above—that is, unlike testimony, surveys or time and motion studies, time data collected indirectly is often 1) generated contemporaneously from precisely the work place at issue and 2) captured without bias (i.e. scientifically) at the time the work was being performed. To the extent the measured times include a non-work component, repeated observations can be used to statistically distinguish some, or perhaps most, non-work times to reveal estimates of the activity time of interest. Another advantage to indirect data analysis is that the source data may be relatively inexpensive to collect, as company-maintained data is generally maintained in known systems and in readily accessible formats.

Sites where (off-the-clock) donning and doffing of work clothes takes place—but time clock records are generated only at the entrance or exit from the work building, for instance—provide data that is correlated with the activity of interest and can be analyzed to extract evidence of pre-shift work activity. In a similar way, call center employees claiming unpaid time for logging into telephone systems and booting up work-required software may swipe into, and out of, the

workplace and through analysis of employee behavior over time can reveal the likely range of off-the-clock pre- and post-shift activity.

Below, we present an illustration of analyzing indirect data. In this matter, a class of employees who were instructed to attend a pre-shift safety meeting prior to commencing work each day alleged these meetings typically lasted 10-15 minutes or more. No direct measure of meetings was available and meeting times could, and did, vary. A mediation date was set and defense attorneys needed to know if the supervisor's position—that meetings were only of a short duration, much less than 15 minutes, for example—could be corroborated.

After inspection of the company data, a complete set of electronic entry and exit records for a company parking lot near the work (meeting) site was available, with identification information of each employee included. We were also able to collect and match scheduling data for each employee, by work date. Knowing the start and stop times of work activities as well as the total time spent from entry to exit of the parking lot for each employee (and importantly, establishing that a given employee attended a given meeting each day), we first estimated the time an employee spent walking back to his/her car after a shifts ended and added to this the time needed to drive to the area where a time record was generated as the employee existed the parking lot. A sample of the information on arrival and schedule times for five employees in our study is shown below in Chart 1:

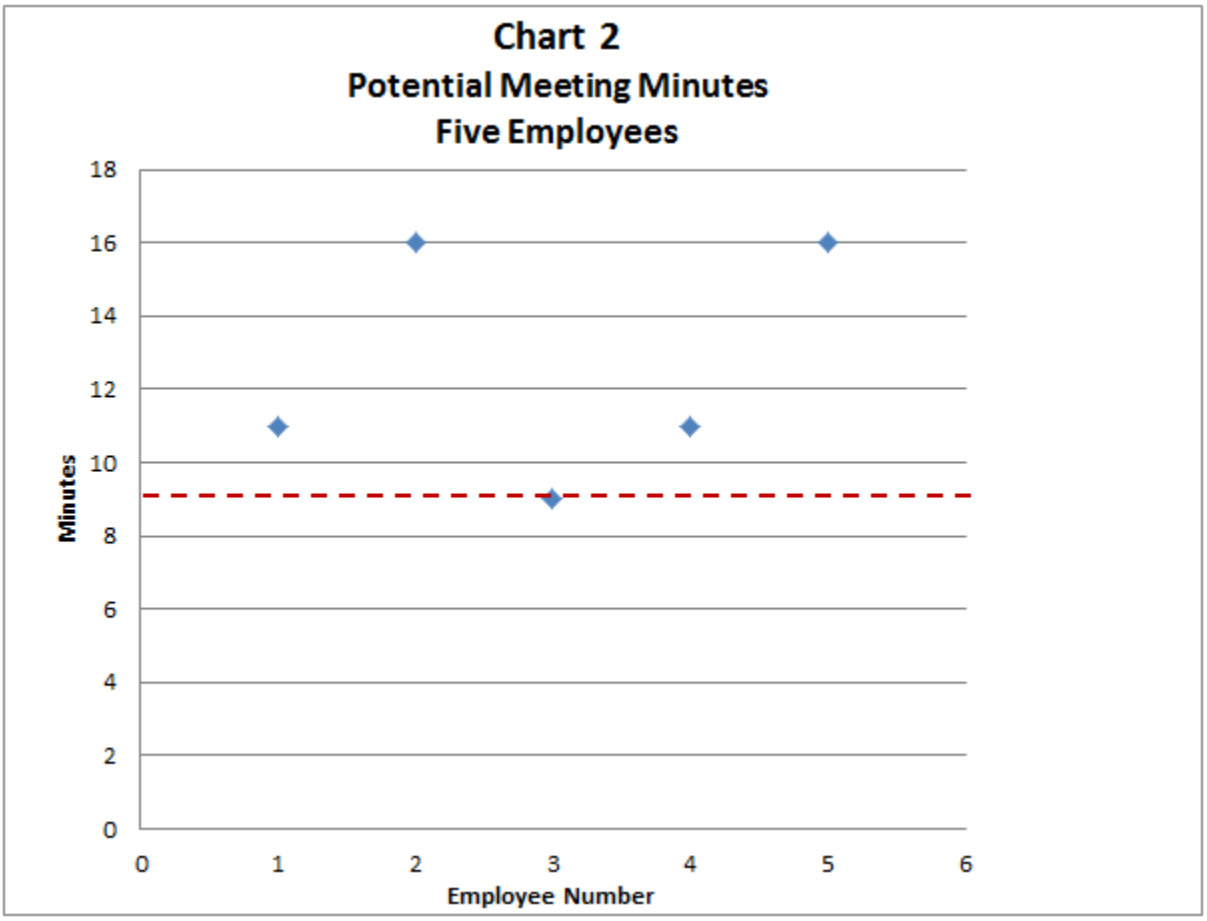
Chart 1
Potential Pre-Shift Meeting Estimates
From Repeated Measures of Indirect Data

