THE FAIR LABOR STANDARDS ACT (FLSA)

Introduction

The following instructions are for use in Fair Labor Standards Act ("FLSA") cases where failure to pay minimum wage or overtime compensation is alleged. 29 U.S.C. § 201, *et seq.* The FLSA is a remedial statute that was enacted to eliminate "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Id.* § 202(a). Generally under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and must pay 1½ times the regular rate for all hours worked in excess of forty in one week. *Id.* §§ 206, 207. The FLSA contains numerous exemptions and exceptions to these general rules.

The following instructions are intended for use in cases involving one (or a few) plaintiffs. Section 216(b) of the FLSA also provides for collective actions, a unique multi-plaintiff litigation process. As a general matter, Section 216(b) allows courts, in a single proceeding, to hear claims brought by multiple plaintiffs against the same employer if those plaintiffs are found to be "similarly situated." *Id.* § 216(b); *see Hoffmann-La Roche v. Spearling*, 493 U.S. 165 (1989). The collective action process is distinct in several critical respects from the class actions procedures of Fed. R. Civ. P. 23. Perhaps chief among the differences is that collective action plaintiffs join the lawsuit by affirmatively and individually "opting-in" rather than by choosing not to "opt out" as is the case in Rule 23 class actions. *See* 29 U.S.C. § 216(b) ("No employee shall be a plaintiff to any such action unless the employee gives consent in writing to become a party and consent is filed in the court in which the action is brought."). The full effect of these procedural differences continues to be explored by the courts, and disputes often arise concerning the extent to which evidence may be presented on a representative basis. District courts should carefully consider the manner in which these instructions may modified for use in collective actions.

General Considerations

Although there are common themes in FLSA cases, claims often turn on specific provisions of the statute, regulations, case law and other authority. Consequently, although certain basic instructions as set forth in this Section may be useful, district courts must carefully consider the precise nature of the issues to be tried in each case, and adopt, reject, modify, and/or supplement these instructions as appropriate for the case.

In crafting appropriate instructions, courts must also carefully consider the nature of relevant authority. For example, with respect to matters such as certain minimum wage and overtime exemptions, the Secretary of Labor has promulgated regulations pursuant to express delegation of statutory authority. *See,* e.g., 29 C.F.R. § 541. In addition, the Secretary of Labor and Department of Labor's Wage and Hour Division have established a substantial body of "interpretive guidance." Much of this guidance is published in the Code of Federal Regulations. *See,* e.g., 29 C.F.R. ch. 531 subpart C, ch. 775-94. Other guidance appears in the form of interpretive bulletins and private opinion letters. When considering agency interpretations, "a court must first ask whether Congress has directly spoken to the precise question at issue." *Glover v. Standard Federal Bank*, 283 F.3d 953, 961 (8th Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

467 U.S. 837, 842 (1984)). "[T]he plain meaning of a statute or regulation controls, if there is one, regardless of an agency's interpretation." *St. Luke's Methodist Hospital v. Thompson*, 182 F. Supp. 2d 765, 775 (N.D. Iowa 2001) (citing *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)).

Where there is room for agency interpretation, interpretive guidance from the Secretary of Labor and Wage and Hour Division may, in certain circumstances, be entitled to varying degrees of "deference" or "respect" by courts, depending on the form of guidance. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Chevron*, 467 U.S. at 842; *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).

Employee and Enterprise Coverage

To prove a case for FLSA overtime or minimum wage violations, a plaintiff must prove he or she was employed by a covered defendant and that defendant failed to pay plaintiff minimum wage or overtime as required by law. *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353 (8th Cir. 1986).

As a threshold matter, FLSA plaintiffs must prove that an employment relationship existed with the defendant. *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1360 (8th Cir. 1993). Employee is defined by Section 203(e)(1) as "any individual employed by an employer." This definition has been interpreted as broad and expansive. *See United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). "Employer" is defined in Section 203(d) as "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* The term "employ" is defined in Section 203(g) expansively as "to suffer or permit to work." *Id.* The Supreme Court has rejected the common law "right-to-control test" and concluded that the "economic reality" test more appropriately satisfies the intended broad application of the statute's protections. *See*, e.g., *NLRB v. Heart Publications*, 322 U.S. 111 (1944). Although the existence of an employment relationship is often not disputed, common examples of workers who do not satisfy the requirement of an employment relationship are independent contractors, trainees, and volunteers.

