OOC BROWN BAG LUNCH SERIES
FAIR LABOR STANDARDS ACT
MAY 24, 2017

I. Introduction

The Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301 *et seq.*, extends certain provisions of the Fair Labor Standards Act ("FLSA") to covered employees within the Legislative Branch. The Board of Directors of the Office of Compliance has adopted substantive regulations, approved by Congress, governing the application of this statute to covered employees and employing offices.

II. Applicable Provisions

Section 203 of the CAA, 2 U.S.C. § 1313, applies the following provisions of the FLSA to the Legislative Branch:

- Section 6(a)(1) – 29 U.S.C. § 206(a)(1) – minimum wage
- Section 6(d) – 29 U.S.C. § 206(d) – prohibition of sex discrimination
- Section 7 – 29 U.S.C. § 207 – maximum hours
- Section 12(c) – 29 U.S.C. § 212(c) – oppressive child labor
- Section 16(b) – 29 U.S.C. § 216(b) – damages

III. Technical Resources

A. OOC substantive regulations
   1. Three sets: Senate (S Series), House (H Series), and Instrumentalities (C Series)
   2. Final regulations were adopted in 1996; updated regulations were proposed regarding overtime exemptions in 2004 but were not adopted.
   3. Available at www.compliance.gov under the "Directives" tab

B. Department of Labor interpretations
   1. Although they do not have the force of law, DOL interpretations of the FLSA provisions are highly relevant and constitute an important source of information and guidance. However, to the extent that the DOL regulations have been revised since 1996, interpretations based on later versions that differ from those in existence at the time the OOC regulations were adopted would not apply.
   2. "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and

litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See* OOC substantive regulations at S501.105, H501.105, C501.105.

3. These interpretations are especially important to employing offices seeking to establish a "good faith defense" to a liquidated damages claim. (*See below.*)
4. Available at https://www.dol.gov/whd/opinion/opinion.htm

IV. Fundamental Principles

A. Every employee is covered unless specifically excluded. The scope of coverage for FLSA purposes is defined in the substantive regulations at S501.102, H501.102, and C501.102.

B. Every covered employee is presumed to be "non-exempt" – i.e., entitled to overtime premium pay at a rate of one-and-a-half times the regular rate for all hours worked above 40 hours in a given workweek, as provided in the maximum hours provisions. 29 U.S.C. § 207(a)(1).

C. Certain exemptions based on job duties apply to the maximum hours provisions, as set forth in the substantive regulations at Parts S541, H541, and C541.[1] (*See next section.*)

D. Under the statute, "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). Unauthorized work time still counts as hours worked – and is therefore compensable – if the employer knows or has reason to believe that the work is being performed, even when the work is performed off-site. 29 C.F.R. §§ 785.11-785.12.

E. In general, only time spent actually working is considered when determining whether an employee has exceeded 40 hours worked in a given workweek. Short rest periods typically count as hours worked, but bona fide meal periods of half an hour of more do not, unless the employee is required to continue working while eating. Paid leave time also does not count as hours worked. The DOL regulations contain other principles governing training, waiting, traveling, etc. *See* 29 C.F.R. Part 785.[2]

V. Exemptions

A. General principles

1. The three "white collar exemptions" detailed in the substantive regulations largely mirror those in the DOL regulations (*see the Appendix A to this outline for the full text of the exemptions*). Case law analyzing these exemptions is therefore instructive even the cases arise outside of the CAA context.

[1] The exemptions contain salary thresholds below which employees are deemed non-exempt even if they meet the duties requirements, but these have not been updated since 1996 and are no longer relevant in practice. The DOL regulations contain an across-the-board minimum salary below which employees are deemed non-exempt regardless of their duties, but this does not apply to the Legislative Branch.

[2] Where the Board's regulations do not cover certain topics, the DOL regulations are instructive.

2. Exemptions are to be narrowly construed because "The details with which the exemptions in this Act have been made preclude their enlargement by implication." *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 618 (1944). "[E]xemptions from the FLSA's reach must be narrowly construed against the employer in order to further Congress' goal of affording broad federal employment protection." *Figueroa v. D.C.*, 869 F. Supp. 2d 66, 72 (D.D.C. 2012) (Judge Barbara Jacobs Rothstein).
3. As a general rule, "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). The plaintiff is not required to produce evidence to support a classification of non-exempt. *Radtke v. Lifecare Mgmt. Partners*, 795 F.3d 159 (D.C. Cir. 2015). If the employer does not raise an exemption in its answer to a complaint, that defense is waived. *Ruffin v. New Destination*, 800 F. Supp. 2d 262, 268 (D.D.C. 2011) (Judge Colleen Kollar-Kotelly).
4. Job titles do not determine exempt status. What matters are the employee's actual duties, not the employer's characterization of those duties via a job title or description. *See*, *e.g.*, *Benton v. Laborers' Joint Training Fund*, 210 F. Supp. 3d 99, 111 n.6 (D.D.C. 2016) (Judge Rudolph Contreras) (the parties disputed the employee's job title, but this issue was not material to the ultimate resolution of whether her job duties rendered her exempt from the FLSA's overtime requirements).
5. Determining whether an exemption applies requires a fact-based, case-by-case analysis. In general, three themes apply: (1) the employee must actually perform exempt work as defined by the regulations; (2) the exempt work must constitute the employee's primary duties; and (3) the employee's compensation must be paid as a salary rather than on an hourly basis.

B. Executive exemption
   1. Parts S541.1, H541.1, and C541.1
   2. *Hernandez v. Stringer*, 210 F. Supp. 3d 54 (D.D.C. 2016) (Judge Richard J. Leon) – Discusses the parameters of the executive exemption and notes that agency regulations are entitled to substantial judicial deference and are the primary source of guidance for determining the scope of the FLSA exemptions.

C. Administrative exemption
   1. Parts S541.2, H541.2, and C541.2
   2. *Benton v. Laborers' Joint Training Fund*, 210 F. Supp. 3d 99 (D.D.C. 2016) (Judge Rudolph Contreras) – Discusses the parameters of the administrative exemption and distinguishes between questions of law and fact.

D. Professional exemption
   1. Parts S541.3, H541.3, and C541.3
   2. *Radtke v. Caschetta*, No. CV 06-2031 (JMF), 2014 WL 11802567 (D.D.C. May 14, 2014) (Magistrate Judge John M. Facciola), *aff'd sub nom. Radtke v. Lifecare*

Mgmt. Partners, 795 F.3d 159 (D.C. Cir. 2015) – What matters in determining the applicability of the professional exemption is not the training or experience that a particular employee actually has, but rather whether the employee's position in general requires specialized academic training.

VI. Equal Pay

A. "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

B. The equal pay protections extend to both exempt and non-exempt employees. S541.5b, H541.5b, C541.5b.

C. *Goodrich v. Int'l Bhd. of Elec. Workers, AFL-CIO*, 815 F.2d 1519 (D.C. Cir. 1987) – In comparing two jobs, the extra duties required for one position can distinguish it as unequal to the other where those extra duties are significant, essential to the employer's operations, and related to the prior expertise of the employee in the position, even if a significant amount of time is not spent on those extra duties. Here, the court found that the plaintiff and her alleged male comparators were not performing substantially equal work, because the comparators' additional duties, "although consuming little time, were 'significant and essential to the operation and mission of the [employer].'" *Id*. at 1525.

D. *Laffey v. N.W. Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) – The airline was held to have violated the FLSA under the "substantially equal" test when it paid its male pursers more than its female stewardesses. Although male pursers had some supervisory duties that female stewardesses did not have, the court found that those supervisory duties "require no greater skill, effort or responsibility than the other functions assigned to all cabin attendants," and that the pursers and stewardesses possessed "equal 'skill, effort and responsibility'" in their respective roles. Therefore, the court held that the male employees' supervisory duties did not alter the equivalence of the two jobs.

E. It is worth noting that this form of discrimination could also give rise to a cause of action for sex discrimination under Title VII of the Civil Rights Act of 1964. Under the CAA, the statute of limitations for both types of claims is the same (180 days), but different types of damages may be available to plaintiffs under each theory – i.e., liquidated damages for FLSA claims and compensatory damages for Title VII claims.

VII. Other Key Concepts

A. Wages

1. *Minimum wage* – The CAA applies the minimum wage provisions of 29 U.S.C. § 206(a). Currently the federal minimum wage is $7.25/hour.
2. *Regular rate of pay* – The FLSA defines "regular rate of pay" as "all remuneration for employment paid to, or on behalf of, the employee" and enumerates several exceptions including, *inter alia*, gifts, vacation/holiday pay, work-related travel reimbursements, payments made at the employer's sole discretion, amounts paid pursuant to a bona fide thrift or savings plan, and pension contributions. 29 U.S.C. §§ 207(e)(1)-(7). Certain amounts excluded from the regular rate are creditable toward wages and overtime compensation, while certain others are not. 29 U.S.C. §§ 207(h)(1)-(2).
3. Certain types of special pay – e.g., Sunday premium pay, night differential pay, and hazard pay – are included in calculating the regular rate of pay, which is used to determine the rate of an employee's overtime pay; previous overtime premium payments, however, are not included in the regular rate of pay. *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948) (regular rate reflects all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments); *see also U.S. Capitol Police Bd. & Fraternal Order of Police, U.S. Capitol Police Labor Comm.*, No. 01-ARB-01 (CP), 2002 WL 34461687 (OOC Board Feb. 25, 2002).
4. *Bona fide thrift or savings plan* – The substantive regulations detail the requirements of a "bona fide thrift or savings plan," to which the employer may contribute sums that are not included in determining the regular rate of pay. S547, H547, C547.
5. *Reasonable cost* – Wages may include the reasonable cost to the employer of furnishing the employee with board, lodging, or other "facilities," except where the facilities are primarily for the benefit or convenience of the employer. S531, H531, C531. However, the parties may choose to exclude these costs from the calculation of employees' wages pursuant to a collective bargaining agreement. S531.6(a), H531.6(a), C531.6(a).

B. Workweek

1. Although the term "workweek" is used throughout the OOC's substantive regulations, it is not explicitly defined in those regulations.
2. According to the DOL regulations, "An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for [the workplace] as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is

established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act." 29 C.F.R. § 778.105.

3. The Legislative Branch generally follows the pay period calendar established by OPM and NFC, which is a seven-day workweek coinciding with the calendar week (Sunday through Saturday) in accordance with the standards set forth for Executive Branch agencies in 5 U.S.C. § 6101, which establishes a 40-hour workweek with the work to be performed over a period of not more than 6 of 7 consecutive days.
4. *Dove v. Coupe*, 759 F.2d 167 (D.C. Cir. 1985) – The workweek, rather than the work hour, is the appropriate unit of time for measuring FLSA minimum wage compliance. *See also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 459-60 (1948) ("Where there are no overtime premium payments the rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek and adjudge additional payment to each individual on that basis for time in excess of forty hours worked for a single employer.").

C. Commuting and travel
   1. According to the Portal-to-Portal Act,[3] the FLSA does not require employers to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" which are done prior to the commencement of the principal activity or after the cessation of the principal activity. 29 U.S.C. § 254(a)(1).
   2. However, travel typically is compensable if performed as part of the principal activity, such as walking on the employer's premises between principal activities, or traveling between worksites during the workday. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005) (holding that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [section 254(a)], and as a result is covered by the FLSA."); *see also Radtke v. Caschetta*, No. 06-2031 EGS, 2011 WL 3681545, at *7 (D.D.C. Aug. 12, 2011) (Magistrate Judge Deborah A. Robinson) (citing 29 C.F.R. § 785.38).

D. Preliminary and postliminary activities
   1. The Portal-to-Portal act provides that the FLSA does not require employers to compensate employees for "activities which are preliminary to or postliminary to [the employees'] principal activity or activities," which are done prior to the commencement of the principal activity or after the cessation of the principal activity. 29 U.S.C. § 254(a)(2).
   2. *Steiner v. Mitchell*, 350 U.S. 247 (1956) – Battery plant workers must be paid for the time spent changing clothes at the beginning of their shifts and showering at

[3] The Portal-to-Portal Act of 1947 "is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA." S501.106(a), H501.106(a), C501.106(a).

the end, "where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health had hygiene, to change clothes and to shower in facilities which state law requires their employer to provide[.]"

3. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) – Where the donning and doffing of unique protective gear is found to be compensable, post-donning and pre-doffing walking between locker rooms and work sites is also compensable.
4. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014) – Where 9 of the 12 items that employees were required to don and doff were considered "clothing" and only 3 were not (earplugs, safety glasses, and a respirator), the time spent donning and doffing was not compensable. "The question for courts is whether the period at issue can, on the whole, be fairly characterized as 'time spent in changing clothes or washing'" which would not be counted as time worked under the FLSA. *Id*. at 881.
5. *Lesane v. Winter*, 866 F. Supp. 2d 1 (D.D.C. 2011) (Judge John D. Bates) – The court determined that the Naval police officers' donning of their uniforms was not compensable because the officers had the option to change into their uniforms at home and in fact often did so at home. On the other hand, the donning of protective gear and weapons was deemed to be "integral and indispensable" to the officers' principal activity of protecting their place of employment, and would thus be compensable unless it was determined to be *de minimis*. The court held that a genuine issue of fact existed as to whether those activities were *de minimis* and therefore denied the employer's motion for summary judgment.
6. *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513 (2014) – The time spent by warehouse workers waiting in line for and completing post-work anti-theft security screening was not compensable time because those were "postliminary" activities that were not an integral part of or indispensable to the performance of the employees' principle work activity, which was retrieving products from warehouse shelves and packaging those products for shipment. The Court clarified that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id*. at 517.

E. Collective Bargaining Agreements

1. Under the OOC substantive regulations, "The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee." S531.6(a), H531.6(a), C531.6(a).
2. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) – FLSA rights are individual, independent of the collective bargaining process, and not waivable. The Court held that the petitioners who had previously submitted their

overtime claims as contract grievances were not barred from also presenting their claims in court. The separate nature of the contractual and statutory rights means that both can be pursued even though both were violated as a result of the same factual occurrence. "Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and… these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum[.]" *Id*. at 745.[4]

3. *U.S. Capitol Police Bd. & Fraternal Order of Police, U.S. Capitol Police Labor Comm.*, No. 01-ARB-01 (CP), 2002 WL 34461687 (OOC Board Feb. 25, 2002) – The CAA's dispute resolution process does not preclude the negotiated grievance procedure arbitration of FLSA claims.
4. *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975) – An employee may sue for an alleged violation of the FLSA without first attempting to vindicate that right through the grievance procedure specified in the collective bargaining agreement. An employee's rights under the FLSA cannot be waived, and apply despite contrary custom or agreement.
5. *Fernandez v. Centerplate/NBSE*, 441 F.3d 1006 (D.C. Cir. 2006) – Breach of a contract provision regarding overtime does not necessarily give rise to a claim under the FLSA. Here, the collective bargaining agreement entitled employees to collect overtime if they worked more than 8 hours in a given day, which is not covered by the FLSA. Because the FLSA does not contain a provision authorizing enforcement of a collective bargaining agreement, the court would not have subject matter jurisdiction over a claim for breach of the workday overtime provision.

VIII. Other Issues of Interest

A. *Intern exclusion* – Interns are specifically excluded from the definition of "covered employee" in all three Series of substantive regulations. S501.102(c), H501.102(c), C501.102(c). "Intern" is defined in each set of regulations. S501.102(h), H501.102(h), C501.102(h). (*See Appendix B to this outline.*) This exclusion means that interns, as defined in these regulations, are not subject to the minimum wage or overtime requirements of the FLSA.

B. *Compensatory time* – In general, employing offices may choose to offer compensatory time to exempt employees rather than overtime compensation, whereas non-exempt employees may not be given compensatory time in lieu of overtime compensation. However, there are notable exceptions to this rule for two groups of non-exempt employees:

[4] Two federal appellate courts have recently held that employees may be compelled to arbitrate FLSA claims if their collective bargaining agreements contain clear and unmistakable waivers of their right to a judicial forum. *Jones v. SCO Silver Care Operations LLC*, No. 16-1101, — F.3d —, 2017 WL 2174526 (3d Cir. May 18, 2017); *Vega v. New Forest Home Cemetery LLC*, No. 16-3119, — F.3d —, 2017 WL 2045584 (7th Cir. May 15, 2017).

1. Non-exempt fire protection and law enforcement personnel may be given compensatory time in lieu of overtime compensation. 2 U.S.C. § 1313(a)(1)(3) and (c)(4); S553.231, H553.231, C553.231.
2. Non-exempt employees whose work schedule "directly depends" upon the schedules of the House and Senate – i.e., an employee who "performs work that directly supports the conduct of legislative or other business in the chamber and works hours that regularly change in response to the schedule of the House and the Senate" – may be compensated at the rate of time-and-a-half in pay for all hours in excess of 40 and up to 60 hours in a workweek and compensated at the rate of time-and-a-half in either pay or compensatory time off for all hours in excess of 60 hours in a workweek. *See* S553 Subpart D, H553 Subpart D, and C553 Subpart D.

C. *Law enforcement exemption* – The CAA incorporates by reference the FLSA's special provisions relating to public sector employees "engaged in fire protection or law enforcement activities." 29 U.S.C. § 207(k). The OOC's substantive regulations include provisions establishing a partial exemption for employees engaged in law enforcement and fire protection, which can be found in the regulations at Parts S553 Subpart C, H553 Subpart C, and C553 Subpart C, respectively.

D. *Pay docking* – A central tenet of the "salary basis test" is that salaried employees are paid a predetermined amount on a weekly basis, without regard to the number of days or hours worked or the quality or quantity of work. However, the substantive regulations allow employing offices to establish pay docking rules for exempt employees' absences for personal reasons in certain circumstances, without disqualifying those employees from the exemptions. S541.5d, H541.5d, C541.5d. *See also Auer v. Robbins*, 519 U.S. 452 (1997) (discusses disciplinary pay docking and its effect on the exempt status of employees).

E. *Nursing mothers* – In 2010 a provision was added to section 207 of the FLSA that requires employers to allow an employee "a reasonable break time" to express breast milk for one year after a child's birth, "each time such employee has need to express the milk," and also requires that the employee be provided with "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(r)(1). Employers are not required to compensate employees for the break time spent for such purpose. 29 U.S.C. § 207(r)(2). It is not clear, however, whether section 207(r) applies to the Legislative Branch, because it was passed after the CAA was enacted, and we are unaware of any statement by Congress evincing its intent one way or the other regarding applicability. *See* 2 U.S.C. § 1302(b)(3) (requiring each report accompanying a bill or joint resolution relating to terms and conditions of employment to describe the manner in which the proposed provisions apply to the Legislative Branch or include a statement of the reasons the provision does not apply).

F. *Retaliation* – The FLSA's anti-retaliation provision does not apply to the Legislative Branch, but section 207 of the CAA, 2 U.S.C. § 1317, prohibits retaliation for opposing

any practice made unlawful by the CAA or for participating for any OOC proceeding, so employing offices are prohibited from discriminating against employees for asserting their rights under the FLSA or participating in the OOC's alternative dispute resolution process.

IX. Pleadings and Evidence

A. Pleading standard

1. District court decisions regarding the pleading standard for FLSA overtime claims vary widely in terms of the level of specificity they require, but the Circuit Courts of Appeal that have addressed this issue tend to agree on two key principles: (1) plaintiffs are not required to approximate the amount of overtime that they worked, but (2) in order to rise to the level of plausibility under the *Iqbal/Twombly* standard, a plaintiff must sufficiently identify at least one week in which she worked at least 40 hours and also some uncompensated time in excess of those 40 hours. It is not enough to allege generally that the plaintiff sometimes or even frequently worked over 40 hours without being paid overtime. *See Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638 (9th Cir. 2014); *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236 (3d Cir. 2014); *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85 (2d Cir. 2013); *Pruell v. Caritas Christi*, 678 F.3d 10 (1st Cir. 2012).
2. *Galloway v. Chugach Gov't Servs., Inc.*, 199 F. Supp. 3d 145 (D.D.C. 2016) (Judge Randolph D. Moss) – Applying the *Iqbal/Twombly* pleading standard, the court declined to treat FLSA claims differently from "any garden-variety claim." An FLSA claim, like any other, must include "sufficient detail to satisfy the 'plausibility' standard and to provide fair notice to the defendant about the substance of the plaintiff's claim." The court noted that "although it might aid an FLSA defendant to know the actual number of overtime hours that the plaintiff claims to have worked, that information is not necessary to put the defendant on notice about the nature of the plaintiff's claim." Here, the plaintiff identified three types of situations in which the employer allegedly failed to pay overtime and gave an estimate of how often the violations allegedly occurred; this was enough to survive dismissal. The court recognized, however, that in other jurisdictions the courts may require more specific and exact details.
3. *Akinsinde v. Not-For-Profit Hosp. Corp.*, No. 16-CV-00437 (APM), 2016 WL 6537931 (D.D.C. Nov. 3, 2016) (Judge Amit P. Mehta) – A plaintiff alleging FLSA violations must aver more than conclusory allegations that merely recite the statutory language, and must allege with some specificity that he worked overtime and did not receive compensation. Citing to the Circuit Courts that have recently established pleading standards for FLSA overtime claims, the court held that at a minimum, a plaintiff must allege that he worked more than 40 hours in a given workweek without being compensated for the hours worked in excess of 40 during that week.

B. Statute of limitations

1. As with all claims arising under the CAA, an employee must request counseling within 180 days of the date of the alleged violation. 2 U.S.C. § 1402.[5]
2. The courts have applied the equitable tolling doctrine to FLSA cases arising outside of the CAA context. *See*, *e.g.*, *Ayala v. Tito Contractors, Inc.*, 82 F. Supp. 3d 279 (D.D.C. 2015) (Judge James E. Boasberg) (applies equitable tolling to FLSA claims and explains what is required in order for a plaintiff to demonstrate that he is entitled to equitable tolling of the statute of limitations). However, the D.C. Circuit has held that the 180-day statute of limitations established by the CAA is jurisdictional and that equitable tolling therefore does not apply to claims arising under the CAA. *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699 (D.C. Cir. 2009). By contrast, the Board has held that the doctrine of equitable tolling is available for administrative complaints filed with the OOC. *See Simms v. Office of Congressman Raul Grijalva*, No. 13-HS-68 (CV), 2014 WL 3887570 (OOC Board July 30, 2014). The Board has not yet entertained the question of whether equitable tolling would apply to FLSA claims or what the parameters of such an exception to the statute of limitations would be.
3. Repeated FLSA violations are not considered to be continuing violations. Rather, a new cause of action accrues with each paycheck that fails to contain all of the wages to which the employee is entitled, such that the limitations period begins to run anew with each deficient paycheck. Therefore, all claims based on paychecks falling within the limitations period are considered timely, whereas all claims based on paychecks falling outside of the limitations period are not. *See Figueroa v. Dist. of Columbia Metro. Police Dep't*, 633 F.3d 1129 (D.C. Cir. 2011). For claims arising under the CAA, this would mean that all deficient paychecks received within 180 days prior to the request for counseling – and only those paychecks – could be considered.

C. Evidentiary issues

1. *Arias v. U.S. Serv. Indus., Inc.*, 80 F.3d 509 (D.C. Cir. 1996) – Describes the burden-shifting framework for allocating burdens of proof in cases brought under the FLSA for unpaid wages or overtime compensation. Although plaintiffs bear the ultimate burden of proof, in situations where the employer's timekeeping and compensation records are inaccurate the plaintiff need only produce sufficient evidence to show the amount and extent of uncompensated work "as a matter of just and reasonable inference." The burden then shifts to the employer to submit its own evidence that rebuts the reasonableness of the employee's evidence. This avoids penalizing employees or giving employers incentive to keep inaccurate records. If the employer cannot rebut the employee's evidence, then the

[5] This is a substantially shorter time frame than that established by the Portal-to-Portal Act of 1947, which provides for a 2-year statute of limitations for claims arising under the FLSA, except for causes of action arising out of "willful violations," to which a 3-year statute of limitations applies. 29 U.S.C. § 255(a).

employee may be awarded damages even though the result may be only approximate.

2. *Escamilla v. Nuyen*, 200 F. Supp. 3d 114 (D.D.C. 2016) (Magistrate Judge Alan Kay) –To establish a *prima facie* case where an employer's records are incomplete or inaccurate, an employee need only allege that he performed work for which he was not properly compensated and then produce sufficient evidence to allow a just and reasonable inference as to the amount and extent of that work. The employer must then present its own evidence as to the amount of work the employee actually performed or rebut the reasonableness of the inference from the employee's evidence. Resolving disputes as to the hours of work actually performed or as to the reasonableness of the inference often requires an assessment of credibility, which is beyond the scope of summary judgment.
3. *Ventura v. Bebo Foods, Inc.*, 738 F.Supp.2d 1 (D.D.C. 2010) (Judge Royce C. Lamberth) – Plaintiffs, through sworn affidavits, produced sufficient evidence to show the amount and extent of the employer's minimum wage, overtime, and equal pay violations as a matter of just and reasonable inference, and the employer failed to refute the plaintiffs' estimates or negate the reasonableness of any inference that the court might draw from the plaintiffs' evidence. The court therefore granted the plaintiffs' summary judgment motion with respect to liability, and set a future hearing to determine the amount of damages to which plaintiffs were entitled.

X. Damages and Defenses

A. Back wages and liquidated damages – When an employing office is found to have violated the FLSA, it must pay the employee the amount that was wrongfully withheld as well as liquidated damages in the same amount. 29 U.S.C. § 216(b), applied by 2 U.S.C. § 1313(b) ("The remedy for a violation of subsection (a) shall be such remedy, including liquidated damages, as would be appropriate if awarded under section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b))."). Liquidated damages serve a compensatory purpose, not a penal one. *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982). No additional damages are available. *Kemp v. Architect of the Capitol*, Nos. 13-AC-01 (CV, FL, RP), 13-AC-35 (AG, CV, RP), 2015 WL 4597722, at *7 (OOC Board July 22, 2015).
B. Attorney's fees and costs – Plaintiffs may also be able to recover reasonable attorney's fees and costs. 29 U.S.C. § 216(b), applied by 2 U.S.C. § 1313(b).
C. "Good faith" defense
    1. The substantive regulations provide that in defending against allegations of FLSA violations, an employing office may avail itself of the "good faith" defense to liability established by the Portal-to-Portal Act of 1947 at 29 U.S.C. § 259, "by pleading and proving good faith reliance upon any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor" which had not been

superseded at the time of the reliance. S501.106(b), H501.106(b), C501.106(b). Satisfying this requirement would completely bar the plaintiff from recovery.

2. The Portal-to-Portal Act also provides for a partial good faith defense that would excuse employers from paying liquidated damages: "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260.
3. *U.S. Capitol Police Bd. & Fraternal Order of Police, U.S. Capitol Police Labor Comm.*, No. 01-ARB-01 (CP), 2002 WL 34461687 (OOC Board Feb. 25, 2002) – To avoid paying liquidated damages, "The burden on the employer is substantial and requires proof that the employer's failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon it more than a compensatory verdict. In the absence of such proof, however, a court has no power or discretion to reduce an employer's liability for the equivalent of double unpaid wages." In this case the Board affirmed an arbitrator's finding that the employing office did not act as effectively and expeditiously as it should have in making overtime payments, and that the employing office did not contend that it had reasonable grounds for believing that its 28-month delay in making the correct FLSA overtime payments was not a violation of the FLSA, or that it sought legal advice from any source concerning those FLSA obligations.
4. *Kinney v. Dist. of Columbia*, 994 F.2d 6 (D.C. Cir. 1993) – The employer failed to establish a good faith defense where it could prove only that it sought general advice about compliance with the FLSA, not advice regarding the applicability of the specific provision at issue in the case.
5. *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370 (D.C. Cir. 1994) – The "reasonableness" component of the good faith inquiry pertains specifically to the reasonableness of the employer's belief that it was complying with the FLSA – not to the employer's reasonableness generally. In this case, the employer did not believe that its failure to include premium pay in calculating the regular rate was in compliance with the FLSA; on the contrary, it conceded that this was erroneous, and argued instead that the violation was caused by a mistake by the payroll department rather than a deliberate action by management. In holding that the plaintiffs were entitled to liquidated damages, the court noted that "'Reasonableness' in general is not, however, what § 260 demands. … Even if, through no fault of management, the payroll department blundered, the employer still must make the undercompensated employee whole."
6. *Dove v. Coupe*, 759 F.2d 167 (D.C. Cir. 1985) – The "good faith" defense "depends on an affirmative showing of a genuine attempt to ascertain what the

law requires, not simply on a demonstration of the absence of bad faith." Here, the employer's "cavalier approach to its wage records" and its management's carelessness justified the judge's refusal to exonerate the employer from its obligation to pay liquidated damages.

7. *Laffey v. N.W. Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) – The employer was not entitled to the good faith defense to liquidated damages. The court found, among other things: that the employer did not do sufficient research to determine whether the male/female wage disparity was justified; that the employer mistakenly operated under the impression that wages established to collective bargaining were invulnerable to challenges under the equal pay provisions, despite the language of the FLSA itself and a DOL interpretation to the contrary; and that the employer's actions to remedy the situation after the lawsuit had been filed did not satisfy its burden to demonstrate a good faith effort to comply with the FLSA *before* the commencement of litigation.

D. Standard of review – "A court's decision to refrain from awarding liquidated damages is reviewed for abuse of discretion, but a court's determination of 'good faith' and 'reasonable grounds' is reviewed for clear error." *Escamilla v. Nuyen*, 200 F. Supp. 3d 114, 118 (D.D.C. 2016) (Magistrate Judge Alan Kay).

APPENDIX A

What follows is an excerpt from the OOC substantive regulations for the Instrumentalities of Congress, regarding the "white collar exemptions" to the FLSA's overtime provisions. The language in the corresponding Senate and House regulations is identical.

C541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: Provided, That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

C541.2 Administrative.

The term *employee employed in a bona fide * * * administrative * * * capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

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

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

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

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

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

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

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

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

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

C541.3 Professional.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system, educational establishment or institution by which employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: Provided, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: Provided further, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

APPENDIX B

What follows is an excerpt from each of the Series of the OOC substantive regulations regarding the exclusion of interns from FLSA coverage.

S501.102 Definitions.

(h) Intern is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; provided that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; provided further that an intern for purposes of section 203(a)(2) of the CAA also includes an individual who is a senior citizen appointed under S. Res. 219 (May 5, 1978, as amended by S. Res. 96, April 9, 1991), but does not include volunteers, fellows or pages.

H501.102 Definitions.

(h) "Intern" is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; provided that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; provided further that the definition of intern does not include volunteers, fellows or pages.

C501.102 Definitions.

(h) *Intern* is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; provided that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; provided further that the definition of intern does not include volunteers, fellows or pages.