Statement of

Richard L. Alfred, Esq.
Seyfarth Shaw LLP

Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

Hearing

"The Fair Labor Standards Act: Is it Meeting the Needs of the Twenty-First Century Workplace?"

July 14, 2011

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Good morning Chairman Walberg, Ranking Member Woolsey, and distinguished members of the subcommittee. My name is Richard Alfred, and I am pleased to provide this testimony to address the substantial problems faced by employers in attempting to apply the Fair Labor Standards Act to the twenty-first century workplace. I am a Partner with Seyfarth Shaw LLP, a national law firm with ten offices nationwide and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with wage and hour claims, as well as other labor and employment matters affecting both employers and employees in their workplaces.[1]

I. Executive Summary

This testimony addresses the explosion of litigation under the Fair Labor Standards Act ("FLSA") in recent years and the manner in which that litigation demonstrates the need for reform. First enacted in 1938, the FLSA has become an anachronism in today's workplace. The statute has not been comprehensively revised in more than sixty years. Likewise, the key regulations interpreting that statute maintain, for the most part, the same structure and content as they did when they were drafted more than half a century ago. Ambiguities that have existed in the statute since its inception, coupled with the fact that the statute has not kept pace with changes in the American workforce, have lead to inconsistent judicial and regulatory interpretations, increased litigation and unfairly exposed employers to potentially catastrophic results. Examples include litigation concerning what activities are included in compensable time, and application of the "white collar" exemptions from overtime to positions in virtually all industries and business sectors. Examples considered here include retail store managers,

[1] I would like to acknowledge Seyfarth Shaw attorney Jessica Schauer for her invaluable assistance in the preparation of this testimony.

pharmaceutical sales representatives and mortgage loan officers. Clarification of employers' obligations is needed to increase compliance and decrease the burdensome litigation that currently plagues even well intentioned employers. Employees would also benefit greatly from clarity in the law as a result of easier and more certain employer compliance in its pay practices and classification decisions, a reduction in prolonged and expensive litigation, and the ability to maintain flexible work schedules through alternative work schedules and locations.

II. Introduction

I am the Chairperson of Seyfarth Shaw's Labor and Employment Department's National Wage & Hour Litigation Practice Group consisting of about 70 of our lawyers from the firm's ten domestic offices. I have practiced in the areas of employment counseling and litigation defense for more than 32 years in Boston, Massachusetts. I am a member of both the Massachusetts and New York bars. Members of Seyfarth Shaw have written a number of treatises on employment laws, including a forthcoming first-of-its-kind treatise dedicated entirely to the defense of wage and hour collective and class action litigation to be published by Law Journal Press., a division of ALM Media, Inc.; defended many hundreds of wage and hour individual, collective and class actions under the FLSA and analogous state laws; and advised thousands of employers on wage and hour compliance issues. We have also conducted a great many workplace pay practices and exempt job classification assessments for our clients.

My personal practice for almost a decade has focused on the defense of wage and hour collective and class actions under federal and state laws. I have represented U.S. businesses – some as large as Fortune 50 companies and others much smaller – in dozens of wage and hour lawsuits primarily in federal courts in many jurisdictions throughout the country. I am a frequent lecturer and have published numerous articles on wage and hour topics.

III. The Fair Labor Standards Act

Enacted in 1938, the Fair Labor Standards Act generally requires covered employers to pay their nonexempt employees at least the federal minimum wage, currently set at $7.25, for all hours worked, and overtime premium pay of one-and-a-half times the employee's regular rate for hours worked in excess of forty in any workweek. The main substantive provisions of the Act have remained largely unchanged since they were enacted more than seventy years ago. In fact, recent Congressional action has been infrequent and has addressed such marginal (albeit important in certain circumstances) issues as whether stock options are included in the regular rate, or whether receiving food from a food kitchen might create an employment relationship.

