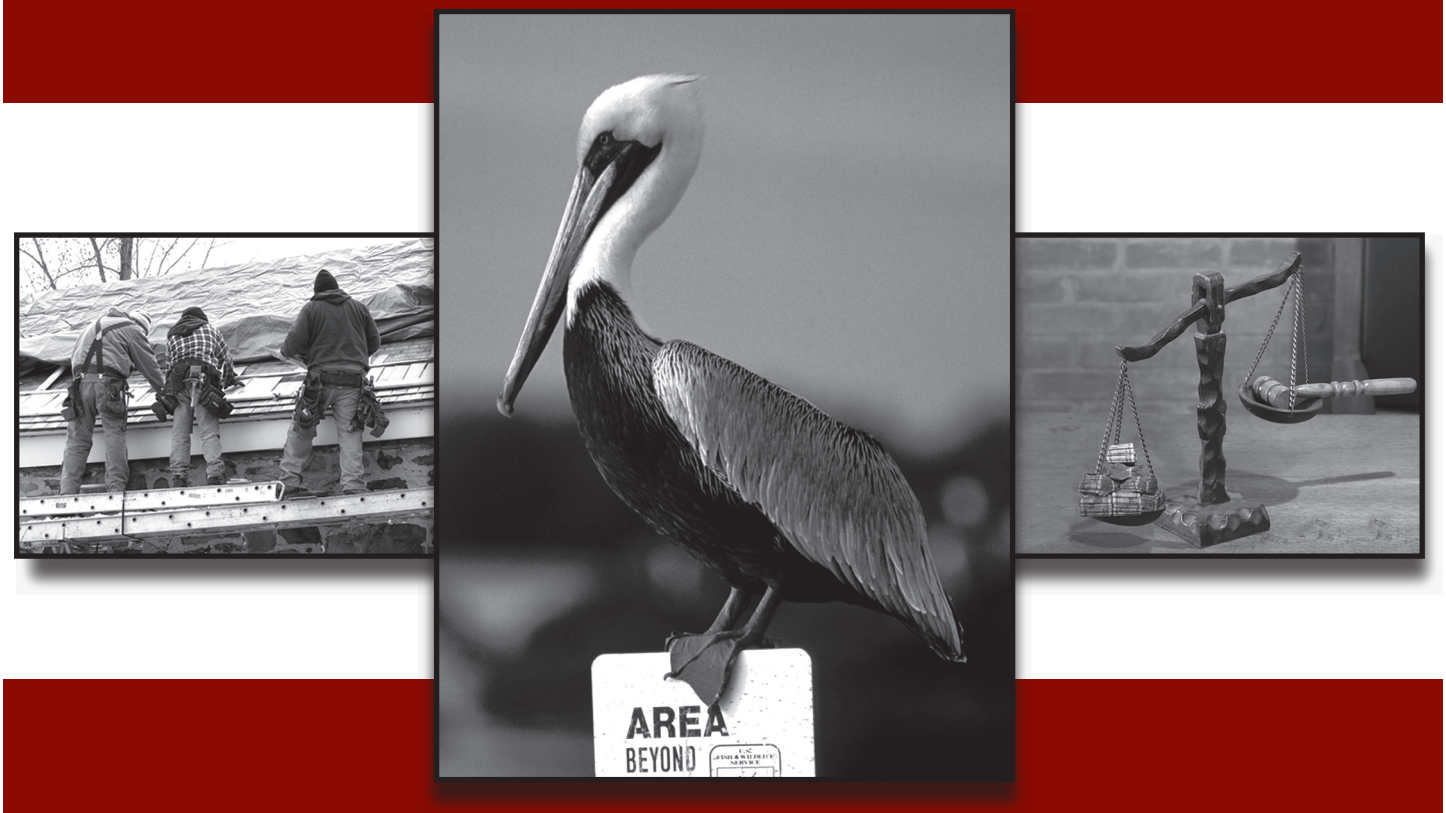
Representing Low Wage And Immigrant Workers In Wage Claims



Presented By:

Louisiana Appleseed

The ProBono Project
Volunteer Lawyers Providing Access to Justice

The Pro Bono Project and Louisiana Appleseed invite readers to engage with this Handbook as a working document, susceptible to supplementation and updating as needs and opportunities arise. We invite readers to submit "practitioner's notes" drawn from their own experiences in handling wage claims. We also recognize that the law is a living instrument and accordingly invite readers' suggestions for revision as may from time to time become relevant. If you would like to submit a practitioner's note or suggested revision, please contact Christy Kane at ckane@appleseednetwork.org.

The information in this Handbook is provided as a matter of public service and is for informational use only. The information does not constitute legal advice and should not be used as such. Readers are strongly urged to talk with a lawyer in matters involving potential wage claims.

Representing Low Wage And Immigrant Workers in Wage Claims

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The Pro Bono Project and Louisiana Appleseed would like to thank law students Marcus McLelland (LSU) and Laura Buck (Tulane) for their research efforts related to this topic. We would also like to thank those who contributed materials for this handbook, including the presenters above, as well as Oxfam America for their generous support of the Employment Law Program of The Pro Bono Project.

REPRESENTING LOW WAGE AND IMMIGRANT WORKERS IN WAGE CLAIMS
AN OVERVIEW OF THE LOUISIANA WAGE PAYMENT ACT
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Vanessa Spinazola
Employment Law Staff Attorney
The Pro Bono Project

I. INTRODUCTION

Low-wage workers have always maintained a presence in southern Louisiana, particularly in the service industry. The post-Katrina (and post-Rita, Ike and Gustav) construction boom has attracted thousands of Spanish and Portuguese-speaking workers to our region, working in low-wage jobs and often not receiving their earned wages at all. The construction industry with its tight profit margins and incentives to underbid competitors is further characterized by financial instability. Unfortunately, the workers on the lowest rung of the ladder are often the last to get paid.[1]

In residential construction – anecdotally, the majority of claims for unpaid wages seen by The Project – hundreds of contractors have descended on Louisiana from Texas, Florida and other states along the disaster corridor. Contractors set up shop and often operate without respect to the law. The manner in which these contractors have set up their businesses, to their maximum benefit, often involves attempts to classify "day laborers" as independent contractors.[2]

Misclassification has its benefits: in labeling workers as independent contractors, employers do not pay payroll taxes, workers' compensation insurance, or unemployment benefits. Independent contractors are not covered by the Fair Labor Standards Act and its overtime provisions. Nor are independent contractors covered by the ADA, the ADEA, or Title VII protections. The first half of this paper explores the definitions of employees, employers and independent contractors and advocates that the majority of the workers seen through The Project are actually employees, despite first appearances.

These riders of the disaster corridor have acted with impunity. Demand letters for unpaid wages are often met with threats of calls to immigration or completely ignored; most cases must be brought to litigation in order to recover wages for the workers. Many contractors who have found themselves in the position of defendants on The Project's cases are shocked that they are being called to task on their actions – or lack thereof. The second half of this paper operates as a practical guide to litigating cases under the Louisiana Wage Payment Act, including the particular challenges that come with representing undocumented immigrant workers.

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[1] For a comprehensive study of the influx of immigrant workers to the New Orleans area immediately post-Katrina, see "And Injustice for All: Workers' Lives in the Reconstruction of New Orleans," *available at*: http://www.nilc.org/disaster_assistance/workersreport_2006-7-17.pdf.

[2] *See* National Employment Law Project "Post-Katrina Fact Sheet," October, 2005, *available at*: http://www.lawhelp.org/documents/294971NELP1099.pdf?stateabbrev=/LA/.

II. IS S/HE OR ISN'T S/HE: EMPLOYEE V. INDEPENDENT CONTRACTOR

Zealous advocacy on behalf of the worker/client entails a critical look at whether that worker was an employee as opposed to an independent contractor. Employees are not subject to deductions from their wages because they "did a bad job" unless they willfully or negligently damage goods or property.[3] Independent contractors, however, are subject to counterclaims of "poor workmanship" and may be expected to mitigate damages in order to obtain full recovery on the contract[4]. Further, a breach of contract case through The Project will often have problems getting off the ground: oral contracts are the norm, where the terms are notoriously difficult to prove, while written contracts often do not encompass all the terms, and there are often later oral modifications, running into problems with parole evidence. Finally, attorneys' fees are statutory under state law for claims made under the Louisiana Wage Payment Act,[5] but in contract cases attorneys' fees are only available per terms of the contract.

II.A. TWO WAYS TO GO AT IT: THE WORKER WAS AN EMPLOYEE AND/OR THE DEFENDANT WAS AN EMPLOYER

II.A.1. THE WORKER WAS AN EMPLOYEE

Louisiana statutes comprising the Louisiana Wage Payment Act, namely sections 231 and 232 of Chapter 6 "Payment of Employees," of the overarching Title 23 "Labor and Workers' Compensation," do not define the terms "employee" or "employer," both of which terms are arguably essential to recognizing an employment relationship.[6] Although the Louisiana Wage Payment Act does not define these terms, several other chapters within Title 23 do.[7]

Because an "employee" is defined as "an individual employed by an employer," and an "employer" is " a person . . . [r]eceiving services from an employee and, in return, giving compensation of any kind to an employee," the essence of the statutes seem to recognize almost any exchange of services for compensation as an employment relationship.[8] Chapter 9 of Title 23

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[3] § 23:635. Assessment of fines against employees unlawful; exceptions: No person, acting either for himself or as agent or otherwise, shall assess any fines against his employees or deduct any sum as fines from their wages. This Section shall not apply in cases where the employees willfully or negligently damage goods or works, or in cases where the employees willfully or negligently damage or break the property of the employer, or in cases where the employee is convicted or has pled guilty to the crime of theft of employer funds, but in such cases the fines shall not exceed the actual damage done.

[4] *See, e.g. Unverzagt v. Young Builders, Inc.*, 215 So. 2d 823 (La. 1968).

[5] *See infra*, Section IV.I.

[6] The definitions section of Chapter 6 defines only "plan," benefit," beneficiary," "participant," and "designation form." La. Rev. Stat. Ann.§ 23:651. These definitions use the word "employee" without actually defining it. *See*: La. Rev. Stat. Ann. §651(4).

[7] Chapter 3 "Employment Standards and Conditions," La. Rev. Stat. Ann. §23:291, Chapter 3-A "Prohibited Discrimination in Employment," La. Rev. Stat. Ann. §23:302, and Chapter 9 "Miscellaneous provisions," La. Rev. Stat. Ann. §23:900, all within Title 23, each define "employee."

[8] La. Rev. Stat. Ann. §23:302(1)(2). While section (2) of this definition goes on to limit the application of the provisions of the chapter to employers with twenty or more Louisiana employees within a specified calendar period, the primary "employer" definition still provides insight as to the broad intent of the legislative authors of Title 23.

defines an employee" as "[a]ny person who performs services for wages or salary under a contract of employment, express or implied, for an employer."[9]

Overall, the definitional statutes included in Title 23 appear to be broad-based, in favor of recognizing generous definitions of "employee" and "employer." In one instance the statute even goes so far as to define an employee as "any person, paid or unpaid, in the service of an employer."[10] The First Circuit Court of Appeal has recognized that the statutes within the Louisiana Wage Payment Act were "enacted with a broad purpose in mind; i.e., to assure the prompt payment of wages upon an employee's discharge or resignation."[11]

Ultimately, the Louisiana statutes themselves do not provide us with an easy answer. As will be shown, Louisiana jurisprudence tends to analyze the *relationship* between employee and employer as opposed to their component parts, and the right of the alleged employer to control the work of the employee.[12] Through the seminal decision in *Hickman v. Southern Pacific Transport Co.*, 262 So. 2d 385 (La. 1972), the employment relationship is often defined in the negative; that is, it exists when it is not a relationship between independent contractors.

II.A.2 THE DEFENDANT WAS AN EMPLOYER

Unsurprisingly, definitions of "employer" are no less vague under Louisiana statutes. An employer is "any person . . . or corporation . . .that has one or more employees, or individuals performing services under any contract of hire or service ... oral or written,"[13] or "a person…[r]eceiving services from an employee and, in return, giving compensation of any kind to an employee,"[14] or a "person, firm, or corporation who employs any employee to perform services for a wage or salary, and includes any person . . .acting as an agent of any employer, directly or indirectly."[15] Essentially, "employer" is defined throughout Title 23 and the Louisiana Wage Payment Act as any person giving compensation to an employee in exchange for services.[16]

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[9] La. Rev. Stat. Ann. §23:900(4).

[10] La. Rev. Stat. Ann. §23:302(C), (2).

[11] *Guidry v. Anderson-Dunham, Inc*., 597 So. 2d 1184, 1186 (La. Ct. App. 1st Cir. 1992) (holding that an employee hired for a specific term, paid bi-monthly, was entitled to protection under the Louisiana Wage Payment Act although the act did not expressly cover this type of employee.)

[12] *See, e.g. Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 112 S. Ct. 1344 (1992).

[13] La. Rev. Stat. Ann. §23:291.

[14] La. Rev. Stat. Ann. §23:302(2).

[15] La. Rev. Stat. Ann. §23:900 (3).

[16] La. Rev. Stat. Ann. §23:302 (1), (2) (2006).

II.B. TWO MORE WAYS TO GO AT IT: THE EMPLOYMENT RELATIONSHIP AND THE IT-WAS-NOT-AN-INDEPENDENT-CONTRACTOR RELATIONSHIP

II.B.1. THE EMPLOYMENT RELATIONSHIP

At first blush, a worker who is paid by the "job" or admittedly a "contract" might seem to have an independent contractor status.[17] The tests to determine whether a worker is an independent contractor or an employee – that is, *whether an employment relationship existed* - are broad. Often, Louisiana courts utilize both the "right of control" test and the five- part test enunciated by the Louisiana Supreme Court in *Hickman v. Southern Pacific Transport Company*[18], to determine whether an employment relationship existed.

Note that the Third Circuit Court of Appeals has stated that "[i]t is also well settled that whether the employer 'actually exercises control or supervision' over the movements and the services rendered by an employee . . .is of no great moment, the 'important question is whether, from the nature of the relationship, he had the right to do so.'"[19] The nature of the relationship is determined from the subjective understanding of the parties.[20]

In Louisiana case law, "[i]t is well established that the single most important factor for determining whether an employer-employee relationship exists is the right of the employer to control the work of the employee."[21] The employment relationship, as opposed to the relationship between a sub-contractor and a general contractor, is a factual analysis characterized by the employer's ability to control, direct, and supervise the work of the employee.[22] This "right of control" test is also characterized in terms of "economic realities," in that an employer essentially controls the ability of an employee to receive payment of wages.[23]

Where a worker was directed as to locations of job sites and could be expected to be terminated if he went about working for the same result using different methods or timeframes, the Third Circuit Court of Appeals recognized an employer-employee relationship.[24] Even

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[17] *See, e.g.* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?,* 14 Lab. Law. 457, 465 (1999), noting that, in today's "changing nature of the workplace," "the traditional notion that a full-time worker is an employee and a part-time one is an independent in contractor doesn't always help classifying workers….Similarly, the notion that set hours typify employees and flexible hours independent contractors is not necessarily valid." The complexity of determining a worker's status is further complicated by the possibility of an individual worker simultaneously being classified both as an independent contractor under the Internal Revenue Service guidelines, and as an employee under the Fair Labor Standards Act. *Id*. at 466, 473.

[18] *Hickman v. Southern Pacific Transport Company*, 262 So.2d 385 (La. 1972).

[19] *Smith v. Hughes Wood Products, Inc.*, 544 So.2d 687, 688 (La Ct. App. 3d Cir. 1989).

[20] *Id.*

[21] *Jones v. Angelette*, 2005-0597 (La. App. 4th Cir. 12/21/05); 921 So.2d 1017, 1020 (citing *Roberts v. State of Louisiana*, 404 So. 2d 1221, 1225 (La. 1981); *Medical Review Panel Proceedings for Claim of Tinoco v. Meadowcrest,* 03-0272, p. 8 (La. App. 4th Cir. 9/17/03), 858 So.2d 99, 105 (granting summary judgment for defendant medical practice on a malpractice claim where written contract between doctor and hospital labeled doctor as indpendent contractor.)

[22] *See: Gordon v. Hurlston*, 854 So. 2d 469 (La. Ct. App. 3d Cir. 2003).

[23] *See, e.g.: White v. Frenkel*, 615 So. 2d 535, 539 (La. Ct. App. 3d Cir. 1993) (holding that an employer-employee relationship existed where wages paid were at the discretion of the employer, and the employee could expect to be fined or fired for not complying with the employer's demands.)

[24] *Hughes,* 544 So. 2d at 689-90.

where a worker did not have income taxes or FICA deducted from his paycheck, the Third Circuit Court of Appeals reasoned that this alone would not defeat recognition of the worker as an employee; rather the lack of a written contract and the "evidence taken as a whole" in light of the right of the employer to control differentiated this worker from an independent contractor. *Lewis v. Teacher's Pet, Inc.,* 621 So. 2d 867, 870-71 (La. Ct. App. 3 Cir. 1993). Even in *Hickman*, the employee at the heart of the suit did not have Social Security or income tax taken out of his monthly paychecks. *Hickman v. Southern Pac. Transport Co*., 262 So. 2d 385, 390 (La. 1972).

II.B.2. THE IT-WAS-NOT-AN-INDEPENDENT-CONTRACTOR RELATIONSHIP

In Louisiana, "[t]he distinction between employee and independent contractor status is a factual determination which must be decided on a case-by-case basis, taking into consideration the total economic relationship between the parties and the various factors weighing either in favor of or against and employer-employee relationship."[25] The relevant factors were solidified and enumerated in the Louisiana Supreme Court decision of *Hickman v. Southern Pacific Transport Company*.[26]

Hickman was a personal injury case where action was taken against both an employee tortfeasor and the employer. When the employer denied liability on the theory that the tortfeasor was an independent contractor, the Court analyzed the relationship in terms of an oft-cited test, utilizing five factors, for determining whether a worker is an independent contractor. The five factors break down as follows:

1. There is a valid contract between the parties;
2. The independent nature of the contractor's business, such that the contractor may employ non-exclusive means of accomplishing the work in question;
3. The contract calls for specific piecework as a unit to be done according to the independent contractor's own methods, without being subject to the control and direction, in the performance of the service, of his employer, except as to the result of the services to be rendered;
4. There is a specific price for the overall undertaking; and
5. Specific time or duration is agreed upon and not subject to termination at the will of either side without liability for breach.[27]

All five factors must be met in order for a worker to be classified as an independent contractor.[28]

If a worker fails to meet even one factor, an independent contractor relationship will not be found. In *Hickman*, the tortfeasor was deemed to be an employee, because of his near-

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[25] *Adams v. Greenhill Petroleum Corp*., 93-795 (La. App. 5th Cir. 1/25/04); 631 So. 2d 1231, 1233 (citing *Sones v. Mutual of Omaha Insurance Company*, 272 So. 2d 739 (La. Ct. App. 2d Cir. 1972), writ denied 273 So. 2d 292 (La. 1973); *Pitcher v. Hydro-Kem Services, Inc*., 551 So. 2d 736 (La. Ct. App. 1st Cir. 1989), writ denied, 553 So. 2d 46 (La. 1989).)

[26] *Hickman*, 262 So. 2d 385.

[27] *See: Hickman* at 390-391.

[28] *Adams*, 631 So. 2d at 1234.

exclusive employment with Southern Transport, the expectation that he be at the job every work day, and the "considerable" supervision of the employer, who directed the employee as to the order of deliveries.[29]

Of note is that the first factor is, "perhaps the most important because its existence seems to be implied in all the other requirements."[30] Throughout the case law, the first requirement of a "valid contract" in *Hickman* has referred to a written contract to the effect of classifying the worker as an independent contractor.[31] This analysis is important for pro bono attorneys representing clients through The Project, as the majority of workers do not contract in writing.

III. WORKERS DEFINE WAGES; WAGES DON'T DEFINE WORKERS

One of the most tempting traps in representing low-wage and immigrant workers through The Project will be to look at the wage payment agreements to define the employment relationship. Sheetrockers will get paid by the sheet, Roofers by the roof tile, Day Laborers by the house, Janitors by the number of stores they clean, Housekeepers by the number of rooms they clean, etc. etc. There is no need to set aside *Hickman* and the tests enumerated above; Louisiana law has yet to hold that a wage agreement defines, determines or drives an employment relationship.

To the contrary, and unsurprisingly, neither the LWPA, nor the Chapter in which it is found, defines "wages." The LWPA does state that employers must notify employees upon hiring: the wages that will be paid, the manner in which they will be paid, and how often they will be paid.[32] Otherwise, employers and employees are free to determine how wages will be earned and paid.

Louisiana courts have interpreted the LWPA language requiring payment of wages to workers "whether the employment is by the hour, day, week, or month"[33] as encompassing "the pay period, rather than the method of calculating, or rate of, pay….We have considered the phrase ["by the day, week, or month"] to be merely illustrative and not exclusive."[34] One Court of Appeal has held the LWPA's definition of wages was met where compensation was based on the number of feet climbed up a radio tower.[35] Bonuses have been found to be compensation

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[29] *Hickman* at 389-392. Again, no social security or tax deductions were made from the employee's wages, but this did not interfere with classifying the worker as an employee. *Id*. At 390.

[30] *White v. Frenkel*, 615 So. 2d at 538.

[31] *See, e.g., Id.*

[32] La. Rev. Stat. Ann. § 23:633 (A).

[33] La. Rev. Stat. Ann. §23:631(A)(1)(b).

[34] *Pearce v. Austin*, 465 So.2d 868, 872 (La. 2d Cir. 1985). *See also: Guidry v. Anderson-Dunham, Inc*., 597 So.2d 1184.

[35] *Morris v. Parish Radio Service Company, Inc*., 444 So. 2d 162 (La. Ct. App. 1st Cir. 1983). The *Morris* court permitted this conclusion, even with lack of written evidence that the climbs were performed; witness testimony sufficed. *Id*. At 164.

within the scope of the act.[36] Even in *Hickman*, the Louisiana Supreme Court case most often cited in the context of wage claims, the employee in question was paid in a piecework fashion.[37]

As the courts have stated, "[t]he pay period as well as the rate of pay and the term (or lack thereof) of employment should not be determinative of the statute's applicability in all circumstances....The more pertinent and relevant inquiry is the existence of the *employment relationship* rather than the rate, or period of pay and/or term of employment."[38]

IV. THE PRACTICAL PART: LITIGATION LOGISTICS UNDER THE LOUISIANA WAGE PAYMENT ACT (LWPA)

Most all of The Project's cases are ready for litigation when they are assigned out to pro bono attorneys through The Project. Written demands have been made by the employee/worker through the Wage Claim Clinic, without success.

IV.A. WORKERS MUST BE PAID REGARDLESS OF REASON FOR SEPARATION:

The employment relationship must have terminated in order for an action to be brought under the Louisiana Wage Payment Act:

§ 23:631. Discharge or resignation of employees; payment after termination of employment

A. (1) (a) Upon the **discharge** of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the **amount then due under the terms of employment**, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.

(b) Upon the **resignation** of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the **amount then due under the terms of employment**, whether the employment is by the hour, day, week, or month, on or before the next regular payday for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, whichever occurs first.

Louisiana does not have a minimum wage statute.[39] Instead, the agreement between the employer and employee as to the wages is what the worker seeks to enforce, thus, "the amount

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[36] *Williams v. Dolgencorp, Inc.,* 888 So. 2d 260 (La. Ct. App. 3d Cir. 2004); *Tran v. Petroleum Helicopters,* 771 So. 2d 673 (La. Ct. App. 3d Cir. 2000).

[37] The contract at issue in determining whether a worker was an employee, "provided for the payment of 20 cents per hundredweight on the first 30,000 pounds of freight handled and 15 cents per hundred weight for all over 30,000 pounds handled by [the employee] each month." *Hickman* at 390.

[38] *Pearce* at 872.

[39] Contrarily, Louisiana has a statute prohibiting any parish from setting a minimum wage:

§ 23:642. Setting minimum wage, prohibited

A. (1) The Legislature of Louisiana finds that economic stability and growth are among the most important factors affecting the general welfare of the people of this state and are, therefore, among its own most important

then due under the terms of employment." In the cases handled by The Project, this agreement almost never includes provisions for overtime compensation, which will be discussed further below.

IV.B. IF THERE IS AN UNDISPUTED AMOUNT OWED, THAT MUST BE PAID:

§ 23:631. Discharge or resignation of employees; payment after termination of employment

B. *In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section.* The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

Practitioner's note: The employers we deal with will often admit via phone or in writing that they owe some of the money to the worker. This is an opportunity for the pro bono attorney to educate the employer as to this portion of the LWPA; if some money is undisputed and owed, the employer should be paying the employee that amount. Further, if there is an undisputed portion and it is *not* paid, litigation including this amount may overcome the employer's potential defense of a "bona fide dispute," granting penalty wages to the worker.

IV.C. DEMAND FOR WAGES MUST BE MADE:

To recover penalties and attorney fees under the LWPA, the worker/plaintiff must establish that "(1) wages were due and owing, (2) demand for payment was made where the plaintiff was routinely paid; and (3) the employer did not pay on demand."[40]

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responsibilities. Economic stability and growth contribute to the standard of living enjoyed by citizens as employment and income are both dependent on the ability and willingness of businesses to operate in the state.

(2) The legislature further finds that wages comprise the most significant expense of operating a business. It also recognizes that neither potential employees nor business patrons are likely to restrict themselves to employment opportunities or goods and services providers in any particular parish or municipality. Consequently, local variation in legally required minimum wage rates would threaten many businesses with a loss of employees to areas which require a higher minimum wage rate and many other businesses with the loss of patrons to areas which allow for a lower wage rate. The net effect of this situation would be detrimental to the business environment of the state and to the citizens, businesses, and governments of the various local jurisdictions as well as the local labor market.

(3) The legislature concludes from these findings that, in order for a business to remain competitive and yet to attract and retain the highest possible caliber of employees, and thereby to remain sound, an enterprise must work in a uniform environment with respect to minimum wage rates. The net impact of local variation in mandated wages would be economic instability and decline and a decrease in the standard of living for the citizens of the state. Consequently, decisions regarding minimum wage policy must be made by the state so that consistency in the wage market is preserved.

B. Therefore, pursuant to the police powers ultimately reserved to the state by Article VI, Section 9 of the Constitution of Louisiana, no local governmental subdivision shall establish a minimum wage rate which a private employer would be required to pay employees.

[40] *Becht v. Morgan Building & Spas*, 2002-2047 (La. 4/23/03), 843 So. 2d 1109, 1112 (*citing Miller v. Heidi's of Baton Rouge*, 818 So. 2d 959, 963 (La. App. 1 Cir. 2002); *Cleary v. LEC Unwired, L.L.C.*, 804 So. 2d 916, 923 (La. App. 1 Cir. 2001); *Harvey v. Bass Haven Resort, Inc.*, 758 So. 2d 264, 268 (La. App. 3 Cir. 2000); *Richard v. Vidrine Automotive Services, Inc.*, 729 So. 2d 1174, 1177 (La. App. 1 Cir. 1999); *Hebert v. Insurance Center, Inc.*,

All of The Project's wage claim cases have demand sent via both certified and regular mail before they are offered out to pro bono attorneys for case assignment. The facts of your particular case may include additional oral demands by the worker which can bolster your case for penalty wages. **Further**, your investigation may lead to additional possible employer-defendants under the LWPA – to be safe, you should send demand for wages to them, as well. Be sure to check the Louisiana Secretary of State's Corporation Database for their Registered Agents.

Oral demand may be sufficient. Where worker asked for his paycheck on his last day of work and subsequently called several times inquiring about the status of his paycheck, the court held that the initial request alone fit the "fairly precise and certain" standard, and that "[requiring] the plaintiff to go to defendants' place of business to pick up a check which did not exist would be a vain and useless act, and cannot serve to defeat plaintiff's claim."[41]

IV.D. WAGE CLAIM MAY BE BROUGHT VIA ORDINARY OR SUMMARY PROCEEDING:

The Louisiana Code of Civil Procedure Article 2592 permits summary proceedings in trial for matters enumerated in that statute, and "all other matters in which the law permits proceedings to be used," such as wage claims.[42] Louisiana Revised Statute §23:631 permits a summary proceeding in wage claims as follows:

§ 23:631. Discharge or resignation of employees; payment after termination of employment

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

Some debate surrounds the question of whether discovery is permissible in the context of a summary proceeding. The Project takes the stance that discovery is permissible only in the context of an ordinary proceeding, because the Code of Civil Procedure articles relating to summary proceedings encourage rapidity at the expense of form. Applying the all the discovery rules applicable to ordinary proceedings in a summary proceeding would arguably obviate the need for summary proceedings. The codal articles describing summary proceedings are:

Art. 2591. Proceedings conducted with rapidity
Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings.

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706 So. 2d 1007, 1013 (La. App. 3 Cir. 1998); *Pokey v. Five L Investments, Inc.*, 681 So. 2d 489, 492 (La. App. 1 Cir. 1996)).

[41] *Kern v. River City Ford, Inc.*, 754 So. 2d 978 (La. App. 1 Cir. 1999). *See also*: *Galata v. Firestone Tire & Rubber Co.,* 368 So. 2d 1243 (La. App. 4 Cir. 1979.)

[42] La. Code Civ. Proc. Ann. Art. 2592(11).

Art. 2593. Pleadings
A summary proceeding may be commenced by the filing of a contradictory motion or by a rule to show cause, except as otherwise provided by law.

Exceptions to a contradictory motion, rule to show cause, opposition, or petition in a summary proceeding shall be filed prior to the time assigned for, and shall be disposed of on, the trial. **An answer is not required, except as otherwise provided by law**.

No responsive pleadings to an exception are permitted.

Art. 2594. Service of process
Citation and service thereof are not necessary in a summary proceeding. A copy of the contradictory motion, rule to show cause, or other pleading filed by the plaintiff in the proceeding, and of any order of court assigning the date and hour of the trial thereof, shall be served upon the defendant.

Art. 2595. Trial; decision
Upon reasonable notice a summary proceeding may be tried in open court or in chambers, in term or in vacation; and shall be tried by preference over ordinary proceedings, and without a jury, except as otherwise provided by law.

The court shall render its decision as soon as practicable after the conclusion of the trial of a summary proceeding and, whenever practicable, without taking the matter under advisement.

Art. 2596. Rules of ordinary proceedings applicable; exceptions
The rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law.

Practitioner's note: If you proceed via summary proceeding, do not forget to include a Rule to Show Cause as to the defendant(s) so they may be ruled into court for the date of the proceeding. *See* LA C.C.P. Article 2593. The Rule to Show Cause asks the judge to order the defendant to appear and show cause why judgment on the pleadings or summary judgment should not be granted. A petition should be filed accompanying the Rule to Show Cause which avers that the wages are due the plaintiff-worker under the LWPA, that the plaintiff is entitled to a summary proceeding, and the remedies due the plaintiff (wages, penalties, court costs including interpreter fees, and attorneys' fees.)

If the defendant/employer fails to answer or appear and a successful prima facie case is made at the summary proceeding, this is a **final judgment; default need not be taken**. If you proceed via ordinary proceeding, the preliminary default rules apply.

Your wage claim may carry an additional cause of action: non-sufficient (or "worthless") checks under La. Rev. Stat. 9:2782. Where possible, The Project refers these matters to the District Attorney, however if the size of the check is relatively small in relation to the overall wage claim, the cases may be assigned to Pro Bono attorneys. Attorneys' fees and double the face value of the check are statutory, provided specific letters have been mailed. These letters are mailed through the Wage Claim Clinic. **However**, the wage claim must then be brought via ordinary proceeding, as non-sufficient checks must be litigated through ordinary proceeding.

IV.E. DEFENDANTS MAY INCLUDE MORE THAN ONE EMPLOYER BECAUSE…:

Many of the claims for unpaid wages that workers bring to The Project are against employers whose business organizations are undercapitalized and not up to par with corporate formalities. The organization may be insolvent and bringing suit against solely the corporation may in actuality preclude recovery for the client. The pro bono attorney may consider naming the employer in his individual capacity, base on one of two theories. The facts may indicate either:

1. The individual contractor *is* an employer: s/he falls under the definition of employer because s/he paid his own cash directly to the employer, wrote personal checks to the worker for wages, did not invoke the company name in employing or dealing with the worker, s/he signed a contract in his or her own name, or most importantly there exists an employment relationship between the worker-plaintiff and the individual based on the employment relationship tests enumerated above; or

2. The business organization's veil may be pierced to reach the individual: the contractor did not maintain a corporate office, his business is not in good standing with the Secretary of State, his construction business is not licensed with the Louisiana State Licensing Board for Contractors[43], the properties upon which the worker labored were all family members and friends of the contractor.

IV.E.1….THE OTHER ENTITIES/INDIVIDUALS ARE EMPLOYERS BY DEFINITION:

While Louisiana law does not provide us with a term as all-encompassing as "joint employer" under the FLSA, other terms appear in the case law. In *West v. Bruner Health Group, Inc.*, 866 So. 2d 260 (La. App. 3 Cir. 2003), a "professional employer organization" (temporary staffing agency, essentially) whose responsibility was limited in fact to processing the plaintiff's payroll checks admitted to being a "co-employer" with its co-defendants. The 3rd Circuit incorporated the "co-employer" term and wrote that even though the staffing agency had not received the funds from its co-defendants to process the payroll, the agency, "confuses the existence of its obligation to [plaintiff] with the reason its obligation was not fulfilled. As an employer of [plaintiff]…it was [agency's] 'duty…to pay…the amount then due under the terms of employment.'"[44] The court further wrote:

> In other words, vis-à-vis [defendants], as co-employers, each owed [plaintiff] her full salary and commissions and were, therefore, solidarily liable to her in that regard. The *method* in which [defendants] chose to divide payroll responsibilities in fulfilling their obligation to [plaintiff] simply created a separate obligation

[43] A "home improvement contractor" under the Contractor Licensing Law, LSA R.S. 37:2175.1, *et. al.* – that is, "any person, including a contractor or subcontractor, who undertakes or attempts to, or submits a price or bid on any home improvement contracting project" – performing services in excess of seventy-five hundred dollars, should be registered; it is a violation of the act to operate without a certificate of registration from the Board. The penalties are administrative in nature. LSA R.S. 37:2175.4. Homeowners have standing to complain, but not workers.

[44] *Id*. at 270.

> vis-à-vis each other but did not eviscerate their coextensive obligation to [plaintiff].[45]

The *West v. Bruner* court further cited Louisiana Civil Code Article 1800 and its Revision Comments to flesh out the notion that co-employers are solidary obligors, including holding the staffing agency liable for penalty wages, even though the co-employers/co-defendants had written a letter to the staffing agency stating the plaintiff had left employment.[46]

Practitioner's note: Where a contractor/employer is involved in a LWPA case involving a residential home, homeowners are not typically defendants and thus not conflicting parties – unless the wage claim is proceeding through lien enforcement as a cause of action. Homeowners may, however, serve as excellent witnesses to the completion and quality of the work. There are situations where the homeowner is also the employer, in which case the pro bono attorney should engage in the necessary legal analysis of the employment relationship. The key is the presence of an intervening independent employer-contractor.

(Another) Practitioner's note: the worker should be interviewed extensively about other supervisors and contractors on the job. Our discussion of the Fair Labor Standards Act will reveal that the definition of employment under federal law is much broader ("to suffer or permit" to work.) The facts may reveal FLSA jurisdiction in the wage claim case.

IV.E.2….THE OTHER ENTITIES/INDIVIDUALS CAN BE REACHED THROUGH THE ORGANIZATION'S VEIL:

When business organization members (the L.L.C. is the most common entity employed by defendant-employers in cases through The Project) conceal themselves from liability by barely respecting the corporate form, hiding behind a L.L.C. to effect fraud, courts may pierce the L.L.C. veil utilizing a number of tests.[47] The Supreme Court of Louisiana has noted that imposing liability on L.L.C. members "is not a punishment for failing to follow the legal niceties of corporate law."[48] Rather, piercing the veil "is an equitable doctrine…grant[ing] relief to an injured person who dealt with a [member] who through his own actions has confused the [L.L.C.'s] business, and even its existence, with his own personal business affairs."[49] In essence,

> The very point of veil-piercing is to avoid injustice by disregarding the formal structure of a transaction or relationship in favor of its substance – to impose personal liability on persons who have, in

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[45] *Id*. at 270.

[46] *Id*. at 270-271. *See also*, *Singleton v. Gulf Coast Truck Service, Inc.*, 409 So. 2d 377 (La. App. 4 Cir. 1982).

[47] *Middleton v. Parish of Jefferson*, 707 So. 2d 454, 456 (La. App. 5 Cir. 1998): "fraud and deceit are recognized exceptional circumstances" which "warrant the remedy of piercing the corporate veil."

[48] *Riggins v. Dixie Shoring Company*, 592 So. 2d 1282, 1283 (La. 1992).

[49] *Id*. The substituted citations are essentially from "corporation" to "L.L.C.." A more recent article in the Tulane Law Review notes that, "[i]t is now well settled in Louisiana that the same standards for piercing the corporate veil apply to piercing the limited liability veil of limited liability companies." Daniel Q. Posin, *Turning Green: Louisiana's Piercing-the-Corporate-Veil Jurisprudence and Its Economic Effects*, 79 Tul. L. Rev. 311 (2004).

> substance, run their normally incorporated business in a way that makes it unfair to allow them to deny their responsibility for the obligations of the business by interposing the corporation's separate legal personality.[50]

West v. Bruner utilized this language of "injury" in holding the defendant-corporation's owners personally liable for the unpaid salary and commissions of the plaintiff through their "fraudulent" actions: "Importantly, 'if an officer or agent of a corporation through his fault injures another to whom he owes a personal duty, the officer or agent is liable personally to the injured third party, regardless of whether the act culminating in the injury is committed by or for the corporation and regardless of whether liability might also attached to the corporation.'"[51]

The Louisiana Supreme Court has outlined specific factors that "courts consider when determining whether to apply the alter ego doctrine…not limited to:

> 1) commingling or corporate and shareholder funds; 2) failure to show statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings."[52]

In summarizing the seminal *Riggins v. Dixie Shoring* case, Tulane Law Professor Posin writes that, "[w]hat the court seems to be saying is that if, by and large, the form is respected, occasional, even significant departures from maintaining the corporate formalities do not result in anyone being misled as to who is really conducting the business do not trigger piercing the corporate veil."[53]

Finally, in addition to the balancing test and the more specific five-factor "alter ego doctrine" test employed in *Riggins* and its progeny,

> "Louisiana courts have also developed a parallel 'two-part' test where the veil may be pierced if (1) the corporation is an alter ego and has been used by the shareholder to carry out some sort of fraud or (2) even in the absence of fraud, the shareholder has failed to conduct business on a 'corporate footing' to such an extent that the corporation has become indistinguishable from the shareholder."[54]

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[50] *Middleton*, 707 So. 2d at 457 (citing Glenn G. Morris, *Agency, Partnership & Corporations*, 52 La. L. Rev. 493, 508 (1992).)

[51] *West*, 866 So. 2d at 269 (*citing Laurents v. La. Mobile Homes, Inc.*, 689 So. 2d 536, 543 (La. App. 3 Cir. 1997).

[52] *Riggins v. Dixie Shoring*, 590 So. 2d 1164, 1168 (La. 1991).

[53] Posin, *supra* note 61, at 337.

[54] *Middleton*, 707 So. 2d at 454.

The second factor largely incorporates the *Riggins* factors outlined above, in its recognition of the merging of the legal, or corporate, personality with that of the member as an option to permit the remedy of piercing the veil.

A NOTE RE: *IN FORMA PAUPERIS*

Due to the transient nature of clients of The Project's Employment Law Program, we do not often pursue the use of *in forma pauperis* (IFP) when litigating. An IFP application to the judge occurs when the applicant maintains a poverty-level income and if the application is granted, the payment of filing fees is delayed until after judgment. Should the case not proceed to judgment (voluntary dismissal, etc.) or should the plaintiff lose, the plaintiff/client will be responsible for paying the fees. LA C.C.P. 5187. Should the plaintiff prevail, including costs and fees, the defendant is responsible for the payment of fees directly to the court. LA C.C.P. 5188.

Should you determine that proceeding *in forma pauperis* is a proper fit for your client's case, The Project can provide you with the necessary forms and will sign as the legal representative attesting to the client's poverty. We can also help you find the 3rd party necessary to attest to the client's poverty on the IFP application.

IV.F. VENUE AND JURISDICTION:

The LWPA provides, in § 23:639 that "[i]n addition to all other locations and courts in which such suit may be appropriate, workmen, laborers, clerks, and all other employees may sue their employers or hirers for any wages or salary due and owing in the district court of the parish where the work was performed."

Other traditional venue choices include:

- Domicile/residence of defendant under LA CCP Article 41(1): [Action against] an individual who is domiciled in the state shall be brought in the parish of his domicile; or if he resides but is not domiciled in the state, in the parish of his residence.
- Corporation domicile under LA CCP Article 41(2): [Action against] a domestic corporation, a domestic insurer, or a domestic limited liability company shall be brought in the parish where its registered office is located.

For questions regarding City Court, Parish Court and Civil District Court jurisdiction, see Louisiana Code of Civil Procedure Articles 4841 through 4853.

IV.G. PROVING UP THE WAGES OWED:

Under state law, the employer is required to keep records of wages paid to their employees:

§ 23:14. Employers to furnish information; keeping of records

B. Every employer shall keep a true and accurate record of the name, address, and occupation of each person employed by him, of the daily and weekly hours worked by, and of the wages paid each pay period to each employee. These records shall be kept on file for at least one year after the date of the record.

Arguably when the employer fails to maintain these records, the plaintiff-workers' contemporaneous record-keeping should stand as evidence of hours worked and wages owed through the burden-shifting rules outlined in *Anderson v. Mt. Clemens Pottery Co.*,[55] utilized in the context of the FLSA when employers do not adhere to that statute's record-keeping requirements.

> Workers who have cases through The Project and who work with local advocacy organizations are encouraged to keep records of their hours worked at the time those hours are worked. A copy of these records should be in your pro bono case file; however it behooves you to ask your client again if they have any documentation of their hours worked.

Practitioner's note: The determination of whether worker/plaintiff records are admissible often comes down to a credibility determination and will typically depend on the facts surrounding when the documents, notebook, or pictures were created, and why. Pro Bono attorneys are encouraged to admit into evidence the records that workers have created through a full direct examination of their creation.

IV.H. PENALTY WAGES MAY BE AWARDED:

§ 23:632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

Because the statutes compelling prompt payment are penal in nature, they must be strictly construed and yield to equitable defenses.[56] A court will not award penalties to an employee if the employer asserts a valid equitable defense for not paying the employee's wages in a timely manner.[57] These equitable defenses include, but are not limited to valid wage disputes, offsets claimed against past-due wages, disputes over owed vacation pay and employee's fault in giving

[55] 328 U.S. 680, 6 WH Cases 83 (1946).

[56] *See, e.g. Beard v. Summit Inst. For Pulmonary Med. & Rehabilitation, Inc.*, 1997-1784 (La. 3/4/98), 707 So. 2d 1233, 1236.

[57] *Id.*

incorrect address.[58] "Basically, when there is a good-faith question of whether or not the employer actually owes past-due wages or whether there may be an offset to wages owed, resistance to payment will not trigger penalty wages." *Id.* In other words,

> Penalty wages are not to be absolutely imposed when the facts indicate that there is an equitable defense. *Boudreaux v. Hamilton Medical Group, Inc., 644 So. 2d at 621; Cochran v. American Advantage Mortgage Company, Inc., 638 So. 2d at 1239.* However, it is only a good faith, non-arbitrary defense to liability for unpaid wages which will permit the courts to excuse the employer from the imposition of penalty wages. *Cochran at 1239-40; Henderson v. Kentwood Spring Water, Inc., 583 So. 2d 1227, 1232 (La. App. 1st Cir. 1991).* Whether or not there is an equitable defense to penalty wages depends on the particular facts of each case. *Cochran at 1240; Henderson v. Kentwood Spring Water, Inc., at 1232.* **Where there is a bona fide dispute over the amount of wages due, courts will not consider failure to pay as arbitrary refusal and generally will refuse to award penalties.** *Cochran at 1240; Washington v. Buffalo Mills Lumber Company, Inc., 451 So. 2d 665, 667 (La. App. 1st Cir. 1984).*[59]

However, where an employer had agreed to mail a final paycheck, but instead kept the check in the cash register at the former employee's place of work, the First Circuit affirmed the trial court's award of penalty wages because the employer had not complied with the agreed-upon method of payment.[60]

IV.I. ATTORNEY'S FEES ARE AWARDED IF WELL-FOUNDED SUIT:

§ 23:632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. *Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.*

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[58] *Pace v. Parker Drilling Co. & Subsidiaries*, 382 So. 2d 988, 991 (La. App. 1 Cir. 1980).

[59] Barrilleaux v. Franklin Found. Hosp., 683 So. 2d 348, 360 (La.App. 1 Cir. Nov. 8, 1996) *See also Pearce v. Austin*, 465 So.2d 868 (La. 2d Cir. 1985). (reasoning that employer's belief as to entitlement of an offset served as an equitable defense to penalties.)

[60] *Pokey v. Five L Investments*, 681 So. 2d 489 (La.Ct. App. 1 Cir. 1996.) Further, the First Circuit affirmed the trial court's acceptance of the former employee's testimony as to her hours worked and her rate of pay, without documentary evidence. *Id*. At 495.

No equitable defenses exist to preclude an award of attorneys' fees when an employee files a "well-founded" suit for unpaid wages.[61]

The Pro Bono Project permits attorneys who are awarded fees to keep their fees, share their fees with the Project, or donate the fees to the Project to keep the Employment Law Program running.

IV.J. OVERTIME CLAIMS

In interviewing your client and upon determining that an employment relationship existed between the worker and the defendant, investigate the possibility of an overtime claim. Most of the cases that come through The Project involve workers who worked at least six days a week, often more than eight hours a day.

Louisiana state law does not provide for overtime compensation. While bringing a state law claim for unpaid wages under the LWPA, the FLSA (Fair Labor Standards Act) controls overtime provisions:

> We agree the trial court properly found the [LWPA] did not apply under these circumstances because there is a distinction between an employer timely paying earned wages for all hours worked, and an employer refusing to pay the extra wages an employee claims are due on the hours [*sic*] he worked in excess of the statutory maximum. *The payment of overtime wages is clearly governed by the FLSA*.[62]

Odom seems to indicate that when the FLSA is implicated for payment of overtime, the overtime claim operates to the exclusion of the LWPA; that is, the 90 days penalty wages available under the LWPA do not apply to overtime, but rather FLSA's standard double damages might.

V. REPRESENTING IMMIGRANT WORKERS

In representing workers whose immigration status is uncertain, special issues arise regarding their potential removal from the United States. Further, working with individual clients who do not speak English as their primary language brings up special issues pertaining to language barriers and credibility determinations at trial.

PROTECTIVE ORDERS:

Employers have an additional threat they may incorporate into their arsenal when the worker owed wages is an undocumented immigrant. The fear of removal (formerly, "deportation") from the United States is enough to quash the desire of many workers to continue

[61] *Richard v. Vidrine Automotive Servs., Inc.* 729 So. 2d 1174 (La. App. 1 Cir. 1999).

[62] *Odom v. Respiratory Care, Inc.,* 754 So. 2d 252, 256 (La. Ct. App. 1999). *See also Sirmon v. Cron & Gracey Drilling Corporation*, 44 F. Supp. 29, 30-31 (W.D. La. 1942).

with a wage claim case. However, undocumented workers are first and foremost entitled to their earned wages under both state law[63] and federal law.[64] Further, inquiries into their immigration status are at best irrelevant and at worst intended to cause the worker to drop the lawsuit.

When defendants make repeated requests for information that could lead to the discovery of a workers' immigration status, workers are entitled to file protective orders preventing these inquiries. An order granting such protective order is included with this paper and cites the cases typically considered in granting such an order.[65] The motion for protective order should be filed at the first signs of trouble and prior to discovery, so that the worker may properly be protected in depositions and written discovery. Protective orders may be expedited.

> When an employer is threatening to call Immigration and Customs Enforcement or to cause bodily harm to a worker, Immigrant workers may want to move from their homes. The Project typically discusses these options with workers when they attend the Wage Claim Clinic, where all cases for The Project originate. If the employer knows where the worker lives and the employer is threatening the worker, we discuss this option and often refrain from sending a demand letter until after the worker has moved. If for some reason the employer has rediscovered the worker's location, you should again discuss the timing of filing suit and the risks involved, as the worker may seek to move yet again. This is also why it is *extremely important to fight disclosure of home addresses of workers on court documents and through discovery.*

Practitioner's note: a motion for protective order under local rules for the Eastern District requires a Certificate of Conference, ensuring the judge that you have attempted to resolve the dispute with opposing counsel.

As will be further discussed in the presentation on immigration law, Immigration and Customs Enforcement ("ICE") maintains "operating instructions" which encourage field officers to contact their supervisors when they seek to detain an undocumented immigrant who may be involved in a labor dispute with the person who gave ICE the tip about their status. If you are representing a worker who believes that the employer-defendant may call ICE in retaliation for the worker seeking to recover their wages, you may draft a letter for the worker to carry with him, in the event he is detained by ICE. Please contact The Project if you would like assistance with drafting such a letter.

INTERPRETERS:

Anyone who has communicated with someone through an interpreter understands that a unique set of circumstances arise in this context. Not only is there a time delay, but also the exact meaning of a question may not be directly conveyed through the multiple layers of

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[63] *Agusiegbe v. Petroleum Associates of Lafayette, Inc.*, 486 So. 2d 314 (La. App. 3 Cir. 1986).

[64] See, e.g., Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984); NLRB v. Kolkka, 170 F.3d 937, 940 (9th Cir. 1999) (including undocumented workers in the NLRA's expansive definition of "employee"); Patel v. QualityInn S., 846 F.2d 700, 703 (11th Cir. 1988) (including undocumented workers in the protection of the FLSA).

[65] *Baca v. Bros. Fried Chicken*, E.D.La. Civ. No. 09-03134 (May 13, 2009), Doc. 37.

communication. It is important that you meet with your client multiple times before they are to provide their direct testimony, both so that you become used to communicating through an interpreter, and also so that you and your client are able to work out the meaning of the questions you are asking.

Further, not all interpreters are created the same. While you may have someone at your office that is more than capable of speaking with a worker on the phone, this is a very different scenario than interpreting word-for-word what a worker may be saying. Particularly if the bilingual person you have chosen to use as an interpreter is not an attorney, or even an attorney who does not practice in the area of employment law, you may miss critical facts that the bilingual person chooses to "summarize" instead of providing you with a verbatim interpretation.

The Project currently can pay interpreter's fees in your wage claim case through our Employment Law Litigation Fund, established through attorneys' fees awarded through co-litigation with Southern Poverty Law Center. We ask that you pray for interpreters' fees in your petition, in court and in your judgment, and that you donate these fees back to The Fund.

ANGELA MERICIA BACA, et al,
v.
BROTHER'S FRIED CHICKEN, et al.

Civil Action No. 09-3134-MLCF-SS.

United States District Court, E.D. Louisiana.

May 13, 2009.

ORDER

SALLY SHUSHAN, Magistrate Judge.

DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT (Rec. doc. 16) DENIED

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER (Rec. doc. 23) GRANTED

Before the undersigned are: (1) the motion of the defendants, Omar Hamdan, Fatmah Hamdan, Alberta, Inc., FHH Properties, LLC, and Alberta Management, LLC, pursuant to Fed. R. Civ. P. 12(e), for a more definite statement; and (2) the motion of the plaintiffs, Angela Mericia Baca and Abigail Analqueto, for a protective order limiting inquiries with *in terrorem* effect. The motions are related. The defendants' seek an order requiring the plaintiffs to provide Social Security numbers and addresses. The plaintiffs seek a protective order barring the defendants from inquiring into this information. In Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002), the court stated:

Courts have generally recognized the in terrorem effect of inquiring into a party's immigration status when irrelevant to any material claim. In particular, courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a danger of intimidating that would inhibit plaintiffs in pursuing their rights.

Id. at p. 78 (Emphasis added and citations, brackets and quotation marks omitted). The plaintiffs contend the information is not relevant to their claims. The determination whether information is relevant to the claim or defense of any party depends on the circumstances of the pending action. Fed. Rule Civ. P. 26(b)(1) Advisory Committee's Note, 2000 amendments.

The plaintiffs seek relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, and Louisiana Wage Payment Act ("LWPA"), La. Rev. Stat. Ann. § 23:631A(1), and allege that: (1) defendants own and operate "Brother's Fired Chicken at 3201 Elysian Fields Avenue; (2) Baca worked there from October, 2007 through July, 2008; (3) Analqueto worked there from January, 2008 through August, 2008; (4) they worked in the kitchen; (5) they were promised a wage; (6) they routinely worked in excess of 40 hours per week; (7) they were paid in cash and were not provided pay stubs; (8) they were not paid timely; (9) they were not paid minimum and overtime wages; and (10) when they demanded their wages, defendants retaliated. Rec. doc. 1.

The Fifth Circuit in In re Reyes, 814 F.2d 168,170 (5th Cir. 1987), issued a writ of mandamus and determined that the district court erred in ordering migrant agricultural workers with FLSA claims to answer questions concerning their citizenship and immigration status. It cited the "well established" fact that the FLSA was "applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant." Id. The Fifth Circuit held:

The district court, however, in this case ordered discovery as to information which was completely irrelevant to the case before it and was information that could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case.

* * *

[T]here is much stronger justification in this case [for a writ of mandamus] where there is no possible relevance and the discovery could place in jeopardy unrelated personal status matters.

Id. at 170-71. Inasmuch as the protections provided by the FLSA apply to undocumented aliens, the plaintiffs' immigration status, Social Security numbers and addresses are not relevant. In Agusiegbe v. Petroleum Associates of Lafayette, 486 So.2d, 314 (La. App. 3rd 1986), the defendant contended that the plaintiff falsely represented himself to be employable as a U.S. citizen. The court held that the LWPA applied to all employees, regardless of their nationality. Id. at 316. The information sought by defendants is not relevant to plaintiffs' LWPA claims.

The defendants urge that the information is required to permit them to comply with the provisions of the Internal Revenue Code for the completion of Forms 1099 and W-2. The burden of reporting payroll information rests with the employer. The defendants have not demonstrated why they could not have obtained this information when the plaintiffs first began working for them. The plaintiffs are not required to provide it to defendants in connection with the pending FLSA and LWPA claims.

The defendants also request a more definite statement on other issues, for example whether they contend they were terminated or they quit their employment. A motion for a more definite statement is not favored and the motion is granted sparingly. 2 James Wm. Moore, et al., Moore's Federal Practice ¶ 12.36[1] (3d ed. 1997). "In the presence of proper, although general, allegations, the motion will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining the detailed information." Id. A claim for relief is only required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a). The plaintiffs' complaint satisfies the requirements of Rule 8(a). The remaining issues raised by defendants can be resolved through discovery.

IT IS ORDERED that: (1) defendants' motion for more definite statement (Rec. doc. 16) is DENIED; and (2) plaintiffs' motion for a protective order limiting inquiries with in *in terrorem* effect (Rec. doc. 23) is GRANTED in that plaintiffs are not required to provide defendants with the following information: (a) immigration status; (b) Social Security numbers; and (c) addresses.

Memorandum

HQINV 50/1.1.2-P

Subject	Revised Operations Instruction 287.3a	Date	Dec. 20, 1996

To	From
Management Team Regional Directors District Directors Chief Patrol Agents Officers in Charge Chief, Immigration Officer Academy, Glynco, GA Chief, Border Patrol Academy, Glynco, GA Regional Counsels District Counsels	Office of Field Operations (HQOPS) Office of Programs (HQPGM)

The Office of Programs with concurrence from the Offices of Field Operations, Policy and Planning and the General Counsel has completed a revised Operations Instruction 287.3a. The instruction seeks to balance the safety of Service enforcement officers with the ability to enforce the employer sanctions provisions of the law during a suspected labor dispute.

It contains several questions that Service enforcement officers need to ask when they suspect or become aware of a worksite involved in a labor dispute and a notification to the ADDI or ACPA for review and approval in continuing the investigation during the labor dispute.

A copy of the revised instruction is provided as an attachment to this memorandum. This instruction becomes effective immediately. Please ensure that all program and operational employees receive a copy of this directive.

for

William S. Slattery
Executive Associate Commissioner
Operations

for

T. Alexander Aleinikoff
Executive Associate Commissioner
Programs

Attachments

O.I. 287.3a QUESTIONING PERSONS DURING LABOR DISPUTES

When information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees to form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights.

Whenever information received from any source creates a suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether a labor dispute is in progress. The Information Officer at the Regional Office of the National Labor Relations Board can supply status information on unfair labor practice charges or union election or decertification petitions that are pending involving most private sector, non-agricultural employers. Wage and hour information can be obtained from the United States Department of Labor (Wage and Hour Division) or the state labor department.

In order to protect the Service from unknowingly becoming involved in a labor dispute, persons who provide information to the Service about the employer or employees involved in the dispute should be asked the following: 1) their names; 2) whether there is a labor dispute in progress at the worksite; 3) whether they are or were employed at the worksite in question (or by a union representing workers at the worksite); and 4) if applicable, whether they are or were employed in a supervisory or managerial capacity or related to anyone who is. Information should be obtained concerning how they came to know that the subjects lacked legal authorization to work, as well as the source and reliability of their information concerning the aliens' status.

It is also appropriate to inquire whether the persons who provide the information had or have a dispute with the employer of the subjects of the information. Likewise, the person providing the information about the aliens should be asked if the subjects of the information have raised complaints or grievances about hours or working conditions, discriminatory practices or about union representation or actions, or whether they have filed workers' compensation claims.

Generally there is no prohibition for enforcing the Immigration and Nationality Act, even when there may be a labor dispute in progress. However, where it appears that information may have been provided in order to interfere with or to retaliate against employees for exercising their rights, no action should be taken on this information without the review of the District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol Agent.

When Service enforcement action is taken and it is then determined that there was a labor dispute in progress, or that the information was provided to the Service to retaliate against employees for exercising their employment rights, the lead immigration officer in charge of the Service enforcement team at the worksite must ensure to the extent possible that any arrested or detained aliens necessary for the prosecution of any violations are not removed from the country without notifying the appropriate law enforcement agency which has jurisdiction over these violations.

Any arrangements for aliens to be held or to be interviewed by investigators or attorneys for the state or federal Department of Labor, the National Labor Relations Board or other agencies/entities enforcing labor/employment laws will be determined on a case-by-case basis.

(rev. 12/04/96)

EMPLOYMENT-RELATED IMMIGRATION LAW AND IMMIGRATION LAW OVERVIEW

By Laila Hlass

INTRODUCTION

In 1883, Emma Lazarus penned the words that would later be inscribed below the Statute of Liberty, greeting immigrants as they enter New York City's harbor: "Give me your tired, your poor, your huddled masses yearning to breathe free..."[1] Lady Liberty's words are in stark contrast to the letter of today's immigration laws, which have strict caps and criteria for immigrating and generally bars "poor" "huddled masses" who are likely to become a "public charge."[2]

Nevertheless, about 13% of the United States population is foreign born.[3] There are an estimated 18.8 million legally resident population of immigrants, which includes Legal Permanent Residents (LPRs) or people who have "greencards," as well as refugees, asylees and those with other types of immigration status. There is also a large number of immigrants who are not authorized to be living here—a number estimated close to 12 million.[4]

WHO'S AN IMMIGRANT?

There are two general categories of immigration status under U.S. law – U.S. citizens and aliens.

U. S. citizens might be citizens because they were born here in the United States, or because they acquired citizenship through their birth abroad to one or two U.S. citizens, through deriving it through a U.S. citizen parent who naturalized when they were still a child or through naturalizing themselves.[5]

There are three broad categories of aliens: nonimmigrants, immigrants and undocumented.

Nonimmigrants are people who are admitted to the U.S. for a specific purpose and limited amount of time. They might be a tourist, a performer, a researcher, a student or a fiancée of a U.S. citizen, to name a few. Usually they have a visa associated with some kind of letter. For example a tourist is granted a B1/2 visa, and a fiancée is granted a K visa. Some types of nonimmigrants are given work authorization, but many are not, and those without work

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[1] Emma Lazarus The New Colossus (1883).

[2] 8 USC§1182(a)(4).

[3] Census Race and Hispanic Origin of the Foreign-Born Population in the United States: 2007 at p. 3 http://www.census.gov/prod/2010pubs/acs-11.pdf (last visited June 5, 2010).

[4] Undocumented Immigration Now Trails Legal Inflow, Reversing Decade-Long Trend, Jeffrey S. Passel and D'Vera Cohn, Pew Hispanic Center October 2, 2008, available at http://pewresearch.org/pubs/978/undocumented-immigration (last visited June 8, 2010).

[5] United States Citizenship and Immigration Services,"Citizenship,"available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a2ec6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=a2ec6811264a3210VgnVCM100000b92ca60aRCRD (last visited on June 5, 2010).

authorization are not permitted to work under U.S. law and should not be issued a social security number. They are dozens of different types of visa's, but you can learn more about them at the Department of State website: http://travel.state.gov/visa/temp/types/types_1286.html.[6]

Immigrants are people who are admitted to the U.S. and intend to remain indefinitely, such as legal permanent residents (LPRs). They are allowed to work, to travel internationally and re-enter the U.S. and can eventually naturalize to become U.S. citizens.

Undocumented people have either entered the country without inspection or have overstayed the period of time they were allowed to be here with their nonimmigrant status.

WHO'S IN CHARGE?

There are a few different agencies who deal with immigration issues, including the Department of Homeland Security, the Department of Justice, and the State Department.

Department of Homeland Security

As of March 1, 2003, Immigration and Nationality Services (INS) ceased to exist. When the Department of Homeland Security was created, there were three bureaus tasked with administering immigration programs:

1. **U.S. Citizenship and Immigration Services (USCIS)**
2. **U.S. Immigration and Customs Enforcement (ICE)**
3. **U.S. Customs and Border Protection (CBP)**

U.S. Citizen and Immigration Services (USCIS) makes decisions on many types of immigration applications—including applications for legal permanent residence, citizenship, and asylum. To access many of these applications, you can download them off their website: www.uscis.gov. The local USCIS office is at 2424 Edenborn Ave, 3rd Floor, Metairie, LA.

Immigration and Customs Enforcement (ICE) is in charge of enforcing immigration law, by arresting immigrants within the borders of the United States, initiating removal proceedings and executing orders of deportations. The local ICE office is at 1250 Poydras St., Ste 325, New Orleans, LA 70130.

Customs and Border Protection (CBP) is in charge of enforcing immigration and customs law at the border.[7] New Orleans is within the reach of border patrol and their mailing address is P.O. Box 6218, New Orleans, LA 70174-6218.[8]

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[6] Types of Visa's for Temporary Visa's, U.S. Dep't of State, available at http://travel.state.gov/visa/temp/types/types_1286.html (last visited June 8, 2010).

[7] "Border Patrol Overview," U.S. Customs and Border Patrol, available at http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/overview.xml

[8] "General Information," U.S. Customs and Border Patrol, available at http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/neworleans_sector_la/neworleans_general.xml

Department of Justice

Executive Office for Immigration Review (EOIR): Immigration Judges conduct administrative "removal proceedings" to determine whether foreign-born "respondents" should be removed from U.S. or may be granted relief from removal, usually so that they can continue to live in the U.S.

Board of Immigration Appeals (BIA): Immigration Judge's decisions can be appealed to a judge or three-judge panel at the Board of Immigration Appeals. BIA decisions that are set as precedential are binding on all Immigration Judges.

HOW DO IMMIGRANTS GAIN LEGAL PERMANENT STATUS?

- **Family-based immigration**: U.S. citizens (USC) or lawful permanent residents can petition on behalf of certain family members. USCs can petition for spouse, parents, child, sons & daughters (married & unmarried), and siblings. LPRs can petition for spouse, child, and unmarried sons & daughters. If their family relative petition is approved, then they can apply for adjustment of status, but depending on if the petitioner is a citizen or LPR and the type of family relationship, as well as potentially the country of origin of the family member, there can be wait times before applying for legal permanent residence upwards of 20 years.[9]
- **Employment-based immigration**: Employers can petition on behalf of potential employee for certain work visa's, and eventually this can be a basis for adjusting status to a Legal Permanent Resident.
- **Humanitarian-based immigration**: Immigrants can often self-petition for a humanitarian based application, such as political asylum, Violence Against Women Act visa (for victims of domestic violence), Special Immigrant Juvenile Status (for abandoned, abused and neglected children), T visa's (for victims of trafficking) or U Nonimmigrant Status (for victims of serious crimes). These status will make the immigrant able to adjust their status to that of an LPR.
- **Certain defenses to removal**: A non-citizen in removal proceedings may petition for certain defensive applications, which can lead to legal permanent residence such as adjustment of status, cancellation of removal, and asylum.
- **Diversity visa lottery** – you can win a greencard!

IMMIGRANT WORKERS

"They are on Long Island, in the suburbs of Maryland and Virginia, in Atlanta and in Southern California. You can find them in the parking lots outside Home Depot in Florida and in Phoenix. Wherever they are, they will likely have four things in common. They are Latino. They are men. They are looking for work. And they are all 'day laborers.'… But as ubiquitous as they are in the

[9] Visa Bulletien, Dep't of State, available at http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited June 8, 2010).

public debate over immigration, day laborers are only a fraction of a growing and diverse population of unauthorized migrants." [10]

Often immigrant workers are synonymous with day laborers, but in fact, foreign born workers make up about 15% of the U.S. workforce, filling a wide range of jobs and having all sorts of immigration statuses—from U.S. citizens, to those with work visa's and other types of immigration status, as well as undocumented workers. About 7.2 million workers in the U.S are undocumented immigrants, who represent approximately 5% of the total U.S. work force.[11]

Immigrant workers are increasingly important to the U.S workforce and economy. Migration Policy Institute estimates that new immigrants, who have been in the U.S. for four years or less, are likely to contribute between one-third and one-half of the growth of the labor force through 2030.[12] Furthermore undocumented immigrants pay an estimated $8.5 billion dollars into the Social Security and Medicare Trust Funds, which they are not ever able to access, and the IRS has calculated that undocumented immigrants have paid almost $50 billion in federal taxes from 1996 to 2003.[13]

At the same time immigrant workers are overrepresented in the highest-risk, lowest-paid jobs.[13] This is true in New Orleans as well—a 2006 study by Tulane and Berkeley found that undocumented immigrants face wage theft at rates twice that of citizens and documented immigrants.[14] Thirty-four percent of undocumented workers report that they receive less money than they expected when paid, and twenty-eight percent of undocumented workers said they had problems obtaining payment at all.[15]

IMMIGRANT WORKERS, ICE & DOL

Memorandum of Understanding

Immigrant workers are often scared to assert their rights under labor law because of the fear of immigration enforcement. In order to address this issue, INS (the immigration agency predecessor to ICE) and the Department of Labor (DOL) signed a Memorandum of Understanding on Nov. 23, 1998, repealing previous agreements and setting forth their relationship in the context of labor standards investigations.[16] The goals of the memorandum are:

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[10] The Complex Tapestry of the Undocumented, Day Laborers Are Just One Strand, by Gabriel Escobar, March 28, 2006 http://pewresearch.org/pubs/14/the-complex-tapestry-of-the-undocumented

[11] National Immigrant Law Center, "Facts about Immigrant Workers," (April 2007), available at .

[12] Id., citing Lowell, Gelatt, Batalova, et al, IMMIGRANTS AND LABOR FORCE TRENDS: THE FUTURE, PAST AND PRESENT (Migration Policy Institute, July 2006).

[13] Id.

[14] Laurel Fletcher, Phuong Pham, Eric Stover and Patrick Vinck, "Rebuilding After Katrina: A Population-based Study of Labor and Human Rights in New Orleans," (June 2006).

[15] Id.

[16] Memorandum of Understanding between the Immigration and Naturalization Service and the Department of Labor, Nov. 1998, available at http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm

- reduce the employment of unauthorized workers in the U.S. and the consequential adverse effects on the job opportunities, wages and working conditions of authorized U.S. workers by increasing employers' compliance with their employment eligibility verification obligations;
- reduce the economic incentives for the employment of unauthorized workers and the consequential adverse effects on the job opportunities, wages and working conditions of authorized U.S. workers by increasing employers' compliance with minimum labor standards;
- avoid the further victimization of unauthorized workers employed in the U.S. by employers which may seek to abuse the enforcement powers of the signatory agencies to intimidate or punish these workers; and,
- promote employment opportunities for legal authorized U.S. workers and improvements in their wages, benefits, and working conditions.[17]

One positive aspect of this memorandum is that in the case of labor complaints, the Department of Labor will not inspect I-9s to see if employee is an undocumented immigrant, and as stated in the memorandum, this limitation "is intended and will be implemented so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer."[18]

Operating Instruction 287.3a

The 1998 Memorandum of Understanding mentions a Immigration and Naturalization Service Operating Instruction 287.3a, "Questioning Persons During Labor Disputes," which gave guidance to immigration agents engaged in a potential worksite raid where there is an ongoing labor dispute. The Memorandum states that DOL and INS should "develop and implement policies consistent with INS Operations Instruction 287.3a that avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute."[19]

To be clear, this Operating Instruction does not bar ICE from conducting immigration enforcement actions when there is an ongoing dispute---they merely provide guidance that the agents should determine if there is a dispute, if there is reason to believe there is one going on, and that if the agent determines there is a labor dispute, then the agent must seek guidance from higher up officials before proceeding.

Although this operating instruction does not necessarily create an enforceable right, Immigration Judges have looked at this operating instruction in determining that ICE's misconduct was sufficient to terminate proceedings against immigrant workers who were arrested in a worksite raid, when there was an ongoing labor dispute.[20]

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[17] Id.
[18] Id.
[19] National Immigration Law Center, ISSUE BRIEF, Immigration Enforcement During Labor Disputes, (Nov. 2009) available at http://www.nilc.org/dc_conf/flashdrive09/Worker-Rights/emp20_labordispute-infobrief-2009-11-06.pdf
[20] *In the Matter of Herrera-Priego,* USDOJ EOIR (July 10, 2003), available at http://www.nilc.org/immsemplymnt/IWR_Material/Advocate/Herrera-Priego.pdf

SUMMARY

There are many types of immigration statuses, and some types of immigrants are expressly given permission to work incidental to their status, while others are barred from working. However, all immigrant workers, no matter their status, have labor rights—the right to be paid for their work, to be paid a minimum wage, to be paid overtime, and to safety in their workplace. Often undocumented workers, because of their status are more susceptible to wage theft as well as unsafe working conditions. They are also at risk of retaliation from employers who might try to have them deported if workers complain about their status. There is a Memorandum of Understanding and Operating Instruction which address these issues and encourage immigration agencies not to interfere with labor investigations. Furthermore, if an immigrant worker is placed in deportation or "removal" proceedings while a labor investigation is ongoing, they can request to have their case terminated based upon ICE's violation of their own policy.

A BRIEF OVERVIEW OF A FEW WAGE AND HOUR ISSUES UNDER THE FAIR LABOR STANDARDS ACT

Michael T. Tusa, Jr.
James R. Rather, Jr.
Sutton & Alker, LLC
4080 Lonesome Road, Suite A
Mandeville, Louisiana 70448
(985) 727-7501

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1. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act is federal legislation which sets forth the minimum wage and overtime requirements for certain covered employers/employees. 29 U.S. C. § 206; 29 U.S. C. § 207. It also sets forth the various exceptions to the minimum wage and overtime requirements. 29 U.S. C. § 213. The provisions of the Act are generally interpreted by the Department of Labor in the Code of Federal Regulations. See 29 C.F.R. § 501 *et seq*.

The purpose of this paper is to highlight certain lesser-known aspects of compensable work time under the FLSA. Before turning to these topics, it may be helpful to review certain prefatory FLSA issues. These issues will often resurface in connection with possible claims and/or defenses under the FLSA.

(a) Who is an "employer" under the Act?

Relevant Statutes and Case Law: 29 USC 203(d); Zorich v. Long Beach Fire Dept., 3 WH Cas. 1799 (9th Cir. 1997); Thomas v. Wichita Coca Cola Bottling Co., 968 F.2d 1022, 1025 (10th Cir. 1992); McComb v. Wyand the Furniture Co., 169 F.2d 766 (8th Cir. 1948).

Under 29 U.S. C. § 203(d), the FLSA specifically defines an "employer" as including:

> . . . any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

However, in order for there to be coverage under the FLSA, the "employer" must be either "engaged in commerce" or its employees must be involved in the "production of goods for commerce."[1]

In general, coverage exists for an employer under the FLSA under one of three theories: traditional, production or enterprise coverage. Zorich v. Long Beach Fire Dept., 3 WH Cas. 1799 (9th Cir. 1997). The traditional basis of coverage extends coverage to employers "engaged in commerce." This language has been interpreted to apply coverage under the FLSA to employers who regularly use interstate or foreign commerce. Thomas v. Wichita Coca Cola Bottling Co., 968 F.2d 1022, 1025 (10th Cir. 1992); McComb v. Wyand the Furniture Co., 169 F.2d 766 (8th Cir. 1948).

The second basis for coverage extends the FLSA to employers whose employees are engaged in the "production of goods for commerce." "Production" is defined under the FLSA by reference to the work of the employee. An employee is engaged in the production of goods for commerce if the employee:

> . . . was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof; in any state. 29 U.S. C. § 203(j).

There is also a third basis for coverage known as "Enterprise" coverage. Whereas the traditional basis and the production basis focus on the work of the employee, the enterprise coverage examines the overall operations of the employer. In order for there

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[1] "Commerce" is defined, under the FLSA, as:
…trade, commerce, transportation, transmission, or communication among the several states or between any state and any place outside thereof. 29 U.S. C. § 203(b).

to be enterprise coverage, the employer, through one or more of its business units, must be "engaged in commerce or in the production of goods for commerce." In addition, the employer must meet a gross annual sales number.[2] 29 U.S. C. § 203(s)(1).

In general, where coverage under the FLSA is established, the employer will be responsible for any violations.

(i) Don't forget certain officers.

Relevant Statute and Case Law: U.S. Dept. of Labor v. Cole Enterprises Inc., 62 F.3d 775 (6th Cir. 1995); Duncan v. Perdue, 988 F Supp. 992 (U.S.D.C. W.Va. 1997); Koster v. Chase Manhattan Bank, 554 F Supp. 285 (S.D.N.Y. 1983); Alvarez Perez v. Sanford-Orlando Kennel Club Inc., 515 F. 3d 1150 (11th Cir. 2008); Chao v. Hotel Oasis, Inc., 493 F. 3d 26 (1st Cir. 2007); Donohue v. Francis Services, 2005 WL 1155890 (E.D. La. 2005).

The definition of "employer" under the FLSA, however, is broad enough to also include certain officers or directors, individually, of the corporation. U.S. Dept. of Labor v. Cole Enterprises Inc., 62 F.3d 775 (6th Cir. 1995); Duncan v. Perdue, 988 F Supp. 992 (U.S.D.C. W.Va. 1997); Koster v. Chase Manhattan Bank, 554 F Supp. 285 (S.D.N.Y. 1983). In general, the court will examine the responsibilities of the officer/director to see if they were involved in the day to day operations of the company and if those corporate responsibilities extended to wage and hour matters. Alvarez Perez v. Sanford-Orlando Kennel Club Inc., 515 F. 3d 1150 (11th Cir. 2008). If so, the officer/director may also qualify as an "employer" under the FLSA and may be sued directly for an FLSA violation. Chao v. Hotel Oasis, Inc., 493 F. 3d 26 (1st Cir. 2007).

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[2] Some types of business are specifically exempted from the gross annual dollar test. 29 U.S. C. § 203(s)(1). See, Carroll v. Pro Tech Paint & Body, Inc., 2009 WL 3762879 (M.D. Fla. 2009).

This opens the door to the plaintiff's counsel adding officers/directors as individual defendants in an FLSA matter and then making a claim against the corporation's Directors and Officers' liability insurance on the basis of the alleged violations of the FLSA by the officer/director. Similarly, it allows companies to seek defense costs and/or possible contribution to settlement/judgments from the D&O insurer.

(b) Joint employment under the Act.

Relevant Statute and Case Law: 29 C.F.R. §791.2, Falk v. Brennan, 94 S.Ct. 427, Schultz v. Capital International Security, Inc., 466 F.3d 298 (4th Cir. 2006); Mendoza v. Essential Quality, 2010 WL 768704 (E.D. La. March 3, 2010).

Separate persons or entities that share control over an individual worker may be deemed joint employers under the FLSA. Schultz v. Capital International Security, Inc., 466 F.3d 298, 305 (4th Cir. 2006). According to U.S. Department of Labor regulations:

> If the facts establish that the employee is employed jointly by two or more employers, i.e. that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as *one employment*. 29 C.F.R. §791.2(a).

All joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the FLSA, including the overtime provision. 29 C.F.R. §791.2(a).

Putative employers overlook 29 C.F.R. §791.2(a) at their own peril. For the purposes of calculating an employee's entitlement to overtime, Courts that determine joint employment exists will consider all of the employee's time spent working for all joint employers. For example, a non-exempt employee who works 25 hours per week for

employer A and 25 hours per week employer B will be entitled to overtime if employers A and B are deemed joint employers.

Federal regulations set forth a three-part, non-exclusive framework for determining when a joint employment relationship will be considered to exist:

1. Where there is an arrangement between the employers to share the employee's services, as for example, to interchange employees;

2. Where one employer is acting directly or indirectly in the interest of the other employer(s) in relation to the employee;

3. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Courts do not rigidly or mechanically apply the above test. Rather, "the joint employment inquiry must take into account the real economic relationship between the employer who uses and benefits from the services of workers and the party that hires or assigns the workers to that employment." Schultz v. Capital International Security, Inc., 466 F.3d 298, 305 (4th Cir. 2006). The ultimate determination of joint employment must be based on "the circumstances of the whole activity." Id. In analyzing the totality of the circumstances, Courts will often look to the same factors that determine whether a putative employee is an independent contractor or an employer. See, Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996) (*e.g.*, degree of control over the worker, degree of supervision over the worker, power to determine rate of pay, ownership of the facilities where work is performed, preparation of payroll, right to hire, fire or modify the conditions of work).

(i) Pleading requirements under *Ashcroft* and *Twombly*.

Relevant Statute and Case Law: Fed. R. Civ. P. 8, Fed. R. Civ. P. 12(b)(6); Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007) Cuvillier v. Taylor, 503 F.3d 397 (5th Cir. 2007); Mendoza v. Essential Quality Construction, Inc., _____ F.Supp.2d_____ 2010, 2010 WL 768704 (E.D. La. 2010).

Because the joint employment analysis is fact intensive, a party seeking to establish a joint employment relationship must set forth factual allegations in the initial Complaint. Conclusory statements regarding joint employment status will be insufficient to survive a Fed. R. Civ. P. Art. 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," Twombly, 127 S.Ct. at 1959, citing Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2L.Ed.2d 80. While a complaint attacked by a Rule12(b)(6) motion to dismiss does not need detailed factual allegations, ibid., a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

A district court may dismiss a Complaint, or any part of it, for failure to state a claim upon which relief can be granted if the plaintiff has not set forth factual allegations in support of his claim that would entitle him to relief. Bell Atlantic Corp. v. Twombly, 127

S.Ct. 1955 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the Complaint are true." Cuvillier v. Taylor, 503 F.3d 397 (5th Cir. 2007). "To survive a Rule 12(b)(6) Motion to Dismiss, a complaint does not need 'detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" Cuvillier v. Taylor, 503 F.3d 397 (5th Cir. 2007), quoting Twombly, 127 S.Ct. at 1964-1965).

In assessing any Federal Court Complaint, including those alleging a joint employment relationship, the Court must accept all well-pleaded facts as true and liberally construe all factual allegations in the light most favorable to the plaintiff. Spivey v. Robertson, 197 F.3d 772, 774 (5th Cir. 1999).

(c) Who is an "employee" under the Act?

Relevant Statute and Case Law: 29 U.S. C. § 203(g); 29 C.F.R. § 785.11; Donovan v. Dial America Marketing, Inc., 757 F.2d 1376 (3rd Cir. 1985); Barfield v. New York City Health & Hospitals Corp., 537 F. 3d 156 (2nd Cir. 2008); Guevara v. I.N.S., 954 F. 3d 733 (5th Cir. 1992); Gromwell v. Driftwood Electric Contractors, 2009 WL 3254467 (5th Cir. 2009).

The act defines "employ" as "to suffer or permit" to work. 29 U.S. C. § 203(g); 29 C.F.R. § 785.11. It does not specifically define "employee." As a result, if there is an issue on employment status it will largely revolve around whether the individual is an employee or an independent contractor.[3] The Courts have created various tests for determining whether an individual is an employee or an independent contractor for FLSA purposes. See Donovan v. Dial America Marketing, Inc., 757 F.2d 1376 (3rd Cir. 1985); Barfield v.

[3] There are certain exemptions from employee status, for purposes of the FLSA, for family members and others. 29 U.S. C. § 203(e). For a discussion of who qualifies as a "volunteer" see 29 C.F.R. § 785.11; and Evers v. Tart, 48 F.3d 319 (8th Cir 1995).

New York City Health & Hospitals Corp., 537 F. 3d 156 (2nd Cir. 2008). In this circuit, the courts have often focused on what is called the "economic reality" test. Guevara v. I.N.S., 954 F. 3d 733 (5th Cir. 1992).

2. COMMON VIOLATIONS UNDER THE FLSA

(a) What is "work" time?

Relevant Statutes and Case Law: Forrester v. Roth's IGA, 646 F.2d 413 (9th Cir. 1981); See 29 C.F.R. § 785 et seq.; 29 U.S. C. § 216(b).

There is much litigation over the issue of what constitutes work time such that an employer must compensate an employee. The mere fact that an employer has not specifically authorized the work does not relieve the employer from liability for payment. Forrester v. Roth's IGA, 646 F.2d 413 (9th Cir. 1981). Indeed, the fact that "employ" is defined as "to suffer or permit" to work makes it clear that compensable work time is interpreted broadly.

But, most of the questions about work time relate to preliminary activities, postliminary activities, travel time, meal time, on call time etc., and whether these are compensable. The answers to these questions are detailed in the Code of Federal Regulations. See 29 C.F.R. § 785 et seq. These regulations, and the cases interpreting them, provide the basis for claims and defenses concerning what is compensable work time. All of these issues are also the potential basis for single actions or collective actions under 29 U.S. C. § 216(b).

(i) "But I didn't know they were working": to suffer or permit.

Relevant Statutes and Case Law: 29 U.S.C. § 203(g); 29 C.F.R. § 785.11; 29 C.F.R. § 785.12; Abbey v. U.S. 82 Fed Cl. 722 (2008); Wood v. Mid America Management Corp, 2006 WL 2188706 (6th Cir. 2006); Hiner v. Penn-Harris-Madison School Corporation, 256 F Supp.2d 854 (N.D. Ind. 2003).

As previously noted, the FLSA does not define "work time." Rather, it merely defines "employ" as "to suffer or permit" to work. 29 U.S.C. § 203(g); 29 C.F.R. § 785.11. As a result of this broad definition, the Code of Federal Regulations provides that:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a piece worker, he may desire to finish his assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. 29 C.F.R. § 785.11.

If the employer "knows, or has reason to believe," that the employee is continuing to work, then it is work time which is compensable. This is true even if the work is being performed off of the job site or at the employee's home. 29 C.F.R. § 785.12; Abbey v. U.S. 82 Fed Cl. 722 (2008); Wood v. Mid America Management Corp, 2006 WL 2188706 (6th Cir. 2006).

Merely passing a rule or promulgating a policy restricting such "unauthorized" work may not be enough. The Code envisions that management must actively take steps to stop such work or it must compensate the employee. 29 C.F.R. § 785.13.

The FLSA and its jurisprudence makes it clear, however, that only if the time at issue is de-minimis, may be disregarded by the employer. 29 C.F.R. § 785.47; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). The de-minimis rule, however;

> . . . applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes [in] duration, and where the failure to count such time is due to considerations justified by industrial realities. Glenn L. Martin Nebraska Co. v. Culkin, 197 F.2d 981, 987 (8th Cir. 1952).

See also Hiner v. Penn-Harris-Madison School Corporation, 256 F Supp.2d 854 (N.D. Ind. 2003).

(ii) "I'm just waiting on a friend": waiting time.

Relevant Statutes and Case Law: 29 C.F.R. § 785.14-16. Skidmore v. Swift, 323 U.S. 134 (1944); Cleary v. ADM Milling Co., 827 F Supp. 472, 475-476 (N.D. Ill. 1993);

The law distinguishes between an employee who is waiting to be engaged and an employee who is engaged to be waiting. 29 C.F.R. § 785.14. Skidmore v. Swift, 323 U.S. 134 (1944). Only if the employee is engaged to wait is the time compensable.

The facts in each case will show which is the proper conclusion. 29 C.F.R. § 785.14. The focus is often on whether the employee is relieved from all duties and can use the time as they wish. Cleary v. ADM Milling Co., 827 F Supp. 472, 475-476 (N.D. Ill. 1993). If the answer to both questions is "yes," then the time is not compensable and the employee is waiting to be engaged. 29 C.F.R. § 785.15-16.

As the court explained in Hiner, supra, page 863:

> Concerning situations in which employees undergo waiting periods, courts draw a distinction between employees who are 'waiting to be engaged' as opposed to those who are 'engaged to wait.'[4] An employee is on duty, and thus, engaged to wait, where waiting is an integral part of the job. 29 C.F.R. § 785.14-15. By comparison, an employee is 'waiting to be engaged' where he is completely relieved from duty and where

[4] In general those employed, for example, as stenographers or firefighters are engaged to wait. 29 C.F.R. § 785.15.

> the time period is long enough to enable him to use the time effectively for his own purposes. 29 C.F.R. § 785.16(a).

(iii) "Just call me": on call time.

Relevant Statutes and Case Law: 29 C.F.R. § 785.14-16.

In some instances, an employee is told he or she is "on call," and subject to being called in to come to work at any time. The FLSA delineates when "on call" time is compensable and when it is not. See generally 29 C.F.R. § 785.14-16. In particular, the focus is on the restrictions placed on the movement of the employee who is on call. As the court wrote in Hinder, supra, page 862:

> In determining whether on call time is compensable, the key question is whether time is spent predominately for the employer's benefit or for the benefit of an employee.[5]

The Code of Federal Regulations, for example, provides that:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. 29 C.F.R. § 785.17.

(iv) Resting and meal periods.

Relevant Statutes and Case Law: 29 C.F.R. § 785.18; Herman v. Palo Group Foster Home Inc., 976 F Supp. 696 (W.D. Mich 1997); Martin v. Ohio Turnpike Comm'n 968 F.2d 606, 609-611 (6th Cir. 1992); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-917 (8th Cir. 1991).

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[5] The court may also examine whether the issue is covered by a collective bargaining agreement in determining whether it is compensable. Cleary, supra.

In determining whether or not breaks, rest periods and/or meal periods are compensable, the courts look at the duration and, as to meal periods, whether the employee is completely relieved of his duties. Where the rest or break period is 5-20 minutes, the code considers such periods as work time and the employee must be compensated. 29 C.F.R. § 785.18. Herman v. Palo Group Foster Home Inc., 976 F Supp. 696 (W.D. Mich 1997).

As to meal periods, the Code provides that:

> Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purpose of eating regular meals. Ordinarily, thirty minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. 29 C.F.R. § 785.19.

In reference to meal periods and their compensability, the courts also look to whether the time is uninterrupted or whether the employee is interrupted for work. Martin v. Ohio Turnpike Comm'n 968 F.2d 606, 609-611 (6th Cir. 1992); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-917 (8th Cir. 1991). If there are no interruptions, it is not work time. If the meal period is often interrupted and the employee must return to work, the entire time period will be considered compensable.

(v) "I'm only sleeping": sleep time.

Relevant Statutes and Case Law: 29 C.F.R. § 785.21-22; See Palo Group, supra; Lee v. Flightsafety Services Corp., 20 F.3d 428 (11th Cir. 1994); Ormsby v. C.O.F. Training Services, 2003 WL 1194208 (19th Cir. 2003); Hendricks v. Oklahoma Production Center Group Homes, 2005 WL 3486008 (10th Cir. 2005).

"Under certain circumstances, an employee is considered to be working even though some of his time is spent in sleeping . . . ." 29 C.F.R. § 785.20. The C.F.R. makes a distinction based upon whether the employee is on duty less than 24 hours or 24 hours or more. 29 C.F.R. § 785.21-22.

In particular, an employee who is on duty less than 24 hours must be paid for time set aside for sleeping. If the employee is on duty 24 hours or more ". . . the employer and employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked. . . ." 29 C.F.R. § 785.22. Of course, the interruptions to the employee sleeping must be minimal and any interruptions are considered hours worked. In addition, the employee must get at least 5 hours uninterrupted sleep or the entire time is considered compensable work time. 29 C.F.R. § 785.22.

See Palo Group, supra; Lee v. Flightsafety Services Corp., 20 F.3d 428 (11th Cir. 1994); Ormsby v. C.O.F. Training Services, 2003 WL 1194208 (19th Cir. 2003).

(vi) Lectures, meetings and training programs.

Relevant Statutes and Case Law: 29 C.F.R. § 785.27-32; Crain v. Helmerich & Payne International Drilling, 30 Wage Hour Cases 1452 (E.D. La. 1992). See also Bienkowski v. Northeastern University, 285 F.3d 138 (1st Cir. 2002); Chao v. Tradesmen International, 310 F.3d 904 (6th Cir. 2002).

It is not uncommon for employers to require employees to attend meetings or training before or after work. Is the time spent in such meetings or training compensable? The answer, once again, is found in 29 C.F.R. § 785.27-32. The general rule is as follows:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;
(b) attendance is, in fact, voluntary;
(c) the course, lecture or meeting is not directly related to the employee's job; and
(d) the employee does not perform any productive work during such attendance. 29 C.F.R. § 785.27.

Crain v. Helmerich & Payne International Drilling, 30 Wage Hour Cases 1452 (E.D. La. 1992). See also Bienkowski v. Northeastern University, 285 F.3d 138 (1st Cir. 2002); and Chao v. Tradesmen International, 310 F.3d 904 (6th Cir. 2002).

(vii) Travel time.

Relevant Statutes and Case Law: 29 C.F.R. § 785.35-39.

Whether or not travel time is compensable depends on the nature of the travel. The C.F.R. refers to (a) home to work travel in ordinary situations, 29 C.F.R. § 785.35; (b) home to work travel in emergency situations, 29 C.F.R. § 785.36; (c) home to work on one day assignments, 29 C.F.R. § 785.37; (d) travel as part of normal work day, 29 C.F.R. § 785.38; and (e) travel that keeps an employee away from home overnight, 29 C.F.R. § 785.39.

The normal rule is that an employee's ordinary travel from home to work and back home is not considered hours of work (785.35). However, if an employee has gone home at the end of their normal work shift, but is called back to work because of an emergency, the travel to and from work is compensable (785.36).

When an employee travels out of town for work the time spent traveling which cuts across the employees normal workday is compensable (785.39). That means that if the employee normally works 9:00 a.m. to 5:00 p.m., the travel out of town during those hours

will be considered hours of work (785.39). This is true even if the travel is on a normal non-work day (Saturday or Sunday) (785.39).

(viii) Minimum wage and the cost of uniform: the requirement of free and clear wages.

Relevant Statutes and Case Law: Marshall v. Roots Rest., 667 F.2d 559 (6th Cir. 1982); Reich v. Priba Corporation, 890 F Supp. 586 (N.D. Tex. 1995); Arriaga v. Florida Pacific Farms, 305 F.3d 1228 (11th Cir. 2002); Ting Yao Lin v. Hayashi Ya II Inc., 2009 WL 289653 (S.D. NY 2009); 29 CFR 531.35.

It would seem hard to believe that any employer would knowingly violate the minimum wage requirements of the FLSA. However, these provisions can be violated inadvertently. For example, where employees are paid minimum wage but are required to pay for work-related items like their work uniforms, the courts have routinely held that this lowers their pay below minimum wage and is, therefore, a violation of the FLSA. Reich v. Priba Corporation, 890 F Supp. 586 (N.D. Tex. 1995); Arriaga v. Florida Pacific Farms, 305 F.3d 1228 (11th Cir. 2002). The Arriaga case also deals with the developing issue of reimbursing foreign based employees for transport to the United States. The Fifth Circuit dealt with this in Castellanos-Contreras v. Decatur Hotels, 576 F.3d 274 (5th Cir. 2009), 601 F.3d 621 – rehearing en banc granted.

(ix) Adjusting grievances.

Relevant Statutes and Case Law: 29 C.F.R. § 785.42; Koontz v. USX Corp., 2001 WL 752656 (E.D. Pa. 2001).

If an employee spends time in grievance proceedings between an employer and employees during normal work time, this is considered hours of work. 29 C.F.R. § 785.42. If, however, the employee is a member of a union, the question of compensability is often

answered by reference to the terms of the Collective Bargaining Agreement. Koontz v. USX Corp., 2001 WL 752656 (E.D. Pa. 2001).

(b) The "regular rate" of pay and the bonus dilemma.

Relevant Statutes and Case Law: 29 CFR 778.208-211; Madison v. Resources for Human Development Inc., 233 F.3d 175 (3rd Cir. 2000); O'Brien v. Town of Agawam, 350 F.3d 279, 295 (1st Cir. 2003).

The FLSA requires that overtime pay be paid based on the formula of the employee's regular rate of pay times (x) time and a half their hourly rate of pay. Most of the time this calculation will be easy; simply multiply the employee's hourly rate of pay by one and a half to determine the overtime rate. However, the calculation of the regular rate of pay has a few traps for the unwary.

The FLSA provides that in calculating the regular rate of pay, the employer must include all remuneration paid to the employee except those things specifically excluded under 29 U.S.C. § 207(e). Madison v. Resources for Human Development Inc., 233 F.3d 175 (3rd Cir. 2000). The list of exclusions is limited to "discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plan." 29 C.F.R. § 778.208.

So what is a "discretionary bonus" and more importantly, what is a nondiscretionary bonus? The C.F.R. makes it clear that a bonus is only discretionary if the employer retains ". . . discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum . . . is determined by the employer without prior promise or agreement." 29 C.F.R. § 778.211.

If the bonus is discretionary, it is not included in the regular rate of pay. If the bonus is not discretionary, it must be included in the regular rate of pay. O'Brien v. Town of Agawam, 350 F.3d 279, 295 (1st Cir. 2003); Theisen v. City of Maple Grove, 41 F Supp.2d 932 (D. Minn. 1999). The inclusion of the bonus, therefore, raises the regular rate of pay which raises the applicable overtime rate. See 29 C.F.R. § 778.209 for methods of calculation. Failure to include nondiscretionary bonuses in the calculation of the regular rate of pay means a violation of the FLSA.

3. A NOVEL COUNTERCLAIM UNDER LA. R.S. 23:635.

Relevant Statutes and Case Law: La. R.S. 23:631, et seq.; Hanks v. Shreveport Yellow Cabs, 187 So. 817 (La. App. 2nd Cir. 1939); Glover v. Diving Services International, 577 So.2d 1103 (La. App. 1st Cir. 1991) and Cupp v. Banks, 637 So.2d 678 (La. App. 2nd Cir. 1994); Brown v. Navarre Chevrolet, 610 So.2d 165 (La. App. 3rd Cir. 1992); Stell v. Caylor, 223 So.2d 423 (La. App. 3rd Cir. 1969).

Recently we have seen a counterclaim by employer/contractors against employees alleging defective work or poor performance which damaged the employer/contractor. The claim is based on La. R.S. 23:635. La. R.S. 23:635, however, is primarily designed to prohibit employers from assessing "fines" against employee's wages. It is part of the Louisiana Wage Payment Statute La. R.S. 23:631, et seq.

In particular, La. R.S. 23:635 provides that:

> No person, acting either for himself or as an agent or otherwise, shall assess any fines against his employees or deduct any sum as fines from their wages. This Section shall not apply in cases where the employee wilfully or negligently damages goods or breaks the property of the employer, or in cases where the employee is convicted or has pled guilty to the crime of theft of employer funds, but in such cases the fines shall not exceed the actual damage done.

The courts have held that the statute is to be strictly construed. Hanks v. Shreveport Yellow Cabs, 187 So. 817 (La. App. 2nd Cir. 1939).

In essence, the statute segregates out from the prohibition of fines:

1. An employee wilfully or negligently damaging goods or works;
2. An employee wilfully or negligently damaging the property of the employer; or
3. An employee who is convicted or pled guilty to the crime of theft of employer funds.

In each of these cases, the employer could pursue damages against the employee and deduct these from the employee's pay.

The principal cases concerning the application of La. R.S. 23:635 are Hanks v. Shreveport Yellow Cabs, 187 So. 817 (La. App. 2nd Cir. 1939); Glover v. Diving Services International, 577 So.2d 1103 (La. App. 1st Cir. 1991) and Cupp v. Banks, 637 So.2d 678 (La. App. 2nd Cir. 1994). In Hanks, supra, the employee and employer had an agreement that the employee-driver would be responsible for any damage to the taxicab while it was in his possession. In Glover, supra, the employee-welder and the employer had a written "Master Service Agreement" requiring the employee to clean and properly store equipment or suffer a deduction in pay. In Cupp, supra, the employer and employee agreed, as a condition of the employee's employment, that the employee would be responsible for the "replacement cost of damaged equipment."

In Hanks, supra, the court ruled in the employer's favor writing that the charges "...constituted sums of money actually expended by the defendant company, pursuant to

the employee's agreement, in caring for damages that arose and existed by reason of plaintiff's operation of his cab" (page 819, emphases added).

In Glover, supra, the court reviewed the employer's request to deduct for a missing motor and reviewing the language of the Master Service Agreement held that it "did not authorize the disputed deduction because it was merely a safety notice and regulation from defendant to employees" (p. 1107).

In Cupp, supra, the court upheld the employer's deduction from the employee's pay for damaging the employer's tractor. In doing so it noted that "Cupp agreed, as a term of employment, to pay for the replacement cost of any equipment he damaged" (p. 679).

In Brown v. Navarre Chevrolet, 610 So.2d 165 (La. App. 3rd Cir. 1992), the court held that deductions from the employee's pay, because a customer failed to pay a repair order, were illegal fines. In particular, the court noted, "There is no provision on the repair order that plaintiff would assume the debt in the event the customer failed to pay...she did not consent to this charge-back as a term of her employment with Navarre" (p. 171).

Likewise, in Stell v. Caylor, 223 So.2d 423 (La. App. 3rd Cir. 1969), the court held that a deposit of funds by an employee to insure the return of company equipment was not a fine under La. R.S. 23:635.

These cases make it clear that La. R.S. 23:635 does not apply absent an agreement between the employer and employee that deductions can be made from the employee's wages for damage to company equipment or damaging goods or works. Further, there is no basis in the case law to suggest an employer can counterclaim against an employee under La. R.S. 23:635 because of the employee's alleged "defective work."

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

COLLECTION RIGHTS AND PRACTICES ON PUBLIC AND PRIVATE CONSTRUCTION PROJECTS AND THE PROPER AND TIMELY PRESERVATION OF STATUTORY CLAIMS UNDER THE LOUISIANA PRIVATE WORKS ACT AND LOUISIANA PUBLIC WORKS ACT

BY:

MICHAEL F. WEINER

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I. INTRODUCTION

The purpose of today's presentation is to provide a brief overview of certain statutory claims for payment available under Louisiana law to various parties on construction projects. Those claims are, of course, in addition to any contractual claims that may be available.

The presentation will discuss certain requirements under Louisiana's Private Works Act, La. R.S. 9:4801, *et seq*., and Public Works Act, La. R.S. 38: 2241, *et seq*., both of which provide certain statutory rights for payment regardless of contractual privity. The discussion will include the proper and timely preservation of claims against the owners, contractors, and/or sureties on both private and public construction projects, as well as certain additional actions required by certain parties.

Certain other claims and rights regarding prompt payment on construction projects will also be addressed. Those prompt payment statutes may result in the recovery of additional penalties and attorneys' fees in certain circumstances.

II. THE LOUISIANA PRIVATE WORKS ACT

A. Claims and Privileges Provided

The Louisiana Private Works Act provides certain claimants (subcontractors, materialmen, laborers, consultants, subconsultants, and lessors) a claim against the owner and a claim against the contractor on a project to secure payment for the price of the work and/or materials used. La. R.S. 9:4802(A); La. R.S. 9:4801. The claims against the owner are secured by a privilege on the immovable upon which the work was performed. La. R.S. 9:4802(B); La. R.S. 9:4801. Thus, the Act provides for two rights for those who work and/or supply materials on immovable property, regardless of contractual privity: (1) the right to sue the owner and contractor personally for the amounts owed; and (2) the right to assert a lien or privilege against the property to secure the claim against the owner. *See* La. R.S. 9:4802(A) & (B); *see also* Michael H. Rubin, *Ruminations on the Louisiana Private Works Act*, 58 La. L. Rev. 569, 574 (1998). A general contractor also is provided a claim against the owner, secured by a privilege on the project property. La. R.S. 9:4801. The Private Works Act is strictly construed, and additional requirements must be met by some claimants, including general contractors, material suppliers, consultants, subconsultants, and lessors, to preserve properly and timely a claim and privilege under the Private Works Act.

Although generally applicable to work performed on immovable property, the Private Works Act is inapplicable to (1) the drilling of oil, gas, or water wells, as well as other activities related thereto;[1] (2) the construction or other work on the permanent bed and structures of a

[1] Claims and privileges related to such oil and gas well work are provided in La. R.S. 9:4861,*et seq*., not covered herein.

railroad;[2] or (3) public works performed by the state or any state board or agency or political subdivision of the state.[3]

B. Amounts Secured by Claims and Privileges

The claims and privileges provided under the Private Works Act secure payment of principal amounts of the obligations owed, including expenses related to the cost of delivery of movables (if owed under the contract), interest, and the fees paid for the filing of a statement of claim or privilege. La. R.S. 9:4803(A)(1) & (2). The recovery of attorneys' fees and costs for the enforcement of claims and privileges is not specifically provided.

The claim or privilege granted the lessor of movables is limited to and secures only that part of the rentals accruing during the time the movable is located at the site of the immovable for use in a work. La. R.S. 9:4803(B). A movable is deemed not located at the site of the immovable for use in a work after: (1) the work is substantially completed or abandoned; (2) a notice of termination of the work is filed; or (3) the lessee has abandoned the movable, or use of the movable in a work is completed or no longer necessary, and the owner or contractor gives written notice to the lessor of abandonment or completion of use. *Id*.

C. Owner, Contractor, General Contractor, and Subcontractor Defined

"An owner, co-owner, naked owner, owner of a predial servitude or personal servitude, possessor, lessee, or other person owning or having the right to the use or enjoyment of an immovable or having an interest therein" is deemed an owner under the Private Works Act. La. R.S. 9:4806(A). However, the claims against an owner are "limited to the owner or owners who have contracted with the contractor or to the owner or owners who have agreed in writing to the price and work of the contract of a lessee, wherein such owner or owners have specifically agreed to be liable for any claims granted by the provisions of La. R.S. 9:4802." La. R.S. 9:4806(B). If more than one owner has contracted, each is solidarily liable. *Id.* Nevertheless, the privileges granted under the Private Works Act affect only the interest in or on the immovable enjoyed by the owner. La. R.S. 9:4806(C).

"A contractor is one who contracts with an owner to perform all of a part of a work." La. R.S. 9:4807(A). A general contractor is a contractor who contracts to perform all or substantially all of a work or who is deemed to be a general contractor under the Private Works Act. La. R.S. 9:4807(B).

"A subcontractor is one who, by contract made directly with a contractor, or by a contract that is one of a series of contracts emanating from a contractor, is bound to perform all or a part of a work contracted for by the contractor." La. R.S. 9:4807(C).

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[2] Claims and privileges related to such railroad related work are provided in La. R.S. 9:4901, *et seq*., not covered herein.

[3] Claims on public projects are provided in La. R.S. 38:2241, *et seq*., discussed below.

D. Work under the Private Works Act

Under the Private Works Act, "[a] work is a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable or its component parts." La. R.S. 9:4808(A). A portion of a project can be deemed to be a work separate and apart from other portions if a written notice of contract and bond are filed timely and properly. La. R.S. 9:4808(B). However, even without those filings,

> [t]he clearing, leveling, grading, test piling, cutting or removal of trees and debris, placing of fill dirt, leveling of the land surface, demolition of existing structures, or performance of other work on land for or by an owner or the owner's contractor, in preparation for the construction or erection of a building or other construction thereon to be substantially or entirely built or erected by a contractor, shall be deemed a separate work to the extent the preparatory work is not a part of the contractor's work for the erection of the building or other construction.

La. R.S. 9:4808(C).

E. Notice of Contract

Under the Private Works Act, if the price of the work stipulated or reasonably estimated in the contract exceeds $25,000, a general contractor does not enjoy a privilege on the owner's property, *i.e.*, the right to file a lien on the property, unless a notice of contract is filed timely. La. R.S. 9:4811(D). Note, however, that at least one court has held that the failure of a general contractor to file a notice of contract does not preclude entirely the general contractor's right to lien the project. *See Burdette v. Drushell*, 2001-2494 (La. App. 1 Cir. 12/20/02), 837 So.2d 54, *writ denied*, 2003-0682 (La. 5/16/03), 843 So.2d 1132. Rather, the First Circuit held that, although such a general contractor has no right to file a lien regarding work performed or materials supplied by its subcontractors, the general contractor still has lien rights as a "contractor" for work it performed with its own forces. *Id.*

A notice of contract must be filed with the recorder of mortgages of the parish in which the work is to be performed before the contractor begins work. La. R.S. 9:4811(A); La. R.S. 9:4831(A).

A notice of contract:

(1) Shall be signed by the owner and contractor.

(2) Shall contain the legal property description of the immovable upon which the work is to be performed and the name of the project.

(3) Shall identify the parties and give their mailing addresses.

(4) Shall state the price of the work or, if not price is fixed, described the method by which the price is to be calculated and give an estimate of it.

(5) Shall state when payment of the price is to be made.

(6) Shall describe in general terms the work to be done.

La. R.S. 9:4811(A).

"A notice of contract is not improperly filed because of an error in or omission from the notice in the absence of a showing of actual prejudice by a claimant or other person acquiring rights in the immovable." La. R.S. 9:4811(B). However, "[a]n error or omission of the identity of the parties or their mailing addresses or the improper identification of the immovable shall be prima-facie proof of actual prejudice." *Id.*

F. Notice of Termination

If a notice of contract is properly and timely filed, non-general contractor claimants to whom a claim or privilege is granted under the Act must file a statement of claim or privilege, *i.e.* "lien," and deliver to the owner a copy of the lien within thirty (30) days after the filing of a notice of termination of the work. La. R.S. 9:4822(A). Note that, as discussed below, if a notice of contract is timely and properly filed, the lien period does not commence until a proper notice of termination is filed, regardless of substantial completion, abandonment, or occupancy of the work.

Under the Act, a notice of termination of the work:

(1) Shall reasonably identify the immovable upon which the work was performed and the work to which it relates. If the work is evidenced by a notice of contract, reference to the notice of contract as filed or recorded, together with the names of the parties of the contract, shall be deemed adequate identification of the immovable and work.

(2) Shall be signed by the owner or his representative.

(3) Shall certify that:

(a) The work has been substantially completed; or

(b) The work has been abandoned by the owner; or

(c) A contractor is in default under the terms of the contract.

(4) Shall be conclusive of the matters certified if it is made in good faith by the owner or his representative.

La. R.S. 9:4822(E).

Contractors often file into the mortgage records a copy of the architect's certificate of substantial completion. However, although the architect's certificate of substantial completion may contain most of the information required by the Act, if it does not clearly reference a properly filed notice of contract or provide a proper legal property description, the certificate may not comply with the requirements of the Act. Indeed, based on a strict interpretation of the lien periods discussed more fully below, if a notice of contract is filed, but a notice of termination is not filed or filed improperly, courts have held that the lien period for claimants never commences, even if the project is substantially complete or occupied. *See Bernard Lumber Co., Inc. v. Lake Forest Constr. Co., Inc.*, 572 So.2d 178, 181-82 (holding that when a notice of contract is filed, but no notice of termination is filed, the lien period for claimants was never activated); *Rowley Co., Inc. v. Southbend Contractors, Inc.*, 517 So.2d 1260, 1261-62 (La. App. 4 Cir. 1987), *writ not considered*, 519 So.2d 139 (La. 1988) (holding that when a notice of contract is filed, but neither the notice of contract nor subsequent notice of termination contains a proper legal description, the lien period for claimants never commenced); *see also In re Whitaker Constr. Co., Inc.*, 439 F.3d 212, 221-26.

G. Consultants and Subconsultants

Under the Act, "[r]egistered or certified surveyors or engineers, or licensed architects, or their professional subconsultants" employed by the owner on a project have a claim and privilege "for the price of professional services rendered in connection with a work that is undertaken by the owner." La. R.S. 9:4801(5). Likewise, "[p]rime consultant registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants" employed by the contractor or subcontractor also are granted a claim and privilege "for the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor." La. R.S. 9:4802(A)(5).

"Professional subconsultant" is defined as "a registered or certified surveyor or engineer, or licensed architect employed by the prime consultant." La. R.S. 9:4802(A)(5)(a); *see also* La. R.S. 9:4801(5). Subconsultants employed by a direct consultant to an owner must provide notice to the owner within thirty (30) days after the subconsultant enters into a contract of employment. La. R.S. 9:4801(5). The notice must include the name and address of the subconsultant, the name and address of its employer, and the general nature of the work to be performed by the subconsultant. *Id.*

Likewise, both prime consultants and subconsultants employed by a contractor or subcontractor must provide written notice to the owner on a project within thirty (30) working days after the date the prime consultant or professional subconsultant is employed. La. R.S. 9:4802(A)(5). The notice must include the name and address of the prime consultant or subconsultant, the name and address of his employer, and the general nature of the work to be performed by the prime consultant or subconsultant. *Id*.

H. Material Suppliers

To be entitled to a privilege against the owner, the seller of movables must deliver a notice of nonpayment to the owner at least ten (10) days before filing a statement of claim or privilege. La. R.S. 9:4802(G)(2). "The notice shall be served by registered or certified mail,

return receipt requested, and shall contain the name and address of the seller of movables, a general description of the materials provided, a description sufficient to identify the immovable property against which a lien may be claimed, and a written statement of the seller's lien rights for the total amount owed, plus interest and recordation fees." *Id*. Further, if a notice of contract has been recorded, and the seller of movables has not been paid by a subcontractor, such a seller must send notice of nonpayment to the general contractor and owner on or before seventy-five (75) days from the last day of the month in which the material was delivered or no later than the statutory lien period, whichever comes first. La. R.S. 9:4802(G)(3).

I. Subcontractors and Material Suppliers to Subcontractors

If a claimant has a direct contractual relationship with a subcontractor, but no direct relationship with the contractor, before that claimant has a right of action against the contractor or the surety, written notice must be given to the contractor by registered or certified mail within thirty (30) days from the recordation of notice of termination of the work, "stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor or service was done or performed." La. R.S. 9:4822(J).

J. Lessors of Movables

For a privilege to arise in favor of lessors of movables, the lessor must deliver a copy of the lease to the owner and to the contractor not more than ten (10) days after the movables are first placed at the site of the immovable for use in a work. La. R.S. 9:4802(G)(1).

K. Statement of Claim or Privilege

If a notice of contract is properly and timely filed, a claimant, other than a general contractor, including a professional consultant or subconsultant employed by a contractor or subcontractor, must, within thirty (30) days after the filing of a notice of termination of the work (1) file a statement of claim or privilege and (2) deliver to the owner a copy of the statement of claim or privilege. La. R.S. 9:4822(A). A general contractor must file a statement of claim or privilege within sixty (60) days after the filing of the notice of termination or substantial completion of the work. La. R.S. 9:4822(B).

If a notice of contract is not filed, those non-general contractor claimants must file a statement of claim or privilege within sixty (60) days of the filing of a notice of termination of the work or the substantial completion or abandonment of the work, if a notice of termination is not filed. La. R.S. 9:4822(C). Professional consultants employed by an owner and their subconsultants must file their statements of claim or privilege within sixty (60) days after the *latter* of (a) the filing of a notice of termination of the work that the services giving rise to the privilege were rendered; or (b) the substantial completion or abandonment of the work if a notice of termination is not filed. La. R.S. 9:4822(D).

As defined by the Act, the work is substantially complete when (1) the last work is performed on, or the materials are delivered to the project site or to that portion with respect to which a notice of partial termination is filed; or (2) the owner accepts the improvement, possesses or occupies the immovable, or that portion to which a notice of partial termination is

filed, regardless of minor or inconsequential matters to be finished or minor defects or errors in the work to be remedied. La. R.S. 9:4822(H).

A statement of claim or privilege:

(1) Shall be in writing.

(2) Shall be signed by the person asserting the same or his representative.

(3) Shall reasonably identify the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof.

(4) Shall set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it, including the person for whom or to whom the contract was performed, material supplied, or services rendered.

La. R.S. 9:4822(G). Unlike sworn statements filed under the Public Works Act, discussed below, note that there is no requirement that a Private Works Act statement of claim or privilege be sworn. *Id*.

Statements of claim or privilege must be filed for registry in the mortgage records of the parish in which the work was performed. La. R.S. 9:4831(A). With regard to the property description required, the description must be sufficient to clearly and permanently identify the property. La. R.S. 9:4831(C). "A description which includes the lot and/or square and/or subdivision or township and range shall meet the requirements of this Subsection. Naming the street or mailing address without more shall not be sufficient to meet the requirements of this Subsection." *Id*.

If a statement of claim or privilege is not filed timely or properly in accordance with the specific requirements of La. R.S. 9:4822, the claim and privilege are extinguished. La. R.S. 9:4823(A)(1).

L. Requiring Notification of Substantial Completion/Termination from Owner

If, before substantial completion, termination, or abandonment of the work, a claimant gives notice to the owner of outstanding amounts owed, the nature of the work or services performed, and his mailing address, the owner must notify the claimant within three (3) days of (1) the filing of a notice of termination; or (2) the substantial completion or abandonment of the work, if no notice of termination is filed. La. R.S. 9:4822(L). If an owner fails to provide the required notice within ten (10) days of the commencement of the lien filing period, the owner is liable for the costs and attorneys' fees incurred by the claimant for the establishment and enforcement of the claim and privilege. La. R.S. 9:4822(L)(2). Note, however, that the owner's failure to provide the required notice does not extend the period for filing claims and privileges. *Byron Montz, Inc. vs. Conoco Const. Inc.*, 2002-0195 (La.App. 4th Cir. 7/24/02), 824 So.2d 498, 503-504.

M. Request for Authorization to Cancel Claims and Privileges

If a statement of claim or privilege is improperly filed, or if the claim or privilege preserved thereby is extinguished, an owner or another interested person may require the claimant to give written authorization to the recorder of mortgages to cancel the statement of claim or privilege. La. R.S. 9:4833(A). One who, without reasonable cause, fails to deliver the requested written authorization within ten (10) days after receiving the written request, shall be liable for damages suffered by the person requesting cancellation and for attorneys' fees incurred in causing the statement to be canceled. La. R.S. 9:4833(B).

N. Bonds and Other Security

An owner is relieved of both the claim against it and privilege against its property if a bond of a solvent, legal surety is provided by the contractor and attached to the notice of contract when it is filed. La. R.S. 9:4802(C); La. R.S. 9:4812(A). If the price of the work or the contract is less than ten thousand dollars ($10,000), the bond must be one hundred percent (100%) of the price. La. R.S. 9:4812(B)(1). If the price is more than ten thousand dollars ($10,000), but less than one hundred thousand dollars ($100,000), the amount of the bond must be at least fifty percent (50%) of the contract price, but not less than ten thousand dollars ($10,000). La. R.S. 9:4812(B)(2). If the price is more than one hundred thousand dollars ($100,000), but less than one million dollars ($1,000,000), the amount of the bond must be at least thirty-three and one third percent (33.33%) of the price, but not less than fifty thousand dollars ($50,000). La. R.S. 9:4812(B)(3). Finally, if the price is more than one million dollars ($1,000,000), the amount of the bond must be at least twenty-five percent (25%) of the price, but not less than three hundred thirty-three thousand three hundred thirty-three dollars ($333,333). La. R.S. 9:4812(B)(4).

Under the bond, the surety must guarantee:

1) To the owner and to all persons having a claim against the contractor, or to whom the contractor is contractually liable for work done under the contract, the payment of their claims or of all amounts owed them arising out of the work performed under the contract to which it is attached or for which it is given. La. R.S. 9:4812(C)(1).

2) To the owner, the complete and timely performance of the contract unless such a guarantee is expressly excluded by the terms of the bond. La. R.S. 9:4812(C)(2).

Thus, notably, unless specifically excluded, a bond provided an owner by a contractor is considered both a payment and performance bond. *Id.*

Although the surety is not bound for a sum in excess of the bond, the bond is deemed to include the following conditions:

1) Extensions of time for the performance of the work shall not extinguish the obligation of the surety, but the surety who has not consented to the extensions has the right of indemnification under the original terms of the contract. La. R.S. 9:4812(E)(1).

2) No other amendment to the contract, or change or modification to the work, or impairment of the surety's rights of subrogation made without the surety's consent shall extinguish the obligations of the surety, but if the change or action is materially prejudicial to the surety, the surety shall be relieved of liability to the owner, and shall be indemnified by the owner for any loss or damage suffered by the surety. La. R.S. 9:4812(E)(2).

3) A payment by the owner to the contractor before the time required by the contract shall not extinguish the obligation of the surety, but the surety shall be relieved of liability to the owner, and shall be indemnified by the owner for any loss or damage suffered by the surety. La. R.S. 9:4812(E)(3).

To facilitate cancellation of an already-filed statement of claim or privilege, any interested party may deposit with the recorder of mortgages a bond of a lawful surety company licensed to do business in Louisiana, cash, certified funds, or a federally insured certificate of deposit. La. R.S. 9:4835(A). The amount deposited is to guarantee payment of the obligation secured by the privilege or that portion as may be lawfully due together with interest, costs, and attorneys' fees to which the claimant may be entitled, and therefore, must be up to a total amount of one hundred twenty-five percent of the principal amount of the claim as asserted in the statement of claim or privilege. *Id*. Notice must be given to the owner, the lien holder, and the contractor by certified mail. La. R.S. 9:4835(C).

If the recorder of mortgages finds that the amount on deposit and the terms of deposit are in conformity with the Act's requirements, he or she is to note approval on the bond and/or other deposit, make note thereof in the margin of the filed statement of claim or privilege, and cancel the statement of claim or privilege from the mortgage records. La. R.S. 9:4835(B). The bond or other deposit is not recorded, but is simply retained in the recorder of mortgages' records. *Id*.

Only the privilege against the owner is extinguished if such a bond is filed by the owner. La. R.S. 9:4823(D). However, both the claim against the owner and the privilege securing it are extinguished if the bond is filed by the contractor. La. R.S. 9:4823(E). Note, however, that the bond or other deposit is merely another form of security substituted for the privilege and, therefore, the claimant can have no greater rights under the bond than he possessed with the statement of claim or privilege. *See Brunet v. Justice*, 264 So.2d 743, 746 (La. App. 4 Cir. 1972).

The surety is liable without the benefit of discussion or division. La. R.S. 9:4812(A). If the total amount owed to persons to whom the surety is liable exceeds the total bond amount, the surety's liability is discharged as follows:

1) First, and pro rata, to all persons who properly preserve their claims. La. R.S. 9:4813(B)(1).

2) Second, and in the order in which they present their obligations to the surety, to persons who did not preserve properly their claims, but to whom the contractor is otherwise liable. La. R.S. 9:4813(B)(2).

3) Third, to the owner. La. R.S. 9:4813(B)(3).

O. Filing Suit to Preserve Claim and Privilege and Notice Lis Pendens

The claim and privilege against the owner and the claim against the contractor are extinguished if the holder thereof does not institute an action against the owner, the contractor, or the surety within one (1) year after expiration of the applicable lien filing period of La. R.S. 9:4822. La. R.S. 9:4823(A)(2); *see also* La. R.S. 9:4813(E). However, the effect of filing for recordation of a statement of claim or privilege and the privilege preserved by it ceases as to third parties unless a notice of lis pendens is filed within one year after the date the statement of claim or privilege was filed. La. R.S. 9:4833(E). In addition to the general requirements of Louisiana Code of Civil Procedure article 3752, the notice must identify the suit to enforce the claim or privilege, reference the notice of contract, if one is filed, or reference the recorded statement of claim or privilege if a notice of contract is not filed. *Id.* Therefore, in order to ensure proper preservation of rights against all persons, an action should be instituted within one (1) year of the date the statement of claim or privilege was filed.

III. THE LOUISIANA PUBLIC WORKS ACT

A. The Public Works Act Generally

The Public Works Act protects laborers and materialmen involved in public works projects by offering them a vehicle by which they can recover monies owed to them for material and labor spent on behalf of a public works project. *United States Pollution Control, Inc. v. National American Ins. Co.*, 95-153 (La. App. 3 Cir. 8/30/95), 663 So.2d 119, 121. Since laborers and materialmen cannot place a lien against the actual public property that is the subject of the public works project, the Public Works Act allows them to assert their claims against the unexpended funds financing the public work or the surety required by the Act. *Id.*; *James A. Teague Rental Equip., Inc. v. Audubon Park Commission*, 93-1728 (La. App. 4 Cir. 1/27/94), 631 So.2d 1299, 1301.

The Public Works Act provides exclusive remedies to parties in public construction work. *Siemens Building Technologies, Inc. v. Jefferson Parish*, 298 F.Supp.2d 415, 419 (E.D. La. 2004); *United States Pollution Control*, 663 So.2d at 122. Additionally, the Public Works Act is strictly construed such that the claims granted are not extended beyond the statutes. *Id.*

B. Written Contract and Bond

If a contract is in excess of twenty-five thousand dollars ($25,000), the public entity must require that the contractor provide a bond with a good, solvent, and sufficient surety in a sum of not less than fifty percent (50%) of the contract price for the payment by the contractor or subcontractor to Public Works Act claimants. La. R.S. 38:2241(A)(2). The bond is a statutory bond, and "no modification, omissions, additions in or to the terms of the contract, in the plans or specifications, or in the manner and mode of payment shall in any manner diminish, enlarge, or otherwise modify the obligations of the bond." *Id.* Any bond failing to contain any of the requirements set forth in the Public Works Act is deemed to incorporate all of the requirements set forth therein. La. R.S. 38:2241(C). Additionally, language in any bond containing obligations beyond the requirements of the Public Works Act is deemed surplusage and read out

of the bond. *Id*. Accordingly, sureties and contractors executing payment bonds for public projects are immune from liability for or payment of any claims not required by the Public Works Act. *Id*. The Act's bond requirements cannot be waived by contract. La. R.S. 38:2241(F).

The bond must be executed by the contractor with a surety approved by the public entity and must be recorded with the contract between the owner and contractor with the recorder of mortgages for the parish where the work is to be performed no later than thirty (30) days after the work has begun. La. R.S. 38:2241(B).

C. Claimant Defined – Who Is Entitled to Assert a Claim?

The Public Works Act defines a claimant as:

> [A]ny person to whom money is due pursuant to a contract with the owner or a contractor or a subcontractor for doing work, performing labor, or furnishing materials or supplies for the construction, alteration, or repair of any public works, or for transporting and delivering such materials or supplies to the site of the job by a for-hire carrier, or for furnishing oil, gas, electricity, or other materials or supplies for use in machines used in the construction, alteration, or repair of any public works, including persons to whom money is due for the lease or rental of movable property used at the site of the immovable and leased to the owner, contractor, or subcontractor by written contract, and including registered or certified surveyors or engineers or consulting engineers, or licensed architects, or their professional subconsultants employed by the owner or by the contractor or subcontractor in connection with the building of any public work.

La. R.S. 38:2242(A).

Under the specific language of the statute, suppliers to material suppliers are not entitled to claims under the Public Works Act. *Id*.; *see also Siemens*, 298 F.Supp.2d at 419; *Thurman v. Star Electric Supply, Inc*., 307 So.2d 283 (La. 1975).

D. Architects and Engineers

If an architect or engineer has not been employed by the contractor or subcontractor, he or she has no claim on the funds due the contractor or subcontractor, nor shall he or she be within the coverage of the payment and the performance bond provided by the contractor. La. R.S. 38:2242(E).

E. Lessors of Movables

To be entitled to assert a claim under the Public Works Act, a lessor of movables must deliver a copy of the lease to the owner not more than ten (10) days after the movables are first placed at the site of the immovable for use in the work. La. R.S. 38:2242(C)(1). The claim granted the lessor of movables is limited to and secures only the part of the rentals accruing during the time the movable is located at the site of the immovable for use in a work. La. R.S. 38:2242(C)(2). A movable is deemed not located at the site of the immovable for use in the work after: (1) the work is substantially completed or abandoned; (2) the notice of termination of the work is filed; or (3) the lessee has abandoned the movable, or use of the movable in a work is completed or no longer necessary, and the owner or contractor gives written notice to the lessor of abandonment or completion of use. *Id*.

F. Material Suppliers and Subcontractors to Subcontractors

If a material supplier has not been paid by the subcontractor, notice of nonpayment must be sent to the owner and general contractor by certified mail before seventy-five (75) days from the last day of the month in which the material was delivered, or no later than the statutory lien period, whichever comes first. La. R.S. 38:2242(F).

Further, to be entitled to a right of action against the contractor or surety, a claimant with a direct contractual relationship with a subcontractor but no contractual relationship with the contractor must give written notice to the contractor, by registered or certