



September 26, 2008

Richard M. Brennan, Director
Office of Interpretations and Regulatory Analyses
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
200 Constitution Avenue, Room S-3506
Washington, D.C. 20210

Re: Comments Submitted on Behalf of the National Employment Lawyers Association (“NELA”) on Notice of Proposed Rulemaking No. RIN 1215-AB13

Dear Mr. Brennan:

The National Employment Lawyers Association (NELA) submits these comments to the United States Department of Labor’s (“the Department”) Notice of Proposed Rulemaking regarding a variety of provisions in the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947, issued for comment on July 28, 2008 at 73 Federal Register 43654, *et seq.*

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members’ clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has a compelling interest in seeing that the goals of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, are realized. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of the FLSA and other federal civil rights laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States.

We appreciate the opportunity to comment on the proposed regulations. By commenting on various aspects of these regulations we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting. We reserve our rights for further comment in that regard.

I. The Department Should Focus Its Regulatory Agenda on Protecting Workers' Rights

It appears that the thrust of the Department's current regulatory proposals are "housekeeping" matters purportedly designed to bring the regulations into line with recent court opinions. However laudatory that goal, the Department's limited resources would be better spent developing regulatory proposals that advance the remedial protective purposes of the FLSA. Regardless of whether the current proposed regulations are adopted, the Department should commit itself at this time to drafting regulatory proposals that will better protect America's workers.

The primary focus of the Department's regulatory agenda should be on fixing the problems created when the Department issued new "white collar exemption" regulations (also referred to as the "541 regs") effective August 2004. As you may recall, NELA submitted comments on the Section 541 regulatory proposals first issued in April 2004 addressing the more problematic proposals. As detailed in the Preamble, when the new 541 regulations were ultimately issued, the Department modified several of the more questionable proposals in light of NELA's input. However, the passing years have only served to aggravate the problems inherent in the "new" white collar exemption regulations.

The primary fix necessary is to revisit, as soon as possible, the minimum weekly salary requirement for the salary basis test. At \$455 per week, or \$23,660 per year, this was (even back in 2004) an absurdly low basis for finding bona fide executive or professional status. The passage of time has not improved the situation as the current economic crisis, particularly the inflationary push of energy and food costs, has made this basic test for the white collar exemptions an anachronism before its time. The weekly minimum should be increased immediately to a more realistic basis for a finding of executive, professional, or administrative status, and should be indexed thereafter to the cost of living.

The Department should also revisit its flawed regulations as to the fundamental "primary duty test" for the white collar exemptions. The "production/staff dichotomy" test should be revived. In addition, the unrealistic "concurrent duties" regulation should be rewritten so that employees who spend the bulk of their time cooking on a grill or stocking shelves cannot be found to be executives. The more practical and realistic quantitative test should be reconsidered, so that exempt status cannot be found unless workers are spending at least 50% of their time on exempt duties. In the alternative, the Department should consider bringing back the minimum floor test so that a worker who spends less than 20% of his/her time on exempt tasks cannot be found to have management of the enterprise/unit as his/her primary duty.

Finally, the new "highly compensated employee" regulation needs to be revised on at least two points: first, the minimum salary component should be increased; second, the \$100,000/year test should be indexed for inflation so that this new test does not swallow up large sectors of the economy.

Outside of the white collar arena, the Department should focus significant attention on revising the Section 516 time keeping regulations so that employers will be required to track the time of their purported independent contractors. With widespread abuses already evident in the mischaracterization of workers as independent contractors, this reform will make it possible to adequately remedy the wage violations in these circumstances. The Department should also consider amending its regulations as to independent contractors to reflect the liberalized view of the Circuit Courts as to the proper implementation of the economic reality test for employee status. The regulatory agenda should also include attention to the Motor Carrier Act exemption (so that it is up to date as to SAFETEA-LU and the recent SAFETEA-LU technical corrections act) and the companionship services exemption (so as to address issues arising from the recent Coke opinion).

In sum, whether or not housekeeping proposals may be appropriate, the Department should commit itself to addressing real regulatory reform to ensure that American workers, already suffering from the nation's economic crisis, are adequately protected from minimum wage and overtime abuses by their employers.

II. Comments on Proposed Regulations Relating to Tipped Employees

A. Summary of Comments Regarding Tipped Employees

The Department proposes revisions to the regulations governing employers of tipped employees. Many tipped workers are low wage workers who are in dire need of protection against unfair labor practices. The Department's regulations should do more to protect tipped workers and to ensure that they are fully notified of their rights – not sanction watered-down notice requirements. We believe that some aspects of the proposed regulations ignore Congressional intent and/or create the potential for confusion and abuse that could adversely impact tipped employees, particularly low wage tipped workers. We have three basic points to make in these comments.

First, Congressional history makes it clear that an employer “must *explain* the tip provision” to its employees. Senate Report 93-690, at p.43 (emphasis added). By suggesting a lesser standard, the Department's proposed regulations ignore Congressional intent. Therefore, the Department should require employers to “explain” – as opposed to merely “inform” – their employees of the FLSA's tip credit provisions.

Second, the proposed regulations do not set forth all the disclosures required by Section 203(m). Because the application of the tip credit provisions requires prior notice of the tip credit provisions, the proposed regulations should be revised to include all of the applicable provisions of Section 203(m).

Third, the proposed regulations create confusion with respect to the ownership of tips. In particular, proposed Section 531.52 suggests an employer can pay its employees a direct wage slightly in excess of the minimum and thereby obtain unfettered access to its employees' tips. This would permit the employer to obtain a tip credit in excess of that permitted by the 1974

Amendments, in violation of Section 203(m). Therefore, the regulations must confirm that tips are the property of the employees who receive them *regardless* of whether the employer elects to take a tip credit.

B. A Brief History of Tips and the FLSA.

1. The FLSA of 1938.

In its original form, the FLSA did not address the issue of whether tips received by an employee counted as wages for the purposes of calculating the minimum wage. *See* Public-No. 718, 52 Stat. 1060 (June 25, 1938). Many tipped industries, such as hotels, restaurants and beauty salons, were exempt from the FLSA's coverage. *Id.*, at 1067 (original Section 213(a)(2)). Railroad "Redcaps" (baggage porters) were the primary tipped occupation within the coverage of the Act. Harry Weiss & Philip Arnow, *Recent Transition of Redcaps from Tip to Wage Status*, 32 Am. Lab. Legis. Rev. 134, 134 (1942).

In anticipation of the FLSA's effects, the railroads sought "methods of avoiding the wage payment of 25 cents per hour to [employees] who got tips." *See, e.g.*, Weiss & Arnow, at 135. After months of conferencing, the railroads "evolved a scheme for counting tips as wages" – the "Accounting and Guarantee system." *Id.* Under the system, each employee was required to report all tips received to the employer. *See, e.g.*, Weiss & Arnow, at 135. If the tips were not sufficient to bring the employee up to the minimum wage, the company would, in theory, bring the employee up to the minimum wage. *Id.* However, "[a]fraid of losing their jobs if they showed earnings of less than the minimum, [employees who earned less than the minimum wage] 'reported the minimum wage even though they were not able to earn it in tips.'" *Id.*, at 136. Thus, when Redcaps "earned the minimum, they reported the minimum, but they also reported the minimum when they did not earn it." *Id.*¹

Redcaps from across the country sued under the FLSA. Redcaps argued tips were not wages within the meaning of the FLSA and therefore did not reduce their employers' minimum wage obligations. Employers argued they were entitled to credit all tips received against the minimum wage. After a series of rulings from the lower courts, the Supreme Court granted certiorari "[b]ecause of the importance of the question whether ... tips could be treated as payment of the [minimum] wage." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 (1942).²

¹ *See also*, Mary Anderson, *Tips and the Legal Minimum Wage*, 31 Am. Lab. Legis. Rev. 11, 13 (1941) ("There is only one effective way out of a situation like this for a worker who desperately needs a job, and that is to report to the employer a greater amount of tips than actually is received.").

² By this time, the Accounting and Guarantee system was largely a thing of the past. In 1940, virtually all of the terminal operators changed to a system of charging a "fee per bag" to customers using Redcaps' services and using this charge to pay Redcap wages. *See, e.g.*, Weiss

The Supreme Court recognized that the “desirability of considering tips in setting a minimum wage, that is whether tips ... should be counted as part of that legal wage, is not for judicial decision.” *Jacksonville Terminal.*, at 388-89. The Court, therefore, limited its inquiry to whether Congress intended to preclude employers from crediting tips against the required minimum wage. *Id.* While the Supreme Court concluded the then-present terms of the FLSA permitted the credit, Congress retained the authority to determine whether employers could credit employee tips against the minimum wage. *Id.*; Weiss & Arnow, at p. 138.