The FLSA's most significant revision occurred in 1947, following a surge of litigation arising from the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that the time spent by pottery factory workers traveling from the entrance of the plant to their work stations was compensable work time. The 1947 amendments, known as the "Portal-to-Portal Act," limited the Act's retroactive application; redefined its statute of limitations; substituted a "collective" action procedure for allowing "similarly situated" individuals to join a lawsuit as "parties plaintiffs" in place of a class action mechanism; and excluded "preliminary and postliminary activities" from compensable time, all in an effort to reduce the rising litigation under the statute.

In its findings in connection with the adoption of the 1947 statutory amendments, Congress stated: "[T]he Fair Labor Standards Act . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation. . . ." 29 U.S.C. § 251(a).

IV. An Anachronistic Law Applied to Today's Workplace

As they did in 1947, employers once again face immense, unexpected liability under the FLSA. The workplace of the twenty-first century has little resemblance to the manufacturing predominant workplace of decades ago. The FLSA and its lengthy regulations, always difficult to interpret because of the many ambiguities and technicalities built into the law, are almost impossible for employers to apply with any certainty in the context of today's very different workplace. Compounding this problem are the inconsistent and often conflicting court decisions that attempt to deal with this anachronistic legal framework. The result has been an explosion of lawsuits, with the resulting risks, expense, and potentially catastrophic exposure challenging well-intentioned decisions of businesses attempting in good faith to apply a pre-World War II statute in the context of a fast-paced technological world.

From 2000 through 2010, the number of FLSA lawsuits filed in the federal courts has increased by more than 300%. Last year, more than 6,000 lawsuits, affecting virtually all industries and business sectors, were filed in the federal courts claiming violations of the Act.[2] This number excludes the thousands of additional wage and hour lawsuits filed in state courts under analogous state laws. *See* Exhibit 1, showing the growth in federal court wage and hour case filings since 2000.

About 40% of these federal wage and hour lawsuits are brought as collective actions, in which one or a few employees seek certification of a group of hundreds, thousands, or even tens of thousands of current and former "similarly situated" employees. Since 2004, reported verdicts and settlements in collective and class actions against businesses operating in the United States for alleged violations of the FLSA have reached as high as $210,000,000. While this staggering amount may be an outlier, there have been others in the nine figures, many in the eight figures and countless others in the seven and high six figures. *See* Attachment 2, listing the largest wage and hour collective/class settlements between 2004 and 2010.[3]

Of course, if an employer intentionally violates the law, cheats its employees out of pay or otherwise engages in unscrupulous practices aimed at exploiting employees or depriving them of earned compensation, one might conclude that it deserves the risk presented by a collective action. However, in my many years defending these lawsuits and monitoring the defense of hundreds of such lawsuits defended by other Seyfarth Shaw lawyers and colleagues at other law

[2] Federal Judicial Caseload Statistics (2000 - 2010).

[3] The settlements listed in Attachment 2 include some settlements of state law wage and hour cases, as well as several cases in which state and federal law claims were asserted simultaneously.

firms, I can testify that this is rarely the case. In fact, I can state without hesitation that, in my career, I have seen only a small handful of truly intentional wage and hour violations.

Virtually all of these cases involve ambiguous or technical requirements. In the private sector, they fall generally into four types: (1) those that challenge the exempt classification of a group of employees such as computer technicians, store managers, analysts, and sales representatives; (2) those that challenge a company's pay practices such as those that treat certain activities as noncompensable pre- and postliminary activities; (3) those that arise from company policies and practices that may run afoul of the strict salary basis requirement for exempt employees such as deductions from weekly pay because of employee absences; and (4) those that challenge the employer's computation of the "regular rate" used in calculating overtime pay. I will focus on the first two types--misclassification and "off-the-clock" claims.

Greater clarity in the law that gives rise to litigation under both of these types of claims would also be helpful to employees. First, through consistent and more predictable employer compliance, employees would benefit at the outset from pay and classifications decisions that are more clearly consistent with the law. Second, such consistency would reduce prolonged and expensive litigation that delays benefits to employees and requires them to pay a large portion of whatever recovery they may obtain in attorneys' fees and costs. Finally, employees, especially women with young children, want and seek alternative work schedules and locations that are possible today through arrangements such as telecommuting from home and working schedules that fit well with homecare obligations. Uncertainty in wage and hour obligations provides disincentives to employers to allow such practices. Federal law reform, on the other hand, could be a vehicle for providing an incentive to employers, without fear of litigation contesting off-the-clock and exempt misclassification claims, to adopt and expand flexible work programs.

V. What is Work?

Some of the most litigated ambiguities in the FLSA result from key terms that have never been defined. This has left the courts and the Department of Labor to decide to whom the Act's overtime provisions apply and the types of activities for which those employees must be compensated. Exacerbating this problem, the statute's provisions have never been comprehensively updated to conform with the requirements of today's technological workplace. The resulting patchwork of judicial and regulatory guidance is replete with inconsistencies and, in many instances, is badly out-of-date. For example, neither the statute nor the DOL regulations define the most basic term that is at the heart of the FLSA's requirements – "work."[4]

While leaving the definition of work unresolved, the DOL and courts apply what is known as the "continuous workday" to determine whether an employee's activities are

[4] Although the Supreme Court attempted in a 1944 case, *Tennessee Coal, Iron & Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), to put a gloss on the statute by defining work in terms of "physical or mental exertion," later cases have seemed to abandon that definition but have failed to provide a substitute. *De Asencio v. Tyson Foods, Inc.* 500 F.3d 361, 371

compensable.[5] Under this principle, all time spent by an employee between the first and last "principal activity" of the day, other than actual break times of at least thirty minutes, is presumptively "work." While this doctrine may have made sense when the DOL devised it in 1947, it is anachronistic in a world where employees have 24-hour access to email through their blackberries and iPhones and can access their employer's computer systems from anywhere in the world, including their homes, via Citrix or VPN connections. The very language chosen by the DOL to describe the "workday" – "roughly . . . the period from 'whistle to whistle,'" – underscores the degree to which this concept is out of touch with the electronic workplace of this century.[6] 29 C.F.R. § 790.6(a).

It is easy to imagine the challenges that can arise in applying this framework to modern working conditions. If an administrative assistant spends five minutes each night and another five minutes each morning checking her smart phone for email before going to bed and after waking up, must she be paid for this time? If so, how does an employer track this time to determine how much she should be paid? Must a call center operator be paid for the time he spends drinking his coffee while waiting for his computer to boot in the morning?[7] The dramatically inconsistent case law bears out these difficulties in application.

For example, the Ninth Circuit Court of Appeals recently addressed a case involving technicians in California who install and repair car alarm systems at customers' locations. The court determined that these employees were not entitled to compensation for their time spent traveling to their first job site of the day, even though they first spent time at home retrieving assignments from a handheld computer, prioritizing jobs, and completing paperwork, because those activities are so minor as to be "*de minimis*." *Rutti v. LoJack Corp.*, 596 F. 3d 1046 (9th Cir. 2010). This result seems sensible, but unfortunately it is at odds with decisions of courts in other jurisdictions. A court in Massachusetts, for example, decided that very similar activities to those at issue in *Rutti* performed by insurance adjusters – checking email and voicemail and preparing their computers for use during the day – were significant and triggered the beginning of the continuous workday, making their subsequent commute time compensable time. *Dooley v Liberty Mutual Ins. Co.*, 307 F. Supp. 2d 234 (D. Mass. 2004). Thus, in the states of the Ninth Circuit – Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon – checking your email before you drive to work probably will not make your commuting time compensable, but in Massachusetts it might. Other seemingly arbitrary distinctions also have come to have great significance in determining what is work time under the FLSA and what is not. For example, whether a commute to a job site in a company van is compensable work time may

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[5] The DOL's continuous workday regulations may be found at 29 C.F.R. § 790.6. The Supreme Court adopted the DOL's "continuous workday" approach in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

[6] These regulations in Part 790, themselves, were written in 1947, and they have not been updated since 1970.