	Recorded Time Stamps and Scheduled Times				
Employee Number	1	2	3	4	5
Gate Entry	**7:37**	**7:28**	**7:42**	**7:36**	**7:32**
Scheduled Work Start	8:00	8:00	8:00	8:00	8:00
Scheduled Work End	4:30	4:30	4:30	4:30	4:30
Gate Exit	**4:42**	**4:46**	**4:39**	**4:43**	**4:32**
Potential Meeting Time	11 min.	16 min.	9 min.	11 min.	16 min.

Critically, each of the employees shown in this chart belonged to the same work Department and, as such, each employee attended the same pre-shift meeting. Although each of the five employees attended the same meeting, the arrival and departure times varied for each of the five individuals. If we assume that the time an employee spent returning to his/her automobile and exiting the lot were approximately the same (employee by employee) as the time spent parking their automobile and walking to the workplace on arrival, an estimate of the remaining pre-shift activity time emerges.

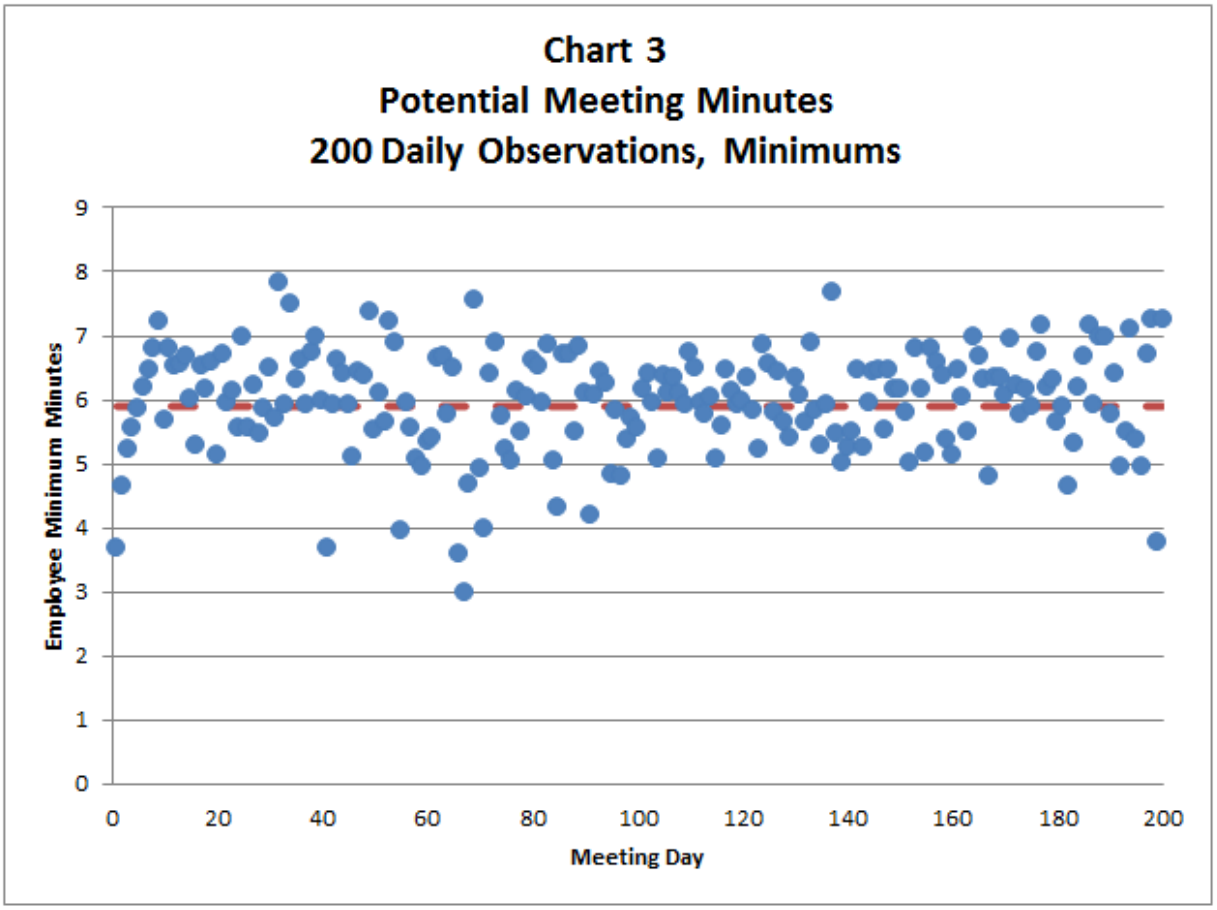
For example, in the Chart above, employee #1 completed his/her shift at 4:30 p.m. and returned to his/her automobile, exiting the lot at 4:42 p.m.—a difference of 12 minutes. Assuming the time spent pre-shift in parking and walking to the worksite was similar (i.e., that pre- and post-shift walk times were similar), the employee would have arrived, ready for a pre-shift meeting, at 7:49 a.m., or 12 minutes after his/her arrival time of 7:37 a.m. This leaves a potential maximum unpaid meeting time for employee #1 of 11 minutes (between 7:49 a.m. and the start of paid time, at 8:00 a.m.).

Because each of the five employees attended the same pre-shift meeting, there are five estimates of potential meeting times derived from the data in Chart 1, with employees #2 and #5 having up to sixteen minutes available for an unpaid meeting, and employee #3 only nine minutes, as shown in Chart 1 and graphically, in Chart 2.