2. The 1966 Amendments.

After years of investigation and debate, Congress entered the “tips as wages” fray in 1966. At that time, Congress greatly expanded the number of “tipping occupations” within the coverage of the Act by extending the FLSA to restaurant, hotels, and retail and service establishments.³ Congress noted the “great need for extending the present coverage of the act to large groups of workers whose earnings today are unjustifiably and disproportionately low.” *See* S.R. 89-1487, S. Rep. No. 1487, 89th Cong., 2nd Sess. 1966, 1966 U.S.C.C.A.N. 3002 at *3004, 1966 WL 4378 (Leg. Hist.). Congress also cited evidence of a “significant correlation between poverty earnings and exclusion from the protected provisions of the act.” *Id.* Congress therefore determined “[e]xtending the coverage of the act [would] do much to relieve the plight of these ‘working poor.’” *Id.*

Congress also sought to limit employers’ ability to claim credit for tips received by their workers. The wage paid to a tipped employee was “deemed to be increased on account of tips by any amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage[.]” *See* Public Law 89-601, 80 Stat. 830 (Sept. 23, 1966). Employees who could demonstrate they actually received less than this amount in tips could petition the Department for a reduction in the employer’s tip credit amount. *Id.*

These tip credit provisions represented a compromise between “two diametrically opposite views[.]” 112 Cong. Rec. 11363 (May 25, 1966) (statement of Cong. Dent). On the one hand, employers sought credit for all tips received by employees. *Id.* Employees, conversely, “demanded that no tip allowance be made toward the minimum wage.” *Id.* Congress drew a line “as to where the tips are actual earnings and where they are gratuities for extra-good service.” 112 Cong. Rec. 11364 (May 25, 1966) (statement of Cong. Pucinski).

However, “any good law can be largely nullified by poor administration.” Mary B. Gilson, *Tips and Social Insurance*, 31 Am. Lab. Legis. Rev. 67, 70 (1941). Approximately a year after the 1966 Amendments, the Department issued regulations suggesting employers could

& Arnow, at 138.

³ *See also* 112 Cong. Rec. 21941 (Sept. 7, 1966) (“I am particularly pleased to report the coverage of tipped employees who have unjustifiably been exempted from [the FLSA.]”) (statement of Cong. Powell).

still require employees to “agree” to turn over their tips. 29 C.F.R. § 531.52 (1967). Later, the Department issued an opinion letter to the same effect. Wage & Hour Opinion Letter WH-251, 1973 WL 36857 (Dec. 26, 1973). Thus, even after the 1966 Amendments, employers could effectively achieve a tip credit equal to 100% (or more) of the applicable minimum wage by simply paying the minimum wage and confiscating employee tips.

3. The 1974 Amendments.

In 1974, Congress again amended Section 203(m) “by requiring employer *explanation* to employees of the tip credit provisions[.]” Senate Report 93-690, p. 42 (emphasis added). In particular, the FLSA’s tip credit provisions would not apply unless the affected employee was “informed by the employer of the provisions of [Section 203(m)].” Public Law 93-259, 88 Stat. 65 (April 8, 1974). By using the past tense (“has been”), the statute required notice *before* a tip credit was taken. *Id.*; 120 Cong. Rec. 8763 (March 28, 1974) (employer must inform its employees of Section 203(m)’s requirements “before the credit ... is applied”). In other words, Section 203(m) requires employers to provide notice of their “intention to treat tips as wages under the Act” prior to taking a tip credit. *Martin v. Tango’s Rest., Inc.*, 969 F.2d 1319, 1322 (1st Cir. 1992).

Congress also moved to correct several errors in the application of the 1966 Amendments. Congress wanted “to make clear the original Congressional intent that an employer could not use the tips of a ‘tipped employee’ to satisfy more than 50 percent of the Act’s applicable minimum wage.” Senate Report 93-690, at p. 43. All tips received by tipped employees were to “be paid out to tipped employees.” *Id.*, at p. 42.⁴

The 1974 Amendments clarified Congress’ determination that tips are the property of the employees who receive them, not the employer. *See* Wage & Hour Opinion Letter (June 21, 1974). Any agreement calling for an employee to turn over tips to the employer is, therefore, illegal. *See, e.g.*, Wage & Hour Opinion Letter WH-386, 1976 WL 41739 (July 12, 1976). This is true “regardless of whether the employer elects to take credit for tips received.” *Id.*; Wage & Hour Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978). Otherwise, employers whose employees earned more than the maximum tip credit in wages could obtain a tip credit in excess of that permitted by law. These employers would simply pay their employees at least the minimum wage and confiscate the employees’ tips.⁵

⁴ The 1974 Amendments also placed the burden of establishing the tip credit on the employer. *See* Senate Report 93-690, p. 43; *see also Reich v. Priba Corp.*, 890 F.Supp. 586, 595-96 (N.D.Tex. 1995).

⁵ Indeed, an employer whose employees average \$8 an hour in tips could effectively obtain a tip credit in excess of the minimum wage (let alone the maximum tip credit).

4. Subsequent Amendments.

Amendments in 1996 and 2007 increased the proportion of the tip credit to the minimum wage. 73 Fed. Reg. 43,657 (July 28, 2008). By this time next year, nearly 70% of a tipped employee's minimum wage earnings may come from tips. *Id.* Given the increasing importance of employee tips *vis-à-vis* the minimum wage, any revised regulations must retain the "strong protections" enacted by Congress to ensure the "fair operation" of the FLSA's tip credit provisions. Senate Report 93-690, at p. 42.

C. The Proposed Regulations.

1. The Proposed Regulations Should (But Do Not) Reflect Congress' Intent that Employers Must Explain the Section 203(m) Provisions to Their Employees in Order to Claim a Tip Credit.

The Department's preamble suggests that "while employees must be 'informed' of the employer's use of the tip credit, the employer need not 'explain' the tip credit." *See* 73 Fed. Reg. 43,659 (July 28, 2008). As authority, the Department cites *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 298 (6th Cir. 1998). However, *Kilgore* makes no mention of Senate Report 93-690 which, as noted above, makes it plain that Congress intended for employers to "explain" the tip credit provisions to their tipped employees. Senate Report 93-690, at p. 42-43. The Department's reliance on *Kilgore* is misplaced given the *Kilgore* opinion's failure to review the legislative history behind Section 203(m).

Congress intended for "inform" to be synonymous with "explain." *See* Senate Report 93-690, at p. 42-3. In addition, the leading FLSA treatise of the time interpreted the 1974 Amendments as requiring an employer "to have explained the tip provisions of the Act" to its employees. *The Fair Labor Standards Act* § 9.VII.A at p. 551 (Ellen C. Kearns, ed., 1999). As Justice Scalia once noted, "[I]f a statute refers to a bear, you can't call it a fish, but if a statute refers to an animal, you certainly can read in that it doesn't mean fleas."⁶ Here, the statutory term "inform" could and should be read as requiring an employer to "explain" the tip credit provisions to its employees.

2. The Proposed Regulations Do Not Include All the Required Disclosures.

To claim a tip credit, "the employer must inform the tipped employees of the provisions of § 3(m) of the FLSA." *Reich v. Priba Corp.*, 890 F.Supp. 586, 595 (N.D.Tex. 1995). The First Circuit determined that "at the very least," an employer must give "notice to employees of the employer's intention to treat tips as satisfying part of the employer's minimum wage obligations." *Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1322 (1st Cir. 1992). However, the

⁶ Oral argument from *Barnhart v. Walton*, 535 U.S. 212 (2001) available at: http://www.oyez.org/cases/2000-2009/2001/2001_00_1937/argument/

court also recognized that Section 203(m) “could easily be read to require more – for example, notice of ‘the amount ... determined by the employer’ to constitute wages[.]” *Id.* Interpreting Section 203(m) as requiring full disclosure of all Section 203(m)’s tip credit requirements is, therefore, clearly within the Department’s authority. *Id.*

A fair reading of Section 203(m) requires an employer to inform its employees that: (1) a cash wage of at least \$2.13 is required; (2) the employer intends to consider a certain portion of the employee’s tips as wages; (3) the employee’s cash wage plus the employee’s tips must equal at least the minimum wage; (4) if the cash wage plus tips do not equal at least the minimum wage, the employer must make up the difference; and (5) the employee is entitled to retain all tips other than those contributed to a valid tip pool. *See* 29 U.S.C. § 203(m).⁷ Incorporating these statutory requirements into any revised regulations would clarify the employer’s obligation to inform “his tipped employees of the specifics of the tip provision.” Peyton Elder, *The 1974 Amendments to the Federal Minimum Wage Law*, 97 Monthly Lab. Rev. 33, 34 (1974).

Requiring “full disclosure” in the regulations is particularly important since the Department correctly recognizes the “FLSA poster alone is not sufficient notice to employees of the provisions of Section 3(m).” Wage & Hour Opinion Letter, 1997 WL 958300 (January 21, 1997); *see also*, *Bonham v. Copper Cellar Corp.*, 476 F.Supp. 98, 101 & n. 6 (E.D.Tenn.1979). While it contains some of Section 203(m)’s requirements, Publication 1088 clearly states that “other conditions must also be met.” *See* Publication 1088.⁸ Under the express terms of the statute, employers bear the burden of “informing” employees of these other conditions. 29 U.S.C. § 203(m). Therefore, a revised Section 531.59(b) should require employers to disclose all of Section 203(m)’s requirements to their tipped employees.

In fact, the Department might include a sample notice by adding the following subsection to proposed Section 531.59:

Sample Notice.

The minimum wage is currently \$_____. We will pay you at the rate of [wage paid (must not be less than \$2.13)] per hour because we intend to credit the tips you will receive against the minimum wage. Specifically, we consider your tips to constitute a

⁷ One court held the employer’s obligations included informing employees: (1) “that a minimum wage is required by law”; (2) “the dollar amount of the minimum wage”; and (3) that “the actual hourly wage paid [is] the result of a deduction allowed by law when tips supplement the reduced wage rate.” *See Reich v. Chez Robert, Inc.*, 821 F.Supp. 967, 976-77 (D.N.J. 1993) *vacated on other grounds* 28 F.3d 401 (3rd Cir. 1994). The limited notice requirements suggested by this decision do not square with the plain language of the statute. *See* 29 U.S.C. § 203(m).

⁸ For example, Publication 1088 does not state employees are entitled to retain all their tips (other than those contributed to a valid tip pool).

credit of \$[tip credit claimed] per hour against the minimum wage. The amount of tips you actually receive must equal at least \$[minimum wage] when they are added to the \$[wage paid per hour] we are paying you. If, at the end of each workweek, you have not earned an average of at least \$[tip credit claimed] per hour in tips, we are required to make up the difference between the minimum wage and what you received in tips and wages. Under the law, you are entitled to keep all your tips other than those contributed to a valid tip pool.

[If a tip pool is used] Under our tip pool arrangement, you are required to contribute ___% of your (tips or sales) to a tip pool. The tip pool will be distributed to (the busboys, bellhops, waiters, etc.) on the following basis:

As noted above, the FLSA requires an employer to explain the tip credit provisions prior to taking any tip credit. Courts are uniformly in accord. *See, e.g., Marshall v. Gerwill*, 495 F.Supp. 744, 753 (D. Md. 1980) (notice must be given prior to taking the tip credit). Our colleagues from Epstein Becker & Green (Epstein Becker) are, therefore, clearly wrong in suggesting that notice can be provided after-the-fact. *See* Letter from Epstein Becker (Epstein Becker Letter), WHD-2008-0003-0003.1, at p. 4 (suggesting paychecks received after the work is performed can provide the requisite notice).⁹ The proposed regulation correctly states that the credit provisions do not apply unless the employer “has informed its employees that it intends to avail itself of the tip wage credit ... in advance of the employer’s use of the tip credit.” 73 Fed. Reg. 43,668 (at proposed 29 C.F.R. § 531.59(b)).

3. The Proposed Regulations Create Confusion with Respect to the Ownership of Employee Tips.

Long before the FLSA, employers have “sought means of diverting [employee tips] into their own tills.” Courtney Kenny, *Jhering on Trinkgeld and Tips*, 32 L.Q.Rev. 306, 313 (1916). “Since the passage of the 1974 Amendments to the FLSA [however], it has been clear that tips are the property of the employee[.]” Wage & Hour Opinion Letter, 2001 WL 1558958 (April 19, 2001). The “tip retention requirement of section 3(m) applies regardless of whether the employer elects to take credit for tips received.” Wage & Hour Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978).

⁹ Because the statute places the burden of “informing” employees on “the employer,” an employer cannot rely on unrelated entities (such as the Department or prior work history) to provide the required information. 29 U.S.C. § 203(m) (notice must be provided “by the employer”); *Dominguez v. Don Pedro Restaurant*, 2007 WL 2884370, at *3 (N.D.Ind. Sept. 26, 2007) (prior employment is irrelevant to whether “the employer” provided the required notice). Epstein Becker is, therefore, also incorrect in suggesting that prior work history can provide the requisite notice. *See* Epstein Becker Letter, at p. 4.

However, proposed Section 531.52 could cloud the decades of administrative guidance on this issue. As currently drafted, Section 531.52 provides that “[w]here an employee is being paid wages *no more* than the minimum wage, the employer is prohibited from using an employee’s tips for any reason other than to make up the difference between the required cash wage paid and the minimum wage or in furtherance of a valid tip pool.” 73 Fed. Reg. 43,667 (July 28, 2008) at § 531.52. By reverse implication, therefore, the proposed rule might suggest to some that where an employee *is paid more* than the minimum wage, an employer can use the employee’s tips. That would be incorrect. *See, e.g.*, 29 U.S.C. § 203(m); Senate Report 93-690, at p. 43; Wage & Hour Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978).

Any confusion on this issue is particularly dangerous given that some courts wrongly permit employers to pocket the tips of employees who are “paid” at least the minimum wage. *See Cumbie v. Woody Woo, Inc.*, 2008 WL 2884484 (D.Or. July 25, 2008) (employers can take employee tips if the employee’s direct wage is equal to or more than the minimum wage); *Cooper v. Thomason*, 2007 WL 306311 (D.Or. Jan. 26, 2007) (same). While proposed Section 531.52 addresses employees earning a direct wage of “no more than the minimum wage,” it does not address employees whose direct wage exceeds the minimum wage. Given the incorrect rulings in *Cumbie* and *Cooper*, it is clear that additional guidance is necessary.

The Department should revise the proposed regulation to clarify that: (1) tips are the property of the employee who receives them (either individually or through a valid tip pool); and (2) the tip retention requirement applies even if the employer pays a wage in excess of the minimum wage. To achieve this result, the Department could simply incorporate examples from its opinion letters. *See, e.g.*, Wage & Hour Opinion Letter WH-536, 1989 WL 610348 (Oct. 26, 1989) (explaining when deductions may be made from the tips of employees who are paid in excess of the minimum wage). As currently drafted, however, proposed Section 531.52 creates confusion rather than offering guidance.

III. Comments on Changes to 29 C.F.R. § 778.114 – Fixed Salary for Fluctuating Hours

NELA objects to the Department’s proposed changes to 29 C.F.R. § 778.114 (“the FWW regulation”) and asks the Department to leave the text of this regulation unaltered. The proposed changes are not only unnecessary, but they would have the direct effect of administratively overturning established uniform case law that benefits employees and prevents employer abuse of the Fluctuating Workweek (“FWW”).

On July 28, the Department published proposed revisions to the FWW regulation with the purported justification that the fluctuating workweek regulations “are in need of clarification and updating to delete outmoded examples and eliminate confusion over the effect of paying bonus supplements and premium payments to affected employees.” 73 Fed. Reg. 43656. While NELA does not endorse the FWW (as briefly discussed below), NELA does not agree that the current FWW regulation requirement of a “fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many” is in need of the amendment proposed by the Department. The regulation, as uniformly interpreted and applied by the courts, does not allow for the payment of “non-overtime premiums” in conjunction with the FWW.

These same courts make it clear that true “overtime premiums” (those provided for in 29 U.S.C. 207(e)(5)-(7)) do not invalidate the FWW. The proposed change would administratively overturn uniform case law. Further, the proposed change will add confusion to well-settled law, may lead to employer abuse, and creates confusion as to the level of deference to be given to the regulation.

A. Overview of the Proposed Change to the FWW.

The principal change being proposed by the Department is to allow employers to pay employees “non-overtime premiums” without invalidating a FWW plan. “Non-overtime premiums” are those premiums and bonuses paid to employees that are not excluded by the terms of the FLSA from inclusion in the regular rate. By way of limited example only, non-overtime premiums would include lump sum bonus payments for nighttime shift differentials, sea pay, day-off pay, HAZMAT pay for firefighters, and certain bonuses for first responders. By contrast, FLSA currently excludes certain “overtime premiums” from inclusion in the regular rate. Congress saw fit to identify a limited number of payments it intended to exclude from the regular rate of pay. The excludable “overtime premiums” are in Section 7(e)(1) through (8). Congress mandated that all other remuneration for work is to be included in the regular rate, including the “non-overtime premiums” which are the subject of the proposed regulation.

The current FWW regulation allows employers to pay a fixed salary to nonexempt employees for varying hours of work, provided that the employer also pays overtime to employees at one-half the regular rate for all hours worked in excess of 40 in a week. That regular rate is calculated by dividing the fixed salary by the total hours worked by the employee in that week. Because “overtime premiums” are excluded from the regular rate of pay, payment of such premiums does not change the fixed “straight time rate” under the FWW. The fixed nature of the straight time pay is a critical component of the FWW. Therefore, payment of true overtime premiums will not invalidate an FWW plan.

The Department, without highlighting the effect on current case law or identifying any confusion created by the present text of the FWW regulation, now seeks to allow “non-overtime premiums” to be paid in conjunction with an FWW plan. The Department should withdraw its proposed change and leave the current FWW intact.

B. The FWW Regulation is Clear That Only “Overtime Premiums” Can Be Paid Without Impacting the FWW.

The current FWW regulation is not confusing as suggested by the Department’s proposed changes to the regulation. The payment of “overtime premiums” is permitted without interfering with the fixed salary component of a valid FWW plan. The text of the regulation allows the parties to mutually agree that “the fixed salary is compensation (apart from overtime premiums)” for all the hours worked each week. The parenthetical reference to overtime premiums makes it clear that the salary is viewed without regard to overtime premiums.

The fact that the Department specifically identified and excluded the impact of “overtime premiums” makes it clear that the Department did not intend to extend the same exclusion to “non-overtime premiums,” as the Department now seeks to do. Such an exclusion is consistent with Congressional intent to exclude certain, limited types of payments from the regular rate as Congress identified in Section 7(e)(1) though (8). Expanding the regulation to allow for “non-overtime premiums” goes beyond the Department’s authority and rewrites the regulation in a confusing manner.

C. Every Court to Consider the Impact of “Non-Overtime Premiums” on the FWW Has Correctly Found They are Inconsistent with the FWW.

Every court to consider the matter has held that “non-overtime premium” payments violate the plain language of § 778.114 requiring fixed pay for straight time work. The requirement is that fixed straight time pay does not vary *up or down* based on the hours worked. Nor is the fixed pay a minimum payment – it must be fixed and unvarying. “Non-overtime premium” pay, even bonuses or incentive pay, violates that fixed pay requirement because payment of these premiums directly changes the amount of straight time pay and the regular rate.

For example, in *O’Brien v. Town of Agawam*,¹⁰ the Town of Agawam paid police officers night-time shift differentials in addition to a fixed amount of straight time pay regardless of whether the night hours were overtime hours. The First Circuit found that such non-overtime premium payments violate the plain language of § 778.114. It explained “it is not enough that the officers receive a fixed *minimum* sum each week; rather, to comply with the regulation, the Town must pay each officer a “fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many.*”¹¹

In *Dooley v. Liberty Mut. Ins. Co.*,¹² an insurance company paid its auto damage appraisers premiums in addition to their straight-time pay for working non-overtime hours on Saturdays. The district court reasoned that because § 778.114 requires a fixed straight time pay for all the hours an employee works, whether few or many, additions to straight time pay are not allowed. It found that the Saturday premium pay violated the fixed straight time pay requirement and found an application of the FWW improper.

In *Ayers v. SGS Control Service, Inc.*,¹³ the employer, an oil, gas, and chemical inspection company, paid its inspectors premium payments for working offshore and for working on scheduled days off in addition to their straight-time pay. The Court found that the premium payments violated the § 778.114 requirement that the fixed amount of straight time pay must not

¹⁰ *O’Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003).

¹¹ *Id.* at 288.

¹² 369 F.Supp.2d 81, 85-86 (D. Mass. 2005).

¹³ 2007 WL 646326, 9 (S.D.N.Y. 2007).

vary, even though the payments were in addition to a fixed salary. Accordingly, the court invalidated use of the FWW.

In short, the case law applying the FWW in the context of “non-overtime premiums” is uniform and clear. These decisions would be reversed by the change the Department is proposing.

D. The Proposed Changes to the FWW Regulation Administratively Overturn Existing and Settled Law Without Justification.

The proposed changes to § 778.114 would change established law which applies the plain language of the current FWW regulation. Courts and the Department have consistently applied the plain language of § 778.114 without difficulty. They have consistently required that fixed straight-time pay not vary with “non-overtime premiums,”¹⁴ and that the fixed salary alone be sufficient to cover the minimum wage for all hours worked in every work week.¹⁵

The FWW regulation has been construed by courts in the decades since its implementation. Courts have been careful to try to strike a balance between the policies behind allowing the FWW and the FLSA’s remedial goals. The proposed changes destroy that balance. They erode important protections for the FLSA’s remedial goals, and incentivize employers to require extraordinarily long overtime hours.

The proposed changes unsettle the law. Employees and employers that have formed their employment relationships based on the existing law will have to re-evaluate the pay methods. Invariably, issues regarding the interpretation of the proposed regulations will arise, requiring extensive litigation. Employers who think they are following the law may find they are not. Employees may no longer understand how they are paid.

If Congress had intended for “non-overtime premiums” to be excluded from the regular rate and therefore be permissible under the FWW regulation, it could have included them in Section 7(e). Congress did not elect to do so and the Department should not now substitute its own view for the carefully considered view of Congress.

¹⁴ *O’Brien v. Town of Agawam*, 350 F.3d 279, 288 (C.A.1 (Mass.),2003); *Dooley v. Liberty Mut. Ins. Co.*, 369 F.Supp.2d 81, 85 -86 (D.Mass. 2005); *Ayers v. SGS Control Services, Inc.*, 2007 WL 646326, 9 (S.D.N.Y. 2007).

¹⁵ *Ayers*, 2007 WL 646326, at 11, citing *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 894 (E.D.Tex.1997); Ferrer Trial Transcript, Ex. 1, at 80; *see also, Aiken v. County of Hampton*, S.C., 977 F.Supp. 390, 398 (D.S.C.1997); Opinion Letter No. 945, Wages-Hours Lab. L. Rep. (CCH) ¶ 30,957 (Feb. 6, 1969) (“Opinion Letter 945”); Opinion Letter No. 896, dated Dec. 2, 1968 (“Opinion Letter 896”).

E. Permitting “Non-Overtime Premium” Payments Under the FWW Undermines the Stated Goals of the FLSA by Creating an Economic Incentive to Abuse Employees.

1. Two Important Goals of the FLSA Are to Prevent Overwork and Spread Employment.

With the FLSA, Congress created a statutory scheme designed to reduce overtime work through the financial disincentive of overtime pay. Two primary, express purposes of the FLSA are (1) to protect workers from long hours of work; and (2) to spread employment. In 1942, the Supreme Court recognized that the Act’s overtime provisions are intended to protect against the “evil of ‘overwork’ as well as ‘underpay’”.¹⁶ In the same case, the Supreme Court went on to recognize that another, equally important goal of the FLSA’s overtime provisions is “the distribution of available work” and that “reduction of hours was part of the plan”.¹⁷ Courts have uniformly followed that seminal case, and legislative history thoroughly supports both premises.¹⁸

2. The FWW Regulation Permits Employers to Pay Employees at Decreasing Marginal Hourly Rates.

In direct contrast to the FLSA’s stated goals, in 1965 the Department of Labor implemented 29 C.F.R. § 778.114, which provides employer incentives for excessive amounts of overtime.¹⁹ Under the FWW an employer may pay a fixed amount each week for whatever hours an employee works. Because the fixed salary covers straight-time pay for all hours worked that week, the employer is only required to pay the “half” portion of the statutory time and one-half for any overtime hours. The result of the FWW is that the more hours an employee works, the less the hourly rate of pay becomes. For example, the regular hourly rate of an employee paid a fixed salary of \$500 per week under the FWW is \$12.50 if the employee works 40 hours (\$500/40 hours). If the employee works 60 hours, the regular hourly rate is \$8.33 (\$500/60 hours). If the employee works 80 hours, the regular hourly rate is \$6.25 (\$500/80 hours). By working 40 hours of overtime in a week, the employee’s regularly hourly rate drops in half, from \$12.50 to \$6.25. Thus, the more overtime required, the less the worker costs the employer on a per hour basis.

Under the FWW, once an employee works 60 hours in a week, there is an economic incentive for the employer to require the employee to continue working overtime rather than to hire another

¹⁶ *Missel v. Overnight Motor Transportation Co.*, 316 U.S. 572, 577-78 (1942).

¹⁷ *Id.*

¹⁸ See e.g., *Bumpus v. Continental Baking Co.*, 124 F.2d 549, 552 (C.A.6 1941); citing Senate Report 884, 75th Congress, 1st Session, July 6, 1937, p. 4.

¹⁹ 30 Fed. Reg. 1076 (1965).

employee to do the work. (See the example above). In the experience of NELA members, the FWW is typically used by employers who work employees long hours that fluctuate, but do so primarily above 40 hours, such that the fixed pay incentive built into the FWW for weeks of less than 40 hours is rarely a benefit to employees.

Because the FWW's encouragement of long work weeks is antithetical to the FLSA's goals of protecting workers from long hours and spreading employment, the elimination of the few protections provided by the current regulation should be avoided at all costs.

3. The Proposed Regulation Would Lead to Further Abuse of the FWW.

The FWW currently requires that the fixed salary must be sufficient to compensate the employees at not less than the minimum wage rate for those workweeks in which his number of hours is greatest. 29 C.F.R. 778.114(a). This important limitation provides a clear limit to the number of hours an employer can work an employee because the number of hours worked cannot drive the regular rate below the minimum wage. This requirement also encourages employers to ensure the fixed salary is high enough to avoid violating the minimum wage floor that protects employees from receiving sub-minimum wages.

The proposed change to the FWW eliminates the beneficial effects of the minimum wage floor. Under the new regulation, an employer can work an employee very long hours that drive the regular rate below the minimum wage and then hand the employee a non-overtime premium that makes up the difference to get the employee to minimum wage. The new regulation would also let employers set very low fixed salaries and then make bonus payments to cure the minimum wage deficiency when it requires long overtime hours. The net effect would allow employers to pay very little to employees in weeks when their hours are less than 40 and to comply with the FWW by making a curative payment in weeks where overtime is worked. Clearly, neither outcome is in the interest of employees or furthers the goals of the FLSA.

The proposed regulations are also inconsistent with Department regulations prohibiting artificial regular rates. Requiring fixed straight-time pay without variation for periodic non-overtime premiums protects against pay plans that circumvent the FLSA's overtime requirements. Under the plain reading of § 778.114, an employer's obligations are mandatory. It must pay a fixed straight-time pay each week and the corresponding overtime pay for any overtime hours. Non-overtime premium payments are typically discretionary, however, and can be used to artificially lower the regular rate. For example, an employer is free to induce employees to work for inflated straight-time pay but at a lower fixed rate in those weeks in which the premiums are not paid. Such manipulation of the regular rate is prohibited.²⁰

There is a third reason the proposed regulations could lead to more widespread abuse or have the effect of driving wage rates down. Because non-overtime premiums are not allowed in conjunction with a FWW plan, occupations where such non-overtime premiums are

²⁰ 29 C.F.R. § 778.500 ("Payment for overtime on the basis of an artificial "regular" rate will not result in compliance with the overtime provisions of the Act.")

commonplace would now be permitted to implement the FWW where they cannot do so under current law. Employees who are paid non-FWW overtime rates do not suffer from the effect of decreasing marginal overtime rates for increased overtime hours. As a result, non-FWW overtime typically results in higher overtime pay per hour. If the regulation is amended as proposed, public occupations such as firefighters and police officers, who commonly receive non-overtime premiums by function of state law or local ordinance, could be placed on FWW plans. The result would be an expansion of the FWW, which is already in tension with the remedial purposes of the FLSA, and a further undermining of those purposes.

F. The Proposed Regulation Violates the Supreme Court Precedent on Which the Current FWW Regulation is Predicated.

The Department contends that the proposed revision is consistent with *Overnight Motor Transportation v. Missel*, 316 U.S. 572 (1942). 73 Fed Reg. 43662. However, as the Department notes in the same paragraph, *Missel* is premised on one thing that the proposed regulation is not – a **fixed** amount of pay per week. As all of the courts reviewing “non-overtime premiums” in conjunction with the FWW have noted, the additional “non-overtime premiums” make the weekly compensation anything but fixed. It has been on this basis that the courts have invalidated the FWW when non-overtime premiums are paid. *Missel* dictates the same conclusion. Making the proposed change ignores the underlying assumption of *Missel* and likely runs afoul of it by making an employee’s compensation variable when an employer seeks to pay “non-overtime premiums.” Therefore, the Department’s purported reliance on *Missel* is unfounded and is not a justification for the proposed change in the regulation.

G. The Risk of Abuse Far Outweighs any Benefit of Allowing Non-Overtime Premiums under the FWW.

In some instances the payment of non-overtime premiums can be beneficial to employees. However, it is not under the FWW regime. Experience tells that the erosion of one of the FWW’s few protections against long hours of work will not lead to additional pay. On the contrary, it gives employers new protection for long hours and low pay. There are many examples of employees being worked more than 80 hours a week on a regular basis for the minimum wage or marginally more, despite the payment of non-overtime premiums.²¹

The current regulation allows an employer who wants to pay its employees more under the FWW to do so. For instance, an employer can pay more than a 50% premium on overtime hours; can increase fixed pay; can make additional payments that are not part of the regular rate; or can offer other benefits such as health insurance or retirement programs that do not figure into the regular rate. There is no need to sacrifice a fundamental protection to offer additional ways to raise pay when so many already exist.

²¹ See, e.g., *Ayers v. SGS Control Services, Inc.*, 2007 WL 646326, 9 (S.D.N.Y. 2007); *Ferrer v. SGS*, 04 Civ. 916 (M.D. Fla. 2005).

H. Even if the Department Allows the FWW to Apply in Conjunction With Non-Overtime Premiums, Some of the Language Deleted by the Proposed Regulation is Problematic and Inconsistent with the Department's Stated Purposes.

The proposed revisions to the fluctuating workweek regulation include two unexplained changes that have no basis in the purported purpose of revising 29 C.F.R. Section 778.114 – that is, to provide that *bona fide* bonus or premium payments do not invalidate the fluctuating workweek method of compensation (73 Fed. Reg. 43662) – and which result in an incorrect statement of the fluctuating workweek methodology.

The current fluctuating workweek regulation enumerates preconditions that must be met before an employer and employee can enter into a fluctuating workweek payment scheme. 29 C.F.R. Section 778.114(a). Among those preconditions is the requirement that “there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek,....” *Id.*

The proposed revised regulation changes this “clear mutual understanding” precondition to omit the parenthetical containing the language “apart from overtime premiums.” 73 Fed. Reg. 43669. “Overtime premiums” includes the payment of statutory overtime.

Similarly, section 778.114(b)(1) of the proposed revised regulation, which provides illustrations of the application of the fluctuating workweek methodology, drops language that makes it clear that the understanding between the employer and employee is that the fixed wage compensates the employee for all her hours *apart from overtime*. 73 Fed. Reg. 43670. That is, the proposed revised regulation drops the clause “except for overtime premiums” from the following clause included in the current regulation: “... with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek.” 73 Fed. Reg. 43670.

The Department's explanation for the revisions to the regulation fails to mention these changes and, as noted above, there is nothing in the stated purpose of the proposed revisions to the regulation that explains these two omissions. 73 Fed. Reg. 43662. Omitting the two clauses does nothing to buttress the Department's stated purpose of clarifying the regulation to ensure that employers can pay their employees “bonus or premium payments for certain activities such as working undesirable hours” without invalidating the fluctuating workweek method of compensation for those same employees. *Id.*

More importantly, omitting these two clauses will result in a misstatement of the law of the fluctuating workweek methodology and will lead to confusion. If these clauses are omitted, the resulting regulation will suggest that the fixed salary, by itself, is sufficient to compensate for *all* hours worked, regardless of whether or not the employee works hours more than 40. This is fundamentally incorrect. The fluctuating workweek methodology applies only where an employee, in addition to receiving a fixed weekly salary, also receives an additional amount in overtime pay for every hour worked over 40 in the workweek. 29 C.F.R. Section 778.114(a) (a

fixed salary in exchange for fluctuating hours is permitted if the employee “receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay”); *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 581 (1942) (holding that a fixed weekly wage in exchange for variable or fluctuating hours violates the FLSA where the payment scheme does not provide for additional pay for overtime hours).

The omissions contained in the proposed revised section 778.114 misstate the law of the fluctuating workweek methodology and have no conceivable basis in the purported purpose of the revisions, given the inclusion of other language in the proposed regulation. While NELA strongly objects to any revision of Section 778.114, the regulation cannot be revised as currently drafted. The parenthetical in 778.114(a) should be left in and the phrase “except for overtime premiums” should remain in 778.114(b)(1).

I. The Proposed Regulation Could Allow for an Unwarranted and Harmful Expansion of the FWW Calculation Method to Other Areas.

In addition to resulting in an incorrect statement of the law and having no basis in the purported reason for the revisions to the fluctuating workweek regulation, the proposed omissions of the parenthetical in 778.114(a) and the phrase “except for overtime premiums” in 778.114(b)(1) also could have far-reaching implications for whether some courts might apply the fluctuating workweek methodology to calculate damages in misclassification cases.

When determining whether the fluctuating workweek methodology is the appropriate measure of damages in misclassification cases, a number of courts have focused on the “clear mutual understanding” precondition. Some of these courts have held that the clear mutual understanding requirement of 778.114 encompasses an understanding that overtime premiums must be paid (else why would it include the parenthetical “apart from overtime.”) *See Rainey v. American Forest and Paper Association, Inc.*, 26 F.Supp.2d 82, 101 (D.D.C. 1998) (holding that the plain language of Section 778.114 requires an understanding that overtime premiums would be paid); *see also Cowan v. Treetop Enterprises, Inc.*, 163 F.Supp.2d 930, 942 (same); *Scott v. OTS Inc.*, --- F.Supp.2d ----, 2006 WL 870369, * 13 (N.D.Ga., 2006) (same).

Conversely, despite the plain language of section 778.114, a number of courts that have decided the methodology is appropriately applied in the remedial context have done so on the basis that the clear mutual understanding requirement is satisfied where the parties had a mutual understanding that while the employee’s hours may vary, his or her base salary will not. That is, these courts have held that the mutual understanding requirement is met where there is an “understanding” that the employee will be paid on a salary basis, and no overtime would be paid. The most recent example of this reasoning can be found in *Clements v. Serco, Inc.*, --- F.3d ----, 2008 WL 2579859 (10th Cir. 2008), holding that the “clear mutual understanding” requirement of the fluctuating workweek methodology requires only that there be a clear mutual understanding that they will be paid on a salary basis: “[t]he parties initially agreed that no overtime would be paid; thus, no agreement as to the payment of overtime ever existed. The regulation, however, ‘calls for no such enlarged understanding.’ The parties must only have

reached a ‘clear mutual understanding’ that while the employee’s hours may vary, his or her base salary will not.” *Id.* at *6 (internal citations omitted); *see also Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999) (same); *Bailey v. County of Georgetown*, 94 F.3d 152, 156-57 (4th Cir. 1996) (same).

The *Clements* line of cases cannot be squared with the plain language of the regulation. But if the proposed omissions make it into the final version of the revised regulation, advocates of the *Clements* analysis will likely point to the new regulation as supporting their position. By promulgating this version of the fluctuating workweek regulation, the Department will be implementing a change that might be used as a rationale drastically to expand the application of the methodology at the expense of workers’ statutory rights under the FLSA to extra pay for overtime “at a rate of not less than one and one-half times the regular rate.” 29 U.S.C. § 207(a). Such a change to the regulations that might be construed as sanctioning a change in the remedies available to FLSA-protected workers should not be adopted where, as here, the implications of the omissions and proposed changes have not been considered by the Department and were not addressed in the Department’s Notice of Proposed Rulemaking and Request for Comments. 73 Fed. Reg. 43662.

J. The Proposed Changes to a Regulation That Has Never Been Properly Promulgated Creates Additional and Unnecessary Problems.

The text of 29 C.F.R. § 778.114 has never been submitted to the public for notice and comment under the Administrative Procedure Act (“APA”). 5 U.S.C. § 553. However, the proposed revisions to the FWW interpretative guidelines are being submitted for notice and comment. Consequently, it is problematic for NELA to comment on the proposed changes to the interpretative guidelines. NELA wants to make clear that by commenting on the proposed changes, it is in no way endorsing or ratifying the underlying text of the FWW regulation. The only provisions up for comment are the amendments themselves. The remainder of the guidelines are not up for comment, though NELA would welcome the opportunity to comment on the FWW regulation as a whole.

There are significant issues raised by the amendments that flow from the terms of the underlying guidelines. The public, however, is not allowed now, nor has ever been allowed, to comment on these issues because comment is now limited only to the narrow terms of the proposed amendments. Therefore, interested parties cannot provide accurate or complete commentary until the underlying guidelines are up for comment.

This incomplete comment process is not in concert with the goals of the APA and will also create confusion far into the future. If these piecemeal amendments are approved without comment on the underlying FWW interpretative guidelines themselves, a bizarre administrative outcome will emerge. The new portions to the FWW guidelines might be given more deference than the guidelines as a whole. Should a court accord less deference to portions of the guidelines than to the new sections, it would be impossible for a court to reach a consistent interpretation of the guidelines and amendments.

Therefore, if there is to be notice and comment on amendments to portions of the FWW guidelines, the guidelines themselves should be subject to comment generally. This allows the public to provide accurate input into the issues raised by the proposed changes and avoids interpretative issues in the future

K. Conclusion – The Proposed Changes to the FWW Regulation Should Be Withdrawn.

The requirements of the FWW are strictly and independently enforced because they serve to provide minimal protections for the FLSA’s remedial goals. Courts recognize the danger that the FWW presents to keeping overtime hours in check and spreading employment. Unlike the statutory regime at 29 U.S.C. 207(f), the FWW does not include the elaborate protections of the FLSA’s goals. The regulation only includes minimal requirements, such as fixed straight-time pay, that provide a modicum of protection against abuse by employers.

The proposed changes to Section 778.114, which allow “non-overtime premiums” to effectively vary straight-time pay each week, erodes the already minimal protections that are in place. The change would make a mutual understanding between employer and employee increasingly difficult to achieve and would create the opportunity for employers to end-run the protections provided in the current FWW regulation. Moreover, the seemingly innocuous changes might be used to argue that there has been an attempt to overturn existing law administratively and run afoul of *Missel*, one of the most important and long-standing Supreme Court opinions under the FLSA. Expanding the circumstances in which the FWW can be used invites abuse and allows employers to use this anti-FLSA method of paying overtime more readily. NELA therefore requests that the proposed changes to the FWW regulation be withdrawn.

IV. Service Writers

A. The “Service Writer” Position.

The service writer position exists at automobile dealerships around the United States. Service writers meet the customer as they come to a mechanic shop. They may take notes on the customer’s description of mechanical problems and interact with the customer in scheduling drop off and pick up. It is a clerical/receptionist position by and large; however, some familiarity with mechanical issues is helpful since the service writer is the mechanical department’s interface with the customer.

B. The Statute – 29 U.S.C. § 213(b)(10).

Title 29 U.S.C. § 213(b)(10)(A) exempts from the overtime requirements of the FLSA “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers” and 29 U.S.C. 213(b)(10)(B) exempts “any salesman primarily engaged in selling trailers, boats, or

aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.”

The Section 213(b)(10) exemptions allow dealerships to pay their sales staff (who are typically paid commissions) without additional overtime compensation. The Section 213(b)(10)(A) exemptions also allow dealerships to also avoid paying overtime to mechanics and partsmen and women within their service departments.

The Supreme Court has stated that exemptions to the FLSA are to be “narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). *See also A.H. Phillips v. Walling*, 324 US 490, 493 (1945). Extending the Section 213(b)(10) exemptions to service writers would confer a further competitive advantage on the generally larger dealerships at the expense of local mechanic shops. It will also bring a group of employees who are not exempt by terms of the statute into exempt status.

The legislative history behind the statutory language confirms that the exemption was intended to apply only to mechanics and partsmen and women.

Formerly § 13(a)(19) of the Act exempted “any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements” from both minimum wage and overtime requirements. *See*, 29 U.S.C. § 213(a)(19) (1964).

As originally introduced in the House of Representatives § 13(a)(19), 29 U.S.C. § 213(a)(19) (1964), would have simply been repealed. *See*, H.R. 8259, 89th Cong., 1st Sess. (1965). However, during the hearings on the proposed amendments, Sam H. White, Chairman of the Governmental Relations Comm. of the National Association of Automobile Dealers, testified in opposition to the repeal of § 13(a)(19). (Hearings on H.R. 8259 before the Gen.Comm. on Education and Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess., Pt. 1, pp. 366-67 (1965). At the next session the House committee, after deliberation reported out H.R. 13712. This new bill contained an exemption, 13(b)(10), which included “any salesman, mechanic, or partsmen employed by an establishment which is primarily engaged in the business of selling automobiles . . . to the ultimate purchaser.” (H.R.Rept.No.1366, 89th Cong., 2d Sess., p. 71 (1966), U.S.Code Cong. & Admin.News 1966, p. 3002.) H.R. 13712 was passed by the House on May 26, 1966 (112 Cong.Rec. 11653). The Senate Committee on Labor and Public Welfare rewrote Section 13(b)(10), restricting that exemption to “any salesman (other than partsmen) or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling

such vehicles to ultimate purchasers.” (S. Rept. No. 1487, 89th Cong. 2d Sess. p. 62 (1968)). The Committee Report explained:

It is the intent of this exemption to exclude from the coverage of Section 7 all mechanics and salesmen . . . employed by an automobile . . . dealership. (at 31-32). Emphasis added.

The House refused to accept the Senate amendments and the conflicting versions were referred to a Conference Committee (112 Cong.Rec. 21228 (1966)), which reported § 13(b)(10) in its present form. The exemption was restored for partsmen of automobile dealers. The Conference Report explained:

The conference substitute conforms to the House provision regarding partsmen except that such exemption shall be available only to salesmen, partsmen and mechanics primarily engaged in selling or servicing such vehicles. (Conference Report No. 2004, 89th Cong., 2d Sess., p. 19 (1966), U.S.Code Cong. & Admin.News 1966, p. 3002. The Conference Report was accepted by the House on September 7, 1966, (112 Cong.Rec. 21949) and the Senate on September 14, 1966 (112 Cong.Rec. 22669).

Brennan v. Deel Motors, Inc., 475 F. 2d 1095 at fns. 1 &2 (5th Cir. 1973). Thus the literal reading conforms to the legislative purpose that “such exemption shall be available only to salesmen, partsmen and mechanics primarily engaged in selling or servicing such vehicles. (Conference Report No. 2004, 89th Cong., 2d Sess., p. 19 (1966), U.S.Code Cong. & Admin.News 1966, p. 3002).”

C. The Current Regulation - 29 C.F.R. § 779.372.

The statute clearly requires that any individual for whom the exemption is claimed must be “primarily engaged in selling or servicing.” The Department’s interpretative regulation has recognized this clear statutory requirement since its promulgation in 1970. The current regulation conformed to the statute. 29 C.F.R. § 779.372 (c)(4) states,

Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsmen, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee’s principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

Despite the Department’s longstanding interpretation and the regulation’s harmony with the literal terms of the FLSA, courts have not followed the statute. The first decision involving service writers, *Brennan v. Deel Motors, Inc.*, 475 F. 2d 1095 (5th Cir. 1973), found service

writers to be exempt because they were “functionally” part of the mechanic shop and were paid on commission:

these service salesmen are functionally similar to the mechanics and partsmen who service the automobiles. All three work as an integrated unit, performing the services necessary for the maintenance of the customer’s automobile. The mechanic and partsman provide a specialized service with the service salesman co-ordinating these specialties. Each of these service employees receive a substantial part of their remuneration from commissions and therefore are more concerned with their total work product than with the hours performed.

475 F.2d at 1097. The Fifth Circuit decision is contrary to the language of the statute and regulation. It also displays improper FLSA analysis by extending an exemption to those not “clearly and unmistakably within its terms.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). If FLSA exemptions were conferred on all non-exempt employees “functionally similar” to exempt employees, all employees in the nation would be exempt.

Several courts simply followed *Deel Motors*. See e.g. *Brennan v. North Brothers Ford, Inc.*, 1975 WL 1074 (E.D. Mich. 1975), *aff’d*. without opinion, *Sub. Nom. Dunlop v North Bros. Ford*, 529 F.2d 524 (6th Cir. 1976); *Yenney v. Cass County Motors Co.*, 1977 WL 1678 (D. Neb. 1977). These District Court decisions offered no further analysis, but merely followed the holding in *Deel Motors*.

In *Walton v Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004), the Fourth Circuit recognized the Fifth Circuit’s faulty FLSA analysis by extending an exemption to those “functionally similar” to mechanics. 370 F.3d at 451-2. The Fourth Circuit, however, harmonized its result with *Deel Motors* by finding service writers exempt under statutory language in the FLSA – “any salesman ... primarily engaged in ... servicing automobiles.” In *Walton*, the Court noted that,

undisputed facts showed that Walton promoted and attempted to sell goods and services provided by Cavalier, openly solicited business by telephone, and his hours were irregular, based on the needs of Cavalier’s customers. Indeed, the undisputed facts of Walton’s employment demonstrate that he was the dealer’s “first line ... service sales representative,” and his job required the “satisfaction of customer and vehicle related problems, [and] meeting pre-determined service sales objectives.” Dist. Ct. slip op. at 12 (J.A. 604) (emphasis removed). Specifically, Walton was required to interact with customers to determine their reasons for seeking service, and based on such interactions, he was to “[o]ffer logical diagnostic services or repairs to satisfy customer’s concerns [,] [p]rovide accurate estimates for all the services or repairs recommended [and] [s]ell the proper repairs and/or services responsive to customer’s perceived needs.” *Id.* (emphasis removed) (citation omitted).

Although the service writer in *Walton* was found to be primarily engaged in “selling” the service of the mechanics department, it is not clear that service writers are “primarily engaged in

servicing” the vehicle. Indeed, it does not appear that Walton himself did any servicing of the vehicle, much less was it the primary part of his job. The statute requires an employee to either primarily service the vehicle or “sell” the vehicle – not sell the service of the vehicle, as *Walton* concluded. *Walton* again misreads the FLSA, by reading out of the analysis the very terms used by Congress.

The Courts have not spoken plainly or clearly about applying the 13(b)(10) exemption to service writers. There are two Circuit decisions with rationales that are mutually inconsistent. The lack of a consistent rationale in the few decisions concerning service writers does not suggest a need to amend the current regulation. The two Circuit decisions are clearly as antagonistic to one another in their reasoning, as they are to the current regulation. The District Court decisions apply one circuit or the other, but without adding any further analysis.

D. The Proposed Regulatory Changes for Service Writers.

The new regulation would further confuse the interpretation of the statute by making service writers exempt if they are selling the servicing of vehicles, but only if the primary vehicles serviced are vehicles that the dealership sells. Proposed 29 CFR § 779.372(c)(4) would state:

Employees variously described as service manager, service writer, service advisor, or service salesman, who are primarily engaged in obtaining orders for servicing of automobiles, trucks, or farm implements that the establishment is primarily engaged in selling, are exempt under section 13(b)(10)(A). Such employees typically perform duties such as greeting customers and obtaining information regarding their service or repair concerns; diagnosing the mechanical condition of the automobile, truck, or farm implement brought in for repair; offering and attempting to sell appropriate diagnostic or repair services; providing estimates for the recommended services or repairs; writing up orders for work authorized by the customer; assigning the work to various employees; directing and checking on the work of mechanics; and communicating with customers regarding the status of their vehicles.

Thus, service writers would be exempt if they “are primarily engaged in obtaining orders for servicing of automobiles, trucks, or farm implements that the establishment is primarily engaged in selling.” This new wrinkle creates a significant difficulty for employees in determining whether they are truly exempt. It is unlikely an employee would be able to know the origin of vehicles that are serviced without bringing a claim to the Department of Labor or a court for determination. Indeed, even a dealership may have difficulty in determining whether the employee is exempt since such a determination would require tracking the origins of each vehicle brought in for servicing, long after the warranty expired.

The new regulation is a step backward. It plainly fails to follow the literal language of the statute. It is contrary to the underlying purpose of the FLSA by extending an exemption to individuals who are not plainly and unmistakably within the terms of the explicit language of an

exemption. FLSA regulations should not artificially expand the scope of an exemption, without statutory basis.

The extension of the exemption will also have anti-competitive results, allowing large dealerships to undercut the stand-alone mechanic shops by paying lower wages to service writers. That is not the result Congress intended or approved in Section 13(b)(10) and not one that DOL should assist. Conferring competitive advantages to one or another sector of the economy is not the role of the Department of Labor in promulgating regulations.

Further, the proposed regulation will create an exemption the applicability of which neither employees nor employers will be able to determine – thereby creating needless confusion and engendering litigation, rather than preventing it. Since neither employers nor employees will be able to determine the applicability of the exemption without a detailed statistical analysis of the business of the service department, based on statistics that are unlikely to exist, the new regulation will create an unworkable mess.

The current regulation correctly tracks the language of the statute. The court decisions that have applied 13(b)(10) to service writers are plainly wrong, since they either extend the mechanic exemption to those “functionally similar” or misread the statute by applying the exemption to those that sell servicing, rather than sell the vehicle. The proposed regulation will only further confuse the rationale and move the debate further from the actual Congressional language and the intent behind that language.

V. The Department Should Provide Interpretive Guidance Regarding the Limited Impact of the Employee Commuting Flexibility Act of 1996 on Compensable Travel.

In its proposed regulations, the Department seeks to amend four regulations to include language from the Employee Commuting Flexibility Act of 1996 (“ECFA”). *See* 73 Fed. Reg. 43672-73, proposing amendments to 29 CFR § 785.9, 29 CFR § 785.34, 29 CFR § 785.50, and 29 CFR § 790.3 (hereinafter, proposed ECFA regulations). Each of the proposed ECFA regulations merely adds language taken verbatim from the ECFA. NELA requests that the Department withdraw its proposed ECFA regulations because the addition of text from the ECFA without qualification and guidance does not clarify the limited impact that the ECFA has on travel time claims. Employees, employers, and courts called upon to interpret the ECFA would be better served by the Department developing revised ECFA regulations based on existing case law and opinion letters that properly interpret the ECFA. The Majority and Minority Reports of the Committee on Economic and Educational Opportunities, which accompanied the passage of the ECFA, identified the need for the Department to clarify the impact of the ECFA. *See* H.R. Rep. No. 104-585, at 5 (Majority view) and 11-12 (Minority view).

In its fully-developed ECFA regulations, the Department should clarify that the ECFA is an amendment to the Portal-to-Portal Act, which provides limited exceptions to the compensability of activities that are preliminary and postliminary to an employee’s principal duties. Revised ECFA regulations should make clear that like the Portal-to-Portal Act,

exceptions to compensable work are narrowly construed and subject to the Supreme Court's principal duty analysis and continuous workday rule. Fully-developed revised regulations should be republished and the public should be provided an additional opportunity to comment on such revised regulations prior to their adoption.

A. In Its Revised Regulations, the Department Should Provide Guidance That the ECFA's Exceptions From Compensable Time Must Be Narrowly Construed.

In 1947, Congress enacted the Portal-to-Portal Act, which amended the FLSA to bar recovery of hours spent on duties that were preliminary and postliminary to an employee's principal activities and on duties that are not "integral and indispensable" to an employee's principal activities. *See* 29 U.S.C. § 254(a)(1)-(2).

In President Truman's Message to Congress on Approval of the Portal-to-Portal Act, President Truman stated, "I am sure the courts will not permit employers to use artificial devices such as the shifting of work to the beginning or end of the day to avoid liability under the law." *See Bobo v. United States*, 37 Fed. Cl. 690, 698 (Fed. Cl. Ct. 1997) (quoting 93 Cong. Rec. 5418, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S.C.C.A.N. 1827-28). Courts and the Department have followed this directive and have narrowly construed the exceptions contained in the Portal-to-Portal Act and have broadly interpreted the words "principal activity or activities." *See e.g., Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976); *Barrentine v. Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (8th Cir. 1984); *Bobo*, 37 Fed. Cl. at 694-95; 29 CFR § 790.8(a) (principal activities include "any work of consequence performed for an employer").

In *Burton v. Hillsborough County*, 181 Fed. Appx. 829, 835 (11th Cir. 2006) (unpublished), the Eleventh Circuit held that the ECFA "must be read as a modification to § 254(a)(1) [traveling to the place of the 'principal activity' is noncompensable] and (2) [pre- and postliminary activities are noncompensable] to account for the use of an employer's vehicle when employees are engaged in the kinds of activities exempted in subsections (1) and (2), rather than as an entirely new category of exempted activity (e.g., a blanket exclusion for *all* travel in an employer's vehicle within the normal commuting area where an agreement exists)."

Similarly, a Pennsylvania district court held that the ECFA "did not create a third, distinct exception to the requirement that employers pay their employees for all principal activities." *Reich v. Brenaman Elec. Serv.*, 1997 U.S. Dist. LEXIS 4163 (E.D. Pa. Mar. 28, 1997).

Accordingly, when the Department issues fully-developed ECFA regulations, it should provide guidance that the ECFA's exceptions to compensable work are modifications to the Portal-to-Portal Act and must be narrowly construed.

B. In Its Revised Regulations, the Department Should Indicate That the Purpose Of the ECFA Is To Make Clear That Otherwise Non-compensable Commuting Is Not Compensable Merely Because the Employee Uses His Employer's Vehicle.

In 1996, the Portal-to-Portal Act was amended by the ECFA, which added the following language to Section 254(a)(2):

For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a)(2). The ECFA was adopted in response to two opinion letters issued by the Department in 1994 and 1995.

On August 5, 1994, the Department issued an opinion letter that analyzed whether workers who drove company-owned vehicles were entitled to compensation for the home-to-work commute. *See* Opinion Ltr. WH-538, 1994 WL 975107 (August 5, 1994). In that letter, the Department ruled that the use of a company vehicle for travel from home to the first work assignment and from the last work assignment to home would be a principal activity that must be compensated.

On April 3, 1995, the Department withdrew the August 5, 1994 opinion letter and announced that time spent traveling between the employee's home and the first work site of the day need not be compensated if use of the company vehicle was voluntary, the vehicle involved was a type normally used to commute, the employee incurred no costs in the use of the vehicle, and the worksites were within the normal commuting area of the employer's establishment. The Majority House Report makes clear that the ECFA was adopted to codify the Department's views expressed in the 1995 opinion letter out of a concern that courts might not follow the 1995 opinion letter because the Department had issued two conflicting opinion letters in a short time period. *See* H.R. Rep. 104-585, at 4 (1996). The Majority noted that the withdrawn 1994 opinion letter would have required compensation to drivers of company-owned vehicles when "[n]o compensation would be required where employees used their own vehicles." *Id.* at 2.

Courts interpreting the ECFA have likewise indicated that its purpose was to clarify that "otherwise non-compensable commuting to work is not compensable merely because the employee uses his employer's vehicle." *United Trans. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1117 (10th Cir. 1999); *see also, Burton v. Hillsborough County*, 181 Fed. Appx. 829, 835 (11th Cir. 2006) (unpublished). Therefore, the Department should emphasize that the

purpose of the ECFA is to place workers who drive company-owned vehicles from home to work on par with workers who drive their own vehicles. To the extent that travel time is compensable for workers who drive their own vehicles, it should likewise be considered compensable for workers driving an employer's vehicle. Moreover, if the worker is undertaking principal work activities prior to and/or during the driving of the company vehicle to a work site, the time spent driving may well be compensable depending on the circumstances.

C. In Its Revised Regulations, the Department Should Clarify That the ECFA Does Not Alter Existing Analytical Tools For Determining Compensable Time.

Fully-developed regulations must emphasize that the ECFA does nothing to alter the analytical analyses for determining compensable time, including whether activities are considered to be principal activities that start the continuous workday rule or are preliminary or postliminary to principal activities and whether activities predominantly benefit the employer. For example, the Eleventh Circuit held that:

The mere use of an employer-owned vehicle does not eliminate this distinction between incidental or non-compensable travel and required or compensable travel.... Thus, if an employee driving an employer-owned car is required to return to the employer's premises after a day's work prior to returning home, that time is compensable under the FLSA. Accordingly, under the ECFA "otherwise non-compensable [traveling] is not compensable merely because the employee uses his employer's vehicle. [] Likewise, otherwise compensable travel time does not become non-compensable simply through the use of an employer-owned vehicle.

Burton v. Hillsborough County, 181 Fed. Appx. 829, 835 (11th Cir. 2006) (unpublished) (internal citations omitted); *see also, McGuire v. Hillsborough County*, 511 F.Supp.2d 1211, 1217 (M.D. Fla. 2007).

In the same vein, the Second Circuit recently held that "[i]n the commuting context, we believe that the appropriate application of the predominant benefit test is whether an employer's restrictions hinder the employees' ability to use their commuting time as they otherwise would have had there been no work-related restrictions." *Singh v. City of New York*, 524 F.3d 361, 369 (2d Cir. 2008). Although *Singh* did not involve an employer-owned vehicle, the case discussed the ECFA and did not suggest that the ECFA would have foreclosed the predominant benefit analysis had it been applicable. The Second Circuit indicated that while employees need not be compensated for commuting to and from work, they must be compensated for any work performed during a commute that is "integral and indispensable" to a principal activity of their employment. *Id.* at 367. The Department should stress this well-established rule in its revised ECFA regulations.

The Department should also address situations where an employee drives a company-owned vehicle from home to a worksite after performing principal work activities or from a worksite to home where principal work activities are performed. In *Dunlop v. City Electric*,

Inc., 527 F.2d 394, 401 (5th Cir. 1976), the former Fifth Circuit found that pre-shift activities performed by electricians that involved filling out time sheets, checking job locations, cleaning and loading trucks, picking up electrical plans, removing trash from trucks accumulated during previous days' work, loading trucks with standard materials and any additional materials necessary, and fueling trucks were "principal activities" primarily benefiting the employer and compensable.

Similarly, in *Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331, *29 (N.D. Ohio 2005) *aff'd*. 184 Fed. App. 506 (6th Cir. 2006), the district court held that insulation installers' beginning-of-day and end-of-day activities at the shop receiving and reporting on their assignments, collecting and loading materials and equipment, and picking up and dropping off their trucks were an integral and indispensable part of their principal activities, and thus compensable. In addition, the court concluded that the time spent traveling from the shop to the job site and back was compensable because it was connected to the principal activities of insulation installation.

And in *Dooley v. Liberty Mutual Insurance Company*, 307 F.Supp.2d 234, 239 (D. Mass. 2004), a Massachusetts federal district court reviewed the compensability of travel time for appraisers who alleged they "sometimes" started laptops, opened software, checked voice mail and email, responded to messages, set a voice mail greeting, reviewed and mapped daily assignments, and loaded supplies into their vehicles before leaving home to drive to their first appraisal site of the day. The appraisers performed similar tasks in the evenings after arriving home, including calling body shops and claimants, completing estimates, time logs, and other paperwork, and transmitting them electronically to defendant. Comparing their home to an office, the court found this work at home was a principal activity, which was compensable under the FLSA. The court also held that the travel time that followed these activities, including travel time to and from the first job site, was compensable. *Id.* at 245; *see also, Boudreaux v. Nolan*, 366 F.Supp.2d 425 (E.D. La. 2005) (precluding summary judgment for employer as to whether initial and final travel time of day was compensable where work performed by repair technicians at home before and after travel constituted preliminary or "integral and indispensable" activities); *Reich v. Brenaman Elec.*, 1997 U.S. Dist. LEXIS 4163 (employees who performed work benefiting employer before and after their regular work day were not within the ECFA because they performed principal activities over and above receiving the benefit of transportation).

The Department should provide guidance that employees who perform principal activities prior to or during a commute using a company vehicle must be compensated for these activities. In its revised regulations, the Department should make clear that the ECFA does not modify the analysis if activities are performed at home by a worker prior to using a company-owned vehicle for commuting. Proposed regulations fully addressing these issues would appropriately be the subject of a subsequent notice and comment procedure.

D. In Its Revised Regulations, the Department Should Provide Guidance Regarding the Statutory Language Used In the ECFA.

The language in the ECFA that excludes from principal activities those activities that are “incidental to the use of [a company-vehicle] for commuting” has caused confusion in the courts. For example, in *Buzek v. Pepsi Bottling Group, Inc.*, 501 F.Supp.2d 876 (S.D. Tex. 2007), a magistrate judge in Texas conducted a review of various dictionary definitions of the word “incidental” to conclude that the activity of transmitting end-of-day reports upon returning from worksites was a noncompensable activity that was incidental to the use of the company vehicle for commuting. When the Department provides fully-developed regulations, it should narrowly interpret the phrase “incidental to the use of the vehicle for commuting.”

The Department’s analysis can be guided by the recent Second Circuit decision in *Singh v. City of New York*, where the court stated:

“We acknowledge that the constraints of commuting may limit an employee’s ability to use commuting time as freely as in other contexts, such as during a break. But those constraints [] are normal incidents of employment. . . . In the commuting context, we believe that the appropriate application of the predominant benefit test is whether an employer’s restrictions hinder the employees’ ability to use their commuting time as they otherwise would have had there been no work-related restrictions.

524 F.3d at 369.

The Department should inform the public that to be incidental to the use of the vehicle for commuting, an activity must, first, relate to using the vehicle, and second, relate to commuting. For example, activities that do not relate to commuting such as transmitting work orders for work performed during periods of the day outside of the commute should not be excluded by the ECFA.

NELA requests that the Department withdraw its proposed ECFA regulations and construct fully-developed regulations that address the complex issues involved in drive time cases, which should be the subject of a subsequent notice and comment process. Employees, employers, and courts will be well served by the Department’s informed analysis of the limited impact the ECFA has on commuting and related issues.

VI. Conclusion

These comments have been submitted on behalf of NELA, a nationwide organization comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes, which is dedicated to protecting the rights of individuals in the workplace. We respectfully request that NELA’s comments be fully and carefully considered before the changes to the FLSA regulations are made and that the Department fully consider the negative impact that certain provisions in the proposed regulations would have on the nation’s workers.

Richard M. Brennan, Director
September 26, 2008
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For the reasons detailed above, the Department should not adopt the current version of the proposed revisions to the regulations governing employers of tipped employees, and should instead revise the proposed regulations to require that employers disclose all of Section 203(m)'s requirements to their tipped employees, and to clarify that: (1) tips are the property of the employee who receives them (either individually or through a valid tip pool); and (2) the tip retention requirement applies even if the employer pays a wage in excess of the minimum wage. Further, because the proposed revisions to the Fluctuating Workweek regulation and the regulation interpreting the FLSA's application to Service Writers are at odds with and undermine the purposes the FLSA, they should be withdrawn. Finally, the proposed revisions to the ECFA regulations should be withdrawn and replaced with fully-developed proposed regulations that address the complex issues involved in drive time cases, which should then be the subject of a subsequent notice and comment process.

Again, NELA appreciates the opportunity to comment on the proposed regulations. We reiterate that by commenting on various aspects of these regulations we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting.

Thank you for your attention and consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with a large initial "T" and "C".

Terisa E. Chaw
Executive Director