Additionally, to satisfy coverage requirements, a plaintiff must prove either individual employee coverage or enterprise coverage. *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005). Individual coverage is established when the plaintiff, in his or her work for the defendant, is engaged in commerce or the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a)(1), 212(c). Enterprise coverage requires that the defendant is "an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000." 29 U.S.C. § 203(s)(1).

Common Types of Cases

The three most common types of FLSA wage disputes involve (1) misclassification, (2) off-the-clock, and (3) payroll and compensation practices.

Misclassification Cases

FLSA litigation frequently involves statutory exemptions from the minimum wage and/or overtime requirements. In such cases, the employer is alleged to have "misclassified" employees as exempt from the FLSA. These cases often involve exemptions known as "white collar" exemptions, which include individuals employed in a bona fide executive, administrative, professional, or outside sales position. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541. Exemptions are to be narrowly construed against the employer and the employer carries the burden of proving an exemption applies. *McDonnell v. City of Omaha*, 999 F.2d 293, 295 (8th Cir. 1993) (Employers have the burden of proving that the exemption applies, and they must demonstrate that their employees fit "plainly and unmistakably within the exemption's terms and spirit.").

Misclassification cases also often involve off-the-clock/payroll practice issues due to the employer's failure to track and record time worked. Therefore, where it is determined that an employer misclassified plaintiff, analysis under the other two major types of cases likely will be necessary.

Off-the-Clock Cases

Ordinarily in off-the-clock cases employers have failed to keep records of the plaintiff-employee's time worked or otherwise improperly recorded time-worked. Reasons for the failure to record all hours worked vary and, for example, may be due to misclassification as exempt or the employer's belief that the activity at issue is not compensable. Such instances may include preparatory and concluding activities such as "donning and doffing," travel time, waiting time, and rest or meal periods.

Payroll Practices/Calculations

Payroll practices are generally at issue when employees' pay was allegedly calculated improperly. Common issues include the allegedly improper calculation of the regular rate for overtime purposes such as when certain bonuses or commissions are not included in the calculation. Other common issues involve tipped employees and employees paid by the job, piece, or task. Payroll practices that involve unlawful deductions comprise another commonly litigated issue. Deduction concerns typically arise when an employer reduces employees' paychecks in amounts meant for items such as uniforms, shortages or other debts.

Significance of Recordkeeping

Section 211(c) of the FLSA requires employers to "make, keep and preserve records" of employees' "wages, hours, and other conditions and practices of employment." *Id.*; 29 C.F.R. § 516(1). Although there is no private cause of action against an employer for noncompliance with recordkeeping obligations, improper recordkeeping practices may have a significant evidentiary impact in FLSA cases. Where an employer has not kept adequate records of wages and hours, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees "are to be awarded compensation on the most accurate basis

possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff must establish "a just and reasonable inference" as to the uncompensated work performed. *Anderson*, 328 U.S. at 687-88 Plaintiffs may satisfy this requirement with evidence of their regular work schedules or work habits, e.g., such as calendars, computer records, parking records, or coworker testimony. Once the plaintiff has produced such evidence of uncompensated labor, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*

Retaliation

It is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter." *Id.* § 215(a)(3). *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034-35 (8th Cir. 2005); *Brennan v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975). *See* Section 5.60 of this Manual for instructions relating to retaliation claims.

Statute of Limitations

Ordinarily, FLSA claims must be brought within two years, but the statute of limitations is extended to three years if it is proven that the employer "willfully" violated the law. *See* 29 U.S.C. § 255(a). A violation is "willful" where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The recovery period generally is calculated backward from the date that the lawsuit is filed or from the date a consent to join form is filed on behalf of an opt-in plaintiff in a collective action pursuant to 29 U.S.C. § 216(b).

Damages

Backpay damages are generally calculated as the difference between what the employee should have been paid had the employer complied with the FLSA and the amount the employee actually was compensated. In addition, liquidated damages in an amount equal to the amount of backpay will be awarded unless the employer proves that it acted in good faith and had reasonable grounds for believing that it was not in violation of the FLSA. 29 U.S.C. § 216(b); *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1083 (8th Cir. 2000). The burden is on the employer to prove it acted in good faith. *Broadus v. O.K. Industries, Inc.*, 226 F.3d 937, 944 (8th Cir. 2000) (Equal Pay Act). This determination is made by the court. *See Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir.1999). "The jury's decision on willfulness [for statute of limitations purposes] is distinct from the district judge's decision to award liquidated damages," *id.*, but "it is hard to mount a serious argument . . . that an employer who has acted in reckless disregard of its obligations has nonetheless acted in good faith." *Jarrett*, 211 F.3d at 1084.

FLSA – ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's FLSA claim][2] if all the following elements have been proved:

First, plaintiff was employed by defendant on or after _____;[3]

Second, in plaintiff's work for defendant, plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000];[4] and

Third, defendant failed to pay plaintiff [minimum wage for all hours worked by plaintiff in one or more workweeks] [overtime pay for all hours worked by plaintiff in excess of 40 in one or more workweeks].[5]

[The term "commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.]

NOTES ON USE

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. This paragraph should be used only if employee status or dates of employment are disputed. Insert the date or dates of relevant recovery period.

4. This paragraph, and the appropriate bracketed language, should be inserted only when applicability of the FLSA is in dispute.

5. Select the appropriate bracketed language.

FLSA – "HOURS WORKED" DEFINITION[1]

The phrase "hours worked" includes all time spent by an employee that was primarily for the benefit of the employer or the employer's business.[2] Such time constitutes "hours worked" if the employer knew or should have known that the work was being performed.[3] Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his own purposes are not "hours worked."[4]

NOTES ON USE

1. This instruction is intended for use only when there is a dispute as to whether certain activities constitute hours worked, or there is a dispute as to the number of hours worked. The language should be modified to reflect the specific circumstances of the case based on case law and the Department of Labor guidance published at 29 CFR part 785.

2. The FLSA does not define "work" but uses the term in its definition of "employ." *See* 29 U.S.C. §254. Under the Act, "employ" means "to suffer or permit to work." 29 U.S.C. §203(g); s*ee also* 29 C.F.R. §785.6. The "suffer or permit" test provides that time spent on a "principal activity" for the benefit of the employer, with the employer's knowledge, is considered to be hours worked and therefore is compensable. *Id.*; *see Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005).

3. An employer must know or have reason to believe that the employee is working. 29 C.F.R. §785.11; s*ee Donovan v. Williams Chem. Co.*, 682 F.2d 185, 188 (8th Cir. 1982). An employer who has such knowledge cannot passively allow an employee to work without proper compensation, even if the work has not been done at the request of the employer.

4. The Supreme Court in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 598 (1946), stated that there need not be physical or mental exertion at all on the part of the employee and that, when the employee is required to give up a substantial measure of his or her time and effort, the time is hours worked. Accordingly, the workweek typically includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." *Id.* at 690-91. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes, however, are not considered "hours worked." An employee is not completely relieved from duty unless the employee is told he or she can cease work until a definitely specified time. For example, a meal period of at least 30 minutes during which an employee is completely relieved from duties does not ordinarily constitute hours worked, even if the employee is not permitted to leave the employer's premises. 29 C.F.R. §785.19. Additionally, rest or break periods of 20 minutes or less must be included in "hours worked." 29 C.F.R. §785.18.

FLSA – DETERMINING HOURS WORKED

You must determine the number of hours worked by plaintiff based on all of the evidence. The defendant is legally required to maintain accurate records of its employees' hours worked. If you find that the defendant failed to maintain records of the plaintiff's hours worked or that the records kept by the defendant are inaccurate, you must accept plaintiff's estimate of hours worked, unless you find it to be unreasonable.