[7] Examples of lawsuits concerning this question include *Gandhi v. Dell Inc.*, No. 08-248 (W.D. Tex.); *Heaps v. Safelite Solutions LLC*, No. 10-729 (S.D. Ohio); *Antoine v. KPMG Corp.*, No. 08-6415 (D.N.J.); *Thigpen v. Illinois Bell Telephone Co.*, No. 10-5589 (N.D. Ill.).

depend on whether the employees "must" or "may" take the company's van to the work site, and, thus, compensability may turn on the happenstance of the words used rather than on the substance of the policy, itself.[8]

Even the manufacturing industry, which features workplaces that are more similar to those envisioned by Congress in 1938, has been plagued by litigation concerning the meaning of "work." One particularly intense area of litigation has concerned the "donning and doffing" of protective clothing. In one case, for example, the Third Circuit Court of Appeals found that employees of a poultry processing plant in Pennsylvania must be paid for the time they spend putting on hair nets, beard nets, smocks, and safety glasses. *DeAsencio v. Tyson Foods*, Inc., 500 F.3d 361 (3d Cir. 2007). The Tenth Circuit Court of Appeals, on the other hand, found that employees at a meat-packing plant in Kansas do not need to be compensated for the time they spend changing into virtually identical gear. *Reich v. IBC, Inc.*, 38 F.3d 1123 (10th Cir. 1994). The same company, Tyson Foods, Inc., owned both the Kansas and the Pennsylvania plants at issue in these cases, demonstrating the degree to which employers may face conflicting legal obligations based solely on geography. Such dilemmas are acute for companies that operate nationwide.

VI. Exempt Classifications

Similarly intense confusion surrounds the question of which employees are entitled to overtime under the FLSA. The Act exempts from overtime any "employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman," but does not define those terms. 29 U.S.C. 213(a)(1). The Department of Labor's exempt status regulations, 29 C.F.R. § 541, which are intended to fill that void, were amended marginally in 2004. The 2004 revisions, for example, added a new regulation exempting "Computer Employees," but defined it so narrowly that, by its terms, it applies only to employees involved in system or software design, and does not apply to most information technology jobs. *See* 29 C.F.R. § 541.400(b).[9] The more commonly utilized "white collar" exemptions maintain the same basic structure that has been in effect for over half a century. This framework is complex, difficult to interpret, and hard to apply, leading to conflicting judicial interpretations of its provisions.

Retailers, for example, have faced a dramatic rise in litigation over the exempt status of store managers, positions that traditionally have been classified as exempt under the executive

[8] Compare *Johnson v. RGIS Inventory Specialists*, 554 F. Supp. 2d 693 (E.D. Tex. 2007) (time spent on optional shuttle to worksite not compensable) with *Gilmer v. Alamed-Contra Costa Transit District*, 2010 WL 289299 (N.D. Cal. 2010) (required travel from end of bus route to starting location at conclusion of shift compensable).

[9] *See also* DOL Opinion Letter, FLSA2006-42 (October 26, 2006), (applying exemption to information technology support specialist position), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_10_26_42_FLSA.htm.

exemption.[10] Plaintiffs in these lawsuits challenge this classification and seek overtime pay for the many hours worked by these managers above 40 per week. Even where it is not disputed that the manager is "in charge" of the store and supervises all of its employees, some courts have found that insufficient to prove the applicability of the exemption. Rather, whether the manager is exempt turns on whether his "primary duty" is that management, which as a practical matter is often, but erroneously, equated by courts to the amount of time he spends day-to-day assisting the employees he supervises with "non-exempt" tasks.[11] Seemingly similar job positions have gone in opposite ways in this inquiry. The Sixth Circuit affirmed an Ohio court's ruling that gas station/convenience store managers were exempt. *Thomas v. Speedway Superamerica*, LLC, 506 F.3d 496 (6th Cir. 2006). The Eleventh Circuit held that managers of a dollar store with a comparable level of responsibility to those of the store managers at issue in the Sixth Circuit case are not exempt. *Morgan v. Family Dollar Stores, Inc*., 551 F.3d 1233 (11th Cir. 2008).

Another highly publicized example of inconsistent guidance on an exempt classification issue involves the pharmaceutical industry. Pharmaceutical companies typically employ "sales representatives" or "detailers" whose job it is to visit prescribing physicians, educate them on the benefits of the company's products, and encourage them to prescribe those pharmaceuticals. They are paid handsomely for this work – it is not unusual for pharmaceutical sales representatives to earn in excess of $100,00 per year in salary, incentive payments, and benefits.[12] The pharmaceutical industry has long considered these individuals to be exempt from overtime under the administrative and outside sales exemptions, and the DOL has long acquiesced in this practice. As early as 1945, the Department of Labor issued an opinion letter stating that "medical detailists" whose job was "aimed at increasing the use of the [employer's] product in hospitals and through physicians' recommendations" met the requirements of the administrative exemption. Likewise, since 1940 the DOL had defined the outside sales exemption in a broad, non-technical manner that easily encompassed the work performed by

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[10] The executive exemption requires that an employee (1) is compensated on a salary basis at a rate of not less than $455 per week; (2) has a primary duty of "management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;" (3) "customarily and regularly directs the work of two or more other employees;" and (4) has the authority to hire or fire other employees or make recommendations for such personnel actions that are "given particular weight." 29 C.F.R. § 541.100.

[11] While 29 C.F.R.§ 541.700(a) states that an employee's "primary duty" is to be determined based on "all the facts in a particular case," and the amount of time spent performing exempt work is but one factor, some courts have given that factor particular weight. *See Morgan v. Family Dollar Stores, Inc*., 551 F.3d 1233 (11th Cir. 2008).

[12] *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 148 (2d Cir. 2010) (average salary for Novartis sales representatives is $91,500, and the company pays more than half a billion dollars a year in total compensation to its representatives); *Amendola v. Brystol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 465 (S.D.N.Y. 2008) (remarking that each of the sales representatives who had submitted affidavits on Brystol-Myers Squibb's behalf earned in excess of $100,000 per year); *Schafer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009) (plaintiff sales representative earned $103,392 in 2005).

pharmaceutical sales representatives, explaining that a "salesman [must] *in some sense* make a sale." Dep't of Labor, Executive, Administrative, Professional, Outside Salesman Redefined (Oct. 10, 1940) at 45-46 (emphasis added).

The application of these exemptions in the pharmaceutical industry, however, is now in a state of flux. More than seventy sales representative lawsuits against more than a dozen different pharmaceutical and life sciences companies have been filed in the past five years, each alleging an entitlement to overtime. These lawsuits have met with dramatically different and conflicting results. The Department of Labor weighed in on the issue in a case against Novartis Pharmaceuticals in the Second Circuit Court of Appeals, filing a friend-of-the-court brief arguing that sales representatives are not exempt. Amicus Brief of Secretary of Labor, *In re Novartis Wage & Hour Litig*., 611 F.3d 141, 149 (2d Cir. 2010). In so doing, the DOL not only reversed its sixty year-old position on sales representatives and advocated for a substantive change in the manner in which the administrative exemption is interpreted generally, but it did so in the context of a judicial briefing and not through actual rule-making.

The administrative exemption regulations include three requirements: the exempt employee must (1) meet certain salary requirements, (2) have a primary duty consisting office or non-manual work directly related to management or general business operations of the employer or the employer's customers, and (3) exercise discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200. Traditionally, this third requirement has been an either/or proposition – either an employee exercises discretion and independent judgment or she does not. The DOL, however, took the position that it is a quantitative requirement, and that an employee must exercise a sufficient level of independent judgment and discretion. The Second Circuit deferred to the DOL and ruled that Novartis's sales representatives must be paid overtime. The court also adopted the DOL's position that sales representatives are not exempt outside salespersons because FDA regulations prohibit them from directly selling pharmaceutical products to patients.