Logically, if each of the five employees attended the same pre-shift meeting, the meeting should not have exceeded nine minutes in length and in all likelihood still included some unknown pre-shift time not spent in the meeting. The horizontal line in Chart 2 is drawn to the minimum of the available minutes revealed by the data for these five employees.

In reality, the actual data in this matter covered hundreds of employees over several years and groups of similarly-situated employees for pre-shift meetings were readily available for analysis. In Chart 3, below, we show the results of analyzing the potential meeting minutes that were found for 50 similarly-situated employees over 200 days with a common meeting. Each of the employee records had 50 sets of in/out parking times and begin/end of paid work time schedule entries. Selecting the minimum potential minute estimate among the employees resulted in 200 daily observation points, as shown in Chart 3. The average number of potential meeting minutes emerging from the 200-day analysis was 5.9 minutes, shown as a horizontal red line in Chart 3.



Arguably, the estimate of 5.9 minutes shown in Chart 3 is likely to still include some non-meeting time, as an employee striving to arrive on-time for meetings could be expected to build in at least some additional minutes for unexpected events to occur beyond the true, expected minimum time needed for a meeting. Nonetheless, the employee behavior shown in Chart 3 generated a typical potential meeting time that was statistically significantly below even the lowest estimate of meeting times proposed by Plaintiffs (of at least 10 minutes per meeting).

At mediation, company witnesses argued that meeting times were routinely short, often taking less than 5 minutes per day and very unlikely to be as long as 10 minutes per meeting and produced the analysis above to bolster their argument, which prevailed.

IV. MEASUREMENT AND PROOF OF UNPAID WAGES IN INDEPENDENT CONTRACTOR MISCLASSIFICATION CASES TO RECOVER EMPLOYMENT EXPENSES PAID THROUGH WAGE DEDUCTION OR BY REQUIREMENT

The use of independent contractors as a primary labor force has taken hold in some industries as preferred business model that offers enormous economic benefits along with substantial economic risk. Legal challenges to the use of an "independent contractor" ("IC") business model have been mounted in numerous industries, including agriculture, trucking, small package delivery, newspaper distribution, construction, home-care services, and adult entertainment.[12]

No matter what their motives may be, businesses that who adopt the IC business strategy avoid liability for employment taxes that fund the social safety net, of equal or greater importance, are spared the ever-increasing cost entailed in providing workers' compensation coverage to workers who carry out their core business objectives. By design, businesses that use an IC business model intentionally shift require their IC workers to bear significant financial responsibility for paying portion of the overhead, administrative and transactional costs to fund their core business operations. Indeed, it is not at all uncommon – and in some industries commonplace -- for companies that depend on IC labor to supply uniforms, tools, and equipment required to carry out the company's business objectives and recoup the costs through pay deductions. While the funds used to pay these expenses, ultimately, come from the IC's compensation paid exclusively for their services, the hope is that the allocation of responsibility will support the fiction that they IC workers are self-employed entrepreneurs who bear the risk of loss alongside the opportunity to profit.

In wage and hour cases brought on behalf of IC workers who contest the IC label, claims can be asserted recoup wages used to underwrite the employer's cost of operations under the panoply of state laws designed to promote the important public purpose to protect the interest of employees to keep the full amount of their earned wages. Employers who violate these laws by taking unlawful deductions from employee wages, or through contractual artifices designed to avoid the prohibitions set out in the wage deduction statutes, risk liability not only for the full amount of the unpaid wages, but also, in many cases, liability for double or treble or other forms of liquidated damages, civil penalties and attorneys' fees and costs. Damages for unpaid wages for violations of state wage deduction statutes should be subject to the same standards of proof as uncompensated overtime discussed above, with some differences, but the law in the area is for the most part undeveloped. Below, I will discuss common theories of recovery followed by a discussion of the challenges of measuring and proving this unique category of damages.

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[12] For an excellent summary of the wide range of industries that have gravitated towards using an "independent contractor" model and economic and social impacts of this practice, see Testimony of Catherine K. Ruckelshaus, National Employment Law Project Senate Committee on Health, Education, Labor & Pensions, *Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification,* June 17, 2010, http://www.nelp.org/page/-/Justice/2010/MisclassTestimonyJune2010.pdf?nocdn=1.

A. Employment Expense Deducted From IC Compensation or Paid By Requirement Are Compensable Under a Multitude of State Law Wage Payment and Expense Reimbursement Statutes.

Statutes exist in nearly every state regulate whether and under what circumstance an employer may withhold, deduct, or divert any portion of an employee's wages. The rights conferred on employees in some states are purely procedural prohibit deductions only for limited and specific types of expenses, so long as the deductions do result in payment of less than the minimum wage.[13] But, the wage payment statutes in a many other states also create substantive rights in employees to be free from wage deductions *except* for limited purposes that directly benefit the employee. Each state has adopted its own formulation of the law, but these statutes typically prohibit employers from withholding, deducting or diverting any portion of employee wages (a) without written authorization from the employee and, even then, (b) only for purposes that directly benefit the employee (as opposed to the employer) like contributions to employee benefit plans for health care and retirement benefits, charitable contributions, or the payment of union dues, and (c) only so long as the deductions are accounted for in the employers' records. Additionally, nearly every state imposes requires employers to pay for uniforms or special apparel and costs of laundering them.

Some states have gone further still to prohibit employers from deducting sums from employee wages for any purpose except those expressly permitted by statute even with written employee authorization.[14] A handful of states, including California, Montana, and South Dakota have enacted statutes that expressly require employers to indemnify their employees for most, if not all, expenses that are reasonably and necessarily incurred by their employees in direct consequence of discharging their duties to the employer. Cal. Labor Code §2802; *see also* South Dakota Lab. Code §60-2-1; Mont. Code. Ann. § 39-2-701. The New York Wage payment statute, similarly includes a

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[13] These include*:* **Arizona:** Ariz. Rev. Stat. 23-355 (prohibiting wage deductions without prior written authorization by employee or where a reasonable good faith dispute exists as to the amount of wage due); **Colorado:** Colo. Stat. §8-4-105 (deductions for loans, advances, goods or services, and equipment or property provided by an employer prohibited without written agreement between employer and employee); **Lousiana:** La. Rev. St. §23:635 (prohibits limited deductions from employee wages for fines and assessments); **Maryland**: Md. G.L.E. §3-501-509 (prohibits wage deductions without employees written authorization); **Minnesota**: Minn. Stat. §181.79 (limits prohibited deductions to those taken for lost or stolen property, damage to property or other claimed indebtedness); **North Carolina**: N.C. Gen. Stat. §95-25.8 (deductions authorized with each paycheck for benefit of employer permitted so long as employee wages not reduced below minimum wage); **South Carolina**: S.C. Code §41-10-10 through 41-10-110 (deductions with prior written notice as to amount and terms permitted); **Utah**: Utah Code § 34-28-1 et. seq. (allowing deductions for goods and services required for employment and furnished/ assigned to the employee by the employer except employee uniforms); **Virginia:** Va. Code § 40.1-29(C) (generally prohibits wage deductions without employee written authorization); **Wisconsin**: Wis. Stat. §103.455 (same as Minnesota).

[14] These include: **Connecticut**: *C.G.S. Sec. 31-71e;* **Iowa**: Iowa Code §91A.5; **Illinois**: 820 ILCS 115/9 and 56 Ill. Admin. Code §300 et. seq.; I**ndiana:** Ind. Code § 22-6-2, §22-6-4;**Kansas**: K.S.A §44-319 and K.A.R. §49-20-1; *Yuille v. Pester Marketing Co.*, 682 P.2d 676 (Kan. Ct. App. 1984) (KWPA prohibits shifting employers' "risks of doing business" to employee wages); **Kentucky**: K.R.S. § 337.060(1) and K.R.R. ch. 800, §1:080; **Massachusetts**: M.G.L. c. 149, §148, 148B and 150; *Camara v. Attorney General*, 458 Mass. 756, 760 (2011); *Awuah v. Coverall N. Am., Inc*., 460 Mass. 484, 496 (2011); *Somers v. Converged Access, Inc.*, 454 Mass. 582 (2009); **New Hampshire**: N.H.R.S.A. § 275:48 and N.H.R.S.A. 275-57; **New Jersey**: N.J.S.A. §34:11-4.1 *et. seq.*; **Oregon**, Or. Rev. Stat. §652.610 *et. seq.*; and **Pennsylvania:** 43 P.S. §260.1 et. seq.; **Vermont**: Vt. Admin. Code §13-1-101:11.

provision that prohibits an employer from charging employee wages, or requiring payment of expenses by separate transaction that are not authorized wage deduction under the statute. N.Y. Labor Code §§198.1 and 198.3; *see also* Iowa Code §91A.8 (employer violate wage deduction statute by an intentional failure to pay wages or reimburse expenses). The Massachusetts Supreme Judicial Court has interpreted its state's wage payment statute to require reimbursement of expenses that would otherwise by the employer's responsibility to misclassified ICs. *See Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (Mass. 2009).

Although, as noted, there is little published case-law interpreting most of these statutes, there California courts have provided some judicial guidance both as to the scope of the compensable damages in these cases as well as their measurement and proof. *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2008) (discussing alternate acceptable methods of proof to demonstrate employer compliance with expense reimbursement statute); *Cochran v. Schwan's Home Services*, __ Cal. App. 4th ___ (Aug. 12, 2014); and *Estrada v. FedEx Ground Package Systems, Inc*., 154 Cal. App. 4th 1 (2007) discussed *infra*.

B. Measurement and Proof

The multitude of "wage payment/ wage deduction" statutes discussed *infra* have not been interpreted or applied widely by the courts. Statutes that provide both substantive and procedural protections, claims have been asserted to recover both to amounts deducted or withheld from employee pay for prohibited purposes as well as amounts employees are required to pay by separate transaction towards the employer's overhead costs that could not be deducted directly from their pay.