NOTES ON USE

1. Use this instruction only when the number of hours worked is in dispute.

COMMITTEE COMMENTS

The FLSA requires employers to "make, keep and preserve such records of the persons employed by him and of wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor's Wage and Hour Division] as he shall prescribe by regulation or order . . .." 29 U.S.C. § 211(c). The Department of Labor's recordkeeping regulations may be found at 29 C.F.R. § 516. The FLSA does not create a private cause of action against an employer for noncompliance with record-keeping obligations. Where an employer has not kept adequate records of wages and hours, however, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff bears the burden of proving the extent of any uncompensated work, but may satisfy that burden by "just and reasonable inference." *Anderson*, 328 U.S. at 687-88 Once the plaintiff has produced such evidence of uncompensated work, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* The Committee believes the proposed instruction properly allocates the relative burdens of proof consistent with *Anderson*, without the risk of confusion that may be associated with an instruction that incorporates the exact language of the *Anderson* decision.

FLSA – MINIMUM WAGE

An employer must pay at least minimum wage for all hours worked by an employee each workweek. The minimum wage rate applicable in this case is as follows:

[_____ to July 23, 2007 – $5.15 per hour

July 24, 2007 to July 23, 2008 – $5.85 per hour

July 24, 2008 to July 23, 2009 – $6.55 per hour

July 24, 2009 to _____ – $7.25 per hour.]

You may have heard about other minimum wage rates that may be applicable in certain states. You must not consider any minimum wage rates other than those listed above.

NOTES ON USE

1. This instruction is intended for use only when the plaintiff claims unpaid minimum wage. Select the minimum wage rate(s) applicable to the period of time at issue.

FLSA – MINIMUM WAGE CREDIT FOR BOARD AND LODGING

In determining whether an employer has paid the minimum wage, the employer is entitled to a credit for the reasonable cost it incurred in furnishing board, lodging or other facilities to an employee if the employer regularly provided the board, lodging, or other facilities for the benefit of the employee.

NOTES ON USE

1. This instruction is intended for use only when the defendant claims credit for board and/or lodging. The instruction should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 CFR part 531.

FLSA – OVERTIME COMPENSATION

An employer must pay overtime compensation in any workweeks in which an employee has more than 40 "hours worked," as defined in Instruction No. __. Overtime compensation must be paid at a rate at least one and one-half times the employee's regular rate of pay for all hours worked in excess of 40.

An employee's "regular rate of pay" is determined by totaling all the compensation that should have been paid to the employee for the workweek, excluding any overtime premium pay and any pay for vacation, holiday, or illness, and then dividing that total by all of the employee's hours worked for that workweek. If the employee is employed solely at a single hourly rate, the hourly rate is his "regular rate of pay."

NOTES ON USE

1. This instruction is intended for use only when the plaintiff claims unpaid overtime compensation. The language regarding regular rate of pay should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 CFR part 778.

FLSA – WORKWEEK DEFINITION

A "workweek" is a regularly recurring period of seven days or 168 hours, as designated by the employer. [In this case, the parties have stipulated – that is, they have agreed – that the workweek was from [day of week] at [time] to [day of week] at [time].]

NOTES ON USE

1. This instruction is intended for use only when the Court determines that "workweek" should be defined to assist the jury. The bracketed language should be inserted if the parties have so stipulated.

FLSA – EXECUTIVE EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis as defined in Instruction No. ___[2] at a rate not less than $455[3,4] per week; [5] and

Second, plaintiff's principal, main or most important duty was management[6] of [(the enterprise in which plaintiff was employed) or (a customarily recognized department or subdivision of the enterprise in which plaintiff was employed)];[7] and

Third, plaintiff customarily and regularly directed the work of at least two or more other full-time employees or their equivalent; and

Fourth, plaintiff had authority to hire and fire other employees, or plaintiff's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees were given particular weight.

The phrase "customarily and regularly" means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

NOTES ON USE

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Insert the number of the "salary basis" instruction.

3. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

4. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

5. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

6. Generally, management includes activities such as interviewing, selecting, and training of employees; setting and adjusting employee rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

7. Select the bracketed language as appropriate for the claimed exemption.

FLSA – ADMINISTRATIVE EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4,5] per week;[6, 7] and

Second, plaintiff's primary duty was the performance of office or non-manual work directly related to the management or general business operations[8] of defendant or defendant's customers; and

Third, plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance.[9]

The term "primary duty" means the principal, main, major or most important duty that plaintiff performs.

NOTES ON USE

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for a

teacher in the educational establishment where plaintiff is employed. 29 C.F.R § 541.600(c). *See* 29 C.F.R. § 541.204(a)(1).

8. "Work directly related to management or general business operations" includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R § 541.201(b).

9. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R § 541.202 (b).

COMMITTEE COMMENTS

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R § 541.2.

The following are types of positions that may qualify for the administrative employee exemption: insurance claims adjusters; employees in the financial services industry; an employee who leads a team of other employees assigned to complete major projects (such as purchasing, selling, or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements); an executive assistant or administrative assistant to a business owner or senior executive of large business; human resources managers who formulate, interpret or implement employment policies; management consultants who study the operations of a business and propose changes in the organization; and purchasing agents with authority to bind the company on significant purchases. 29 C.F.R § 541.203.

The following are types of positions that typically do not qualify for the administrative employee exemption: personnel clerks who screen applicants to obtain data regarding their minimum qualifications and fitness for employment; ordinary inspection work; examiners or graders (such as employees that grade lumber); comparison shopping performed by an employee of a retail store who reports to the buyer the prices at the competitor's store; public sector inspectors or investigators,

such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists; and similar employees. 29 C.F.R § 541.203.

FLSA – LEARNED PROFESSIONAL EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4,5] per week;[6] and

Second, plaintiff's principal, main, major or most important duty was the performance of work requiring advanced knowledge in a field of science or learning.[7]

The term "advanced knowledge" means work that is predominantly intellectual in character, and that requires the consistent exercise of discretion and judgment. Advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

NOTES ON USE

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605. The salary basis and minimum salary requirements are inapplicable to certain employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. "Field of science or learning" includes traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have

a recognized professional status. 29 C.F.R § 541.301(c). This instruction should be modified, as appropriate, for employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

COMMITTEE COMMENTS

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R § 541.2.

The following are types of positions that may qualify for the learned professional exemption: registered or certified medical technologists, registered nurses, dental hygienists, physicians assistants, certified public accountants, executive chefs and sous chefs, certified athletic trainers, and licensed funeral directors and embalmers. 29 C.F.R. § 541.301(e).

The following are types of positions that typically do not qualify for the learned professional exemption: licensed practical nurses and other similar health care employees, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work, cooks who predominantly perform routine mental, manual, mechanical or physical work, and paralegals and legal assistants. 29 C.F.R § 541.301(e).

FLSA – CREATIVE PROFESSIONAL EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4,5] per week;[6] and

Second, plaintiff's principal, main, major or most important duty was the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.[7]

NOTES ON USE

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. Recognized fields of artistic and creative endeavor include music, writing, acting and the graphic arts. 29 C.F.R § 541.302(b).

COMMITTEE COMMENTS

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R § 541.2.

The performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is distinguished from routine mental, manual,

mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and may depend on the extent of the invention, imagination, originality or talent exercised by the employee. 29 C.F.R § 541.302(a) and (b).

The following are types of positions that may qualify for the creative professional exemption: actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons holding the more responsible writing positions in advertising agencies. 29 C.F.R § 541.302(c)

Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent; performing on the air radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. 29 C.F.R § 541.302(d).

The creative professional requirement generally is not met by a person who is employed as a copyist, as an animator of motion-picture cartoons, or as a retoucher of photographs. 29 C.F.R. § 541.302(c). Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. *See* 29 C.F.R. § 541.302(d).

FLSA – COMPUTER EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on [(a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4,5] per week[6]) or (at a rate not less than $27.63 per hour)];[7] and

Second, plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; and

Third, plaintiff's principal, main, major or most important duty consisted of at least one of the following:

A. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;

B. The design, development, documentation, analysis, creation, testing, modification of computer systems or programs, including prototypes, based on and related to use or system design specifications;

C. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

D. A combination of the aforementioned duties, the performance of which requires the same level of skills.

NOTES ON USE

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. Select the bracketed language that corresponds to plaintiff's compensation.

FLSA – SALARY BASIS

An employee is paid on a "salary basis" if the employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, and the amount is not subject to reduction because of variations in the quality or quantity of the work performed.[1] [An employee is paid on a salary basis even if the employee's salary is subject to reduction for one or more of the following reasons: (insert permissible deduction(s) at issue)].[2]

NOTES ON USE

1. 29 C.F.R § 541.602(a).

2. Permissible deductions from an employee's salary include:

   A. Deductions when an employee is absent from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R § 541.602(b)(1).

   B. Deductions for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation or loss of salary occasioned by sickness or disability. Deductions for full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted their leave allowance. Similarly, an employer may make a deduction from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state workers' compensation law. 29 C.F.R § 541.602(b)(2).

   C. While the employer may not make deductions for an employee's absence occasioned by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by the employee as jury fees, witness fees or military pay for a particular week against the salary for that particular week without loss of the exemption. 29 C.F.R § 541.602(b)(3).

   D. Deductions for penalties imposed in good faith for infractions of safety rules relating to the prevention of serious danger in the workplace or to other employees. 29 C.F.R § 541.602(b)(4).

   E. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees. 29 C.F.R § 541.602(b)(5).

F. In the initial and final week of employment, the employer may pay a proportionate part of an employee's salary for the time actually worked. 29 C.F.R § 541.602(b)(6).

G. When an employee takes an unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

FLSA – DAMAGES

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[1] you must award plaintiff damages in the amount that plaintiff should have been paid in [minimum wages and/or overtime compensation], less what defendant actually paid plaintiff.

[The minimum wage amount that should have been paid is the number of hours worked in each workweek up to 40 hours, times the minimum wage applicable to that workweek, as set forth in Instruction No. __.][2]

[The overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times the regular rate for that workweek, times one and one-half, as set forth in Instruction No. __.][3]

You must calculate this amount [these amounts] separately [for each plaintiff] for each workweek.

In determining the amount of damages, you may not include or add to the damages any sum for the purpose of punishing defendant.

NOTES ON USE

1. Insert the bracketed language if defendant has asserted an exemption defense.
2. Insert the bracketed language if the plaintiff claims damages for a minimum wage violation.
3. Insert the bracketed language if the plaintiff claims damages for an overtime pay violation.

FLSA – DAMAGES (ONLY HOURS WORKED SUBMITTED TO JURY)[1]

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[2] you must determine the number of hours worked in each workweek.

NOTES ON USE

1. Use this instruction only where the parties have agreed or the court determines that the jury will be asked to decide the number of hours worked, but will not be asked to calculate damages. Such an instruction may be appropriate where, for example, the appropriate rate of pay is not in dispute and damages may be calculated as a matter of law once the number of hours worked is determined by the jury.

2. Insert the bracketed language if defendant has asserted an exemption defense.

FLSA – WILLFUL VIOLATION

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[1] you must determine whether defendant's failure to pay [minimum wage and/or overtime] was willful. Defendant's failure to pay [minimum wage and/or overtime] was willful if it has been proved that defendant knew that its conduct was prohibited by the [federal][2] law regarding [minimum wage and/or overtime pay], or showed reckless disregard for whether its conduct was prohibited by the [federal] law regarding [minimum wage and/or overtime pay].

NOTES ON USE

1. Select minimum wage and/or overtime as appropriate for the claim.

4. Insert the bracketed language only if there is potential risk of confusion to the jurors due to evidence or argument regarding state law.

FLSA - GENERALVERDICT FORM

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

1. On the [(minimum wage) or (overtime)][1] claim of plaintiff [_____][2] against defendant [_____],[3] we find in favor of:

_____

(Plaintiff _____) or (Defendant _____)

Note: Answer question 2 only if the above finding is in favor of plaintiff [_____][2]. If the above finding is in favor of defendant [_____],[3] have your foreperson sign and date the form because you have completed your deliberations on this claim.

[2. Has it been proved that the defendant either knew its conduct was prohibited by the Fair Labor Standards Act or showed reckless disregard for whether its conduct was prohibited by the Fair Labor Standards Act?

_____ Yes _____ No

Note: If you answered yes to question 2, you should award damages for the period from [____ to _____].[5] If you answered no to question 2, you should award damages for the period from [____ to _____].[6]][7]

3. We find that the plaintiff should be awarded damages in the amount of:

$_____.

_____
Foreperson

Dated: _____

NOTES ON USE

1. This phrase should be used when the plaintiff submits multiple claims to the jury.

2. Insert the name of the plaintiff.

3. Insert the name of the defendant.

4. Model Instruction ___ (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Insert the date on which the plaintiff's cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

6. Insert the date on which the plaintiff's cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

7. This question is used when the parties dispute the "willfulness" of the defendant's actions. When the parties do not dispute "willfulness," question 2 may be eliminated. Question 3 should become question 2 with the following recommended language:

> For the period from _____ to _____, we find that the plaintiff should be awarded damages in the amount of:
>
> $_____.

FLSA - SPECIAL INTERROGATORIES (DAMAGES)

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

[Question No. 1: Was plaintiff employed by defendant on or after _____?

Yes ____ No ____
(Mark an "X" in the appropriate space)]

[Question No. 2: In plaintiff's work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000]?

Yes ____ No ____
(Mark an "X" in the appropriate space)]

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

Yes ____ No ____
(Mark an "X" in the appropriate space)

NOTE: If you answered "No" to *any* of the above questions, you should have your foreperson sign and date this form and turn it in because you have completed your deliberations on this claim. If you answered "Yes" to all of the above questions, please proceed to Question No. 4.

[Question No. 4: Do you find for defendant under Instruction No. ___? [Exemption]

Yes ____ No ____
(Mark an "X" in the appropriate space)

NOTE: If you answered "Yes" to Question No. 4, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "No" to Question No. 4, please proceed to Question No. 5.]

Question No. 5: For each workweek on the attached table, state plaintiff's hours worked, as that term is defined in Instruction No. ___.

Question No. 6: For each workweek on the attached table, state the amount that plaintiff should have been paid in minimum wage, as set forth in Instruction No. _____.

Question No. 7: For each workweek on the attached table, state the amount that plaintiff should have been paid in overtime compensation, as set forth in Instruction No. _____.

Question No. 8: For each workweek in the attached table, state the amount of wages that you find plaintiff was actually paid by defendant.

Question No. 9: For each of the periods set forth below, state the amount of plaintiff's damages as that term is defined in Instruction No. _____:

$_____ for the period [Date three years prior to filing suit] to [Day before date two years prior to filing suit]

$_____ [Date two years prior to filing suit] to the date of your verdict

Question No. 10: Do you find that defendant's failure to pay [minimum wage and/or overtime] was willful as defined in Instruction No. ___?

Yes ____ No ____
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Workweek Beginning Date	Workweek Ending Date	Hours Worked	Minimum Wage That Should Have been Paid	Overtime Compensation That Should Have Been Paid	Wages Actually Paid

FLSA - SPECIAL INTERROGATORIES (HOURS WORKED)

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

Question No. 1: Was plaintiff employed by defendant on or after _____?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Question No. 2: In plaintiff's work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000]?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

Yes ____ No ____
(Mark an "X" in the appropriate space)

NOTE: If you answered "No" to *any* of the above questions, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "Yes" to *each* of the above questions, please proceed to Question No. 4.

Question No. 4: Do you find for defendant under Instruction No. ___? [Exemption]

Yes ____ No ____
(Mark an "X" in the appropriate space)

NOTE: If you answered "Yes" to Question No. 4, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "No" to Question No. 4, please proceed to Question No. 5.

Question No. 5: For each workweek on the attached table, state plaintiff's hours worked, as that term is defined in Instruction No. ___.

Question No. 6: Do you find that defendant's failure to pay [minimum wage and/or overtime] was willful as defined in Instruction No. ___?

Yes ____ No ____
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Workweek Beginning Date	Workweek Ending Date	Hours Worked