Other courts of appeals have ruled differently on these issues. In February of this year, the Ninth Circuit decided that pharmaceutical sales representatives for GlaxoSmithKline qualify for the outside sales exemption, rejecting the DOL's position in part because it conflicted with the Department's long-standing views. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011). The Third Circuit ruled last year that sales representatives for Johnson & Johnson are administratively exempt. *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010). Thus, a sales representative assigned to a territory in New York, which is part of the Second Circuit, must receive overtime, but a sales representative for the same company assigned to a territory in New Jersey – a short commuter train ride away – is exempt. District courts in Illinois and Indiana have also reached opposite conclusions on this same issue.[13] For a nationwide employer, complying with these conflicting standards is fraught with the possibility of an inadvertent misclassification. There are hazards for the employees as well. As one

[13] *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009) (pharmaceutical sales representatives qualify for both outside sales and administrative exemptions); *Jirak v. Abbott Laboratories, Inc*., 716 F. Supp. 2d 740 (N.D. Ill. 2010) (pharmaceutical sales representatives do not qualify for outside sales or administrative exemptions).

pharmaceutical industry group has pointed out, many pharmaceutical sales representatives are attracted to the position because of its flexibility, and that flexibility is likely to diminish if sales representatives must punch a clock or otherwise log their time so that their overtime pay may be calculated accurately. *See* Amicus Brief of Pharmaceutical Research and Manufacturers of America in Support of Petition for Certiorari, *Novartis Pharmaceuticals Corp. v. Lopes*, No. 10-460 (Nov. 5, 2010).

A similar pattern of shifting regulatory guidance emerges with respect to mortgage loan officers ("MLOs"). These individuals, who work for banks and mortgage companies and are responsible for guiding homebuyers through the mortgage application process, are often classified as administratively exempt. MLOs commonly receive incentive compensation based on the number of loans they close, and with these incentives may earn total annual compensation well within the six-figure range.[14] In 2006, the DOL issued an opinion letter stating that MLOs' typical job duties, including responding to customer inquiries and leads, collecting and analyzing financial information, and advising customers about the risks and benefits of various loan alternatives, meet the requirements of the administrative exemption.[15] Less than four years later, the DOL withdrew that guidance, issuing an "Interpretive Guidance," a newly created form of generalized administrative guidance, stating that loan officers are not exempt because their primary duty is not "directly related to the management or general business operations" of their employers or their employers' customers.[16] According to the DOL, MLOs' primary duty is sales, which makes them more like production workers than administrators.[17] Numerous class action lawsuits on behalf of loan officers seeking to capitalize on the DOL's sudden about-face are currently pending in the federal courts.[18]

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[14] In one pending case against Bank of America, some plaintiffs earned as much as $384,000 and $650,000 per year. *See* Brief in Opposition to Conditional Certification, *Kelly v. Bank of America, N.A.*, No. 10-cv-05332 (N.D. Ill.).

[15] DOL Wage & Hour Division Opinion Letter FLSA 2006-31 (Sept. 8, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.htm.

[16] Administrator's Interpretation 2010-1 (Mar. 24, 2010) available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm.

[17] Although MLOs provide guidance and advice to their customers, the DOL takes the position that such duties are irrelevant to the administrative exemption criteria because MLOs' customers are generally individuals rather than organizations, and thus they do not have "business operations" for the MLO to help them manage.

[18] *See, e.g., Greenberg v. The Money Source, Inc*., No. 10-01493 (E.D.N.Y); *Kelly v. Bank of America, N.A.*, No. 10-05332 (N.D. Ill.); *Sliger v. Prospect Mortg., LLC*, No. 11-465 (E.D. Cal.); *McCauley v. First Option Mortg*., LLC, No. 10-980 (E.D. Mo.); *Garcia v. Freedom Mortg. Corp.*, __ F. Supp. 2d __, 2011 WL 2311870 (D.N.J.) (denying employer's motion for summary judgment on plaintiffs' overtime claims).

Lawsuits by securities brokers or "registered representatives" claiming to be overtime-eligible have also become increasingly common. Like MLOs, these employees claim to be salespersons, rather than true administrative employees. In addition, at least one Minnesota court has determined that the fact that these employees must have passed a Series 7 securities representative examination is not sufficient to make them exempt professionals. *In re RBC Dain Rauscher Overtime Litig*., 703 F. Supp. 2d 910, 926 (D. Minn. 2010). Citigroup and UBS have settled lawsuits by their brokers for huge amounts – $98 million and $89 million, respectively.[19]

These results are incongruous with the purpose of the white collar exemptions: "the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Preamble to Exempt Status Regulations, 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004). The positions held by pharmaceutical sales representatives, mortgage loan officers, and stockbrokers are what most of us would think of as "good jobs." For the most part, they are highly paid, prestigious, and receive good benefits. If a mortgage loan officer earning $200,000 a year must receive time-and-a-half for his overtime hours, while a public school teacher scraping by on $20,000 a year is unquestionably exempt, we have strayed far from the FLSA's original intent.

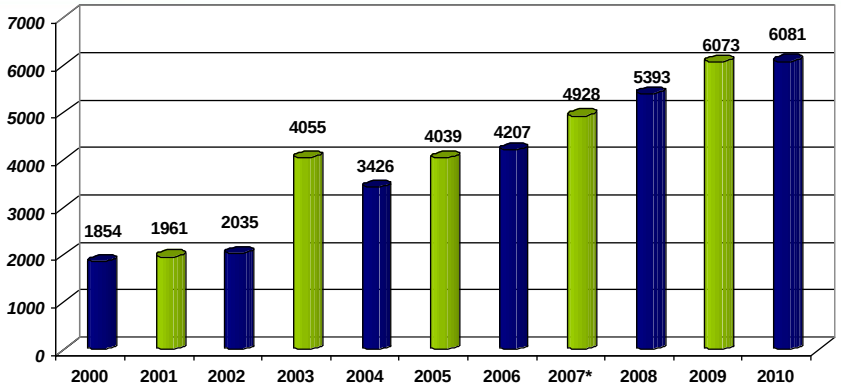
VII. Conclusion

The current state of the FLSA has left employers in a quandary. Determination of the number of compensable hours worked, application of the white collar exemptions, and other important concepts in the statute have never been straightforward due to the statute's definitional gaps. Because the statue has never comprehensively been updated or clarified, employers now also must contend with the fact that the statute was designed to apply to a very different kind of workplace than exists for most American workers today. Unable to avoid liability in these highly technical lawsuits merely by paying their employees generously – many of the largest judgments and settlements under the statute have benefited highly paid employees – they are forced to wade through conflicting judicial decisions and rapidly shifting regulatory guidance to determine the contours of their obligations. Employers need a clear, comprehensible framework to allow them more easily to determine how their employees must be paid. Employees, likewise, would benefit from the consistency and increased compliance associated with clear rules, especially as litigation of an FLSA claim may take years to resolve.

Chairman Walberg, Ranking Member Woolsey, I thank you again for inviting me to testify. I am happy to answer any questions you may have.

[19] Motion for Preliminary Approval of Class Action Settlement, *Bahramipour v. Citigroup Global Markets Inc.*, No. 04-04440 (N.D. Cal. Feb. 16, 2007).

FLSA Cases Filed in Federal Court: 2000-2010



Source: Federal Judicial Caseload Statistics (2000-2010)

*2007 excludes 2,382 individual cases filed in the Northern District of Alabama against Dolgencorp d/b/a Dollar General.

Exhibit 1

Largest Wage-Hour Collective/Class Settlements 2004 - 2010

- $210.0 million – Farmers Insurance
- $135.0 million – State Farm Insurance
- $120.0 million – Allstate Insurance
- $98.0 million – Citigroup
- $89.0 million – UBS Financial Services
- $87.0 million – United Parcel Service
- $86.0 million – Wal-Mart Stores
- $72.0 million – City of Houston
- $65.0 million – IBM
- $65.0 million – Wal-Mart Stores
- $55.0 million – Wal-Mart Stores
- $53.3 million – Albertson's
- $44.0 million – Merrill Lynch
- $42.5 million – Morgan Stanley
- $42.4 million – Richmond State Hospital
- $42.0 million – Staples
- $40.0 million – Wal-Mart Stores
- $39.0 million – Wachovia
- $38.0 million – 24 Hour Fitness
- $38.0 million – Washington Mutual
- $38.0 million – Staples