1. Pure Wage Deduction Cases

Both the fact and amount of business expenses deducted directly from employee compensation should not be difficult to prove. Often, but not always, deductions are almost always broken out at least to some degree company records and will be accessible electronically. Nonetheless, issues do arise in cases involving true wage deductions focus on three areas and can present difficult issues of measurement and proof:

(1) Do the deductions fall within the statutory exceptions? Employers will frequently argue that the expense was incurred for the employee's benefit (e.g. a truck he or she can use for other purposes, or personal vehicle or cellphone the employee also uses for work).

(2) Were the deductions properly authorized in writing? While "independent contractor" agreements will often identify these kinds of expenses, express written authorization to permit the employer to deduct the cost from employee compensation is *not* always obtained;[15] and

[15] As one example, Leonard Carder LLP represented a group of limousine chauffeurs in an expense reimbursement action from whom the national limousine company that employed them deducted substantial sums from the monthly pay to cover the company's overhead and other business expenses. These include, among others, hundreds of dollars per month to fund the company's liability insurance policy along with equally steep "spot fees" intended to cover the company's sales, marketing, dispatch, and billing costs, and vehicle lease payments collected by the company on behalf of a preferred vendor from which the drivers obtained vehicles that complied with the company's exacting standards. All told, the deductions – for which no express written authorization was obtained and which entirely benefitted the employer-- consumed more than 50% of the drivers' monthly pay.

(3) Are the employer records sufficiently accurate and detailed to prove the full amount of the loss and maintained in an accessible format? The statutory obligation to provide clear and timely pay-stubs to employees and to maintain those records for a fixed period of time that exists in every state does not apply to non-employee "independent contractors." Moreover, it is not uncommon for employers who engage 'independent contractors" to perform a core service to contract out the payroll function to a third-party vendor so that the employer itself does not have adequate electronic records to use as proof.

2. Wage Claims to Recover Expenses Paid By Separate Transaction

a) General Legal Principles

Although courts in a number of jurisdictions have addressed the categories of employment expenses that may be recovered under state law, predictably, these cases do not address evidentiary issues. The exception is California where a handful of expense reimbursement cases under Labor Code Section 2802 that address more nuanced issues of measurement and proof.

The leading case is *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007). There, California Supreme Court considered whether an employer violated California's expense reimbursement statute by paying its outside salesmen increased wages and commissions as opposed to specified sums for each mile driven as reimbursement for their vehicle expenses. The court examined alternate methods for reimbursing employees for vehicle expenses, and held that *any* reasonable method may be acceptable *so long as* the amount of the reimbursement is transparent to the employees and in fact fully reimburses them for the expenses they incur for the benefit of the employer.

In addition to proof that particular vehicle-related expenses were actually reimbursed, the *Gattuso* Court explained that other methods, such as a mileage reimbursement formula (established by the IRS or otherwise) or payment of increased wages or commission in a "lump sum" that is intended to reimburse the employee's predictable and recurring expenses could satisfy the employer's obligations *so long as* the employer separately identifies the amounts allocated to service performed and reimbursement for business expenses.

In *Estrada v. FedEx Ground Package Systems, Inc*., 154 Cal. App. 4th 1 (2007)—a class action brought on behalf of FedEx Ground package delivery drivers who had been misclassified as independent contractor decided several months before *Gattuso*—the California Court of Appeal affirmed a trial court order requiring the plaintiff drivers to proffer receipts and personal records to prove their expense reimbursement claims. The trial court rejected the plaintiffs' claim that they should be permitted to establish their losses through expert testimony, based modeling of sample data, on the ground that the vehicle and other employment expenses are, at least in theory, capable of exact proof. The real-world effect of the *Estrada* ruling was to preclude some of the plaintiff driver from recovering damages for expenses they undeniably paid and which they could reasonably approximate. It remains to be seen whether this aspect of the *Estrada* decision has continued vitality after *Gattuso* in which the since the end result was less than full recovery to the plaintiff drivers for their losses.

More recently, the California Court of Appeal addressed the question of the extent to which an employer can be held liable some or all of an expense an employee incurs for personal items used for work related reasons in *Cochran v. Schwan's Home Services*, __ Cal. App. 4th ___ (Aug. 12, 2014). The expense at issue in that case were cellphone charges. Construing the statutory mandate to prevent employers from passing on operating costs to their employees broadly, the Court held that compliance with Section 2802 requires "the employer to pay *some reasonable percentage* of the employee's cell-phone bill" used for the employer's benefit since, to find otherwise, would result in a windfall to the employer. *Id*. The logic of *Cochran* should be applied to any personal items that an employee may use for both personal and work purposes -- for example, tools, car insurance, computers, internet access, or even a home office – and may be proven by any method that will fairly arrive at a reasonable and defensible allocation of those expenses.

b) Employee Losses for Business Expenses Can be Established With Multiple Forms of Proof

i. *Receipts and Other Direct Evidence That Expenses Were Incurred*

The most accurate proof that *specific items of expense* were incurred by an employee of will be found in receipts and similar records showing that goods or services were purchased and paid for by the plaintiff. These include purchase orders and invoices (e.g. fuel, vehicle maintenance and repairs, uniforms, tool and equipment, office supplies, etc.), cancelled checks, vehicle and equipment leasing, purchase and sale agreements and registration documents, vehicle and equipment repair estimates and related records, mileage logs, credit and debit-card statements showing point-of-service transactions, state and local business licenses, insurance contracts, policies, premium invoices and claim records, as well as medical records relating to work related injuries, and so on. In all cases, these records must be carefully parsed to distinguish business from other expenses and properly authenticated with testimony. As one example, while the tank of gas paid for by an employee who drives for living, groceries purchased at the gas-station convenience store are not. Thus, while itemized proof of expenses has the benefit of accuracy, it can be difficult to find and burdensome to tabulate and is unlikely to result in full compensation since comprehensive receipt-based proof frequently is frequently no longer available or accessible years after the fact for use as proof in damages action.[16] Even the best record keepers.

ii. *Contemporaneous Expense and Mileage Logs, Summaries and Other Compilations*

In addition to detailed itemized proof, contemporaneously expense and mileage logs, summaries and other compilations prepared to track business expenses should be accepted as

[16] As one example, Leonard Carder LLP has litigated brought multiple IC misclassification cases to recoup fuel and other vehicle costs in which the plaintiff employees had not kept or could not find some or all of their receipts for fuel, oil changes, cellphone bills and other relatively small expenses but, which in the aggregate, add up to considerable sums of money. These kinds of records are often initially stored in garages, attics, and storage spaces and left behind as time passes and people move on in their lives.

adequate proof of employment expenses in lieu of receipts or other itemized proof so long as those records are proper authentication and lay or expert witness testimony regarding when, how and by whom the logs and summaries were created and what they show. Summary compilations of large numbers of receipts are certain to reduce the costs and burdens of litigation for all parties and the court, and also may be more complete than underlying receipts which, as discussed, may have been lost, left behind, or destroyed.[17]

Mileage logs—which are almost always maintained by companies that engage independent contractor truck drivers to haul freight or perform delivery services—are likely the best means to establish the fuel and other vehicle costs incurred by employee drivers. So long as the fuel economy of the vehicle is known or knowable, fuel costs can easily be calculated using historic fuel prices that are available on the internet for every city in the United States. *See, e.g.* www.gasbuddy.com (comprehensive listing of historic gas prices by city, state and zip code).

iii. Convincing Substitutes: Employee Estimates, Expert Testimony, and Other Circumstantial Evidence

The "just and reasonable inference standard announced by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946) and its progeny permitting employees to prove their hours of work her through their own testimony corroborated, or not, by other circumstantial evidence, should apply with equal force in actions to recover wages unlawfully withheld, deducted or diverted to pay an employers' costs of doing business, whether by deduction or requirement under state wage payment or reimbursement statutes. The principal at work in *Mt. Clemens Pottery* is imposing on employees the evidentiary burden of to establish their hours of work with precision would create a strong disincentive for employers to keep any records at all, a result inconsistent with the remedial purpose of the FLSA to provide full compensation to workers who depend on their wages for subsistence. *Id*.

The wage payment statutes are designed to remedy the very same harm from a different perspective: in both situations an employee is owed compensation for services or acts performed for the employer's benefit and are deprived of their full compensation. In the absence of actual expense records, a misclassified "independent contractor" should be able to prove the amounts she indisputably spent as a condition of employment and for the benefit of the employer through any form of proof that would support a "just and reasonable inference" of the damages sustained. While there are no cases on point, and the *Estrada* case in California reached a different conclusion, a strong argument therefore argument exists that the evidentiary burden in an action to recoup wages unlawfully deducted or diverted from employee pay should be borne by the employer.

By way of example, in the limousine driver case referred in footnote 13 above, the plaintiff chauffeurs undeniably spent substantial sums on fuel, maintenance and repairs to keep their Town Cars on the road in excellent condition, but only a few had complete expense records and several had no records at all. But, the plaintiff drivers could prove the expenses they incurred for fuel using records produced by those drivers who did maintain records, because they each drove the nearly identical cars and serviced the same client base, and they offered testimony that they all worked the

[17] These kinds of proof problems may disappear as records of all kinds continue to be generated or stored electronically using scanners and e-business technologies.

approximately the same hours and logged the same number of miles each week. Alternatively, they could arrive at reasonable estimates these same expenses using the company's electronic billing records showing the location, pickup and drop-off times for customer serviced. These forms of proof – which would certainly by acceptable to prove their hours of work to establish overtime damages under *Mt. Clemens Pottery* and its progeny, would be equally likely to generate an accurate and complete estimate of the miles driven as a basis for calculated fuel and other vehicle expenses.

iv. *Tax Returns and the Taxpayer Privilege*

It is tempting to turn to the state and federal tax filings of misclassified "independent contractors" to prove damages for unreimbursed employment expenses since these kinds of expenses can be deducted from the plaintiff's gross income and reduce her tax liability. In nearly every IC misclassification case where employment expenses are claimed, the question of whether to proffer tax returns as proof, or demand their production, arises. Good reasons exist, however, to avoid the temptation for legal and practical reasons. As a threshold matter, income tax returns are not discoverable in the ordinary course of civil litigation but, instead, are subject to a qualified privilege under which the party seeking discovery must show that the information is relevant to the case and there is compelling need for disclosure.[18]

Thus, introducing tax returns into the equation is certain to increase the burdens and costs of litigation, often to no avail. Additionally, tax returns are not contemporaneous records and deductions are taken for the purpose of reducing tax liability. Thus, whether or not the plaintiff's tax returns are discoverable, the type and amount of deductions taken for unreimbursed business expenses are likely to be both over- and under-inclusive and, for that reason, to have little evidentiary value. Since, in all cases, other forms of direct or circumstantial proof should be available to establish the amount of damage, no compelling need for tax records exist.

C. A Brief Word About Employee Benefits

Employer liability for denying misclassified ICs employee benefits was extensively explored by the Ninth Circuit Court of Appeal in *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), an ERISA enforcement action. In that case, , the Ninth Circuit Court of Appeals held a class workers who had been misclassified as ICs were unlawfully deemed ineligible by plan administrators to participate in two Microsoft employee benefit plans. The Court's ruling turned on the language of the plan documents which expressly *excluded* both freelancers and independent contractors, but which applied to common-law employees. The Circuit found the class of ICS was entitled to recovery for the value of the benefits denied on the basis that Microsoft has

[18] For a comprehensive summary of the approaches taken by different courts in applying the federal taxpayer privilege, *see* Stein, *The Qualified Privilege Against Discovery of Federal Income Tax Returns*, 5 Pittsburgh Tax Review 173 (2008). In California, by contrast, individual and corporate income tax returns and the specific entries they contain are protected from disclosure by a near-absolute statutory privilege. *Webb v. Standard Oil*, 49 Cal.2d 509, 514 (1957) (individual tax returns); *Rifkand v Superior Court*, 123 Cal.App.3d (1981) (corporate tax returns); *Sav-On Drugs, Inc. v. Superior Court*, 15 Cal.App.3d 1, 7 (1975) (entries); *Weingarten v. Superior Court (Pointe San Diego Residential Community)* (2002)102 Cal.App.4th 268, 274 (2002) (listed narrow circumstances in which privilege will not be upheld).

misrepresented both their employment status *and* their eligibility for benefits. *Id*. at 1200. Despite early predictions, the *Vizcaino* ruling has had limited impact; the Court's ruling, most large employers amended their employee benefit plan documents expressly to exclude from coverage all workers classified by the employer as "independent contractors" regardless of their true legal status to avoid the defect identified by the Court in the Microsoft plan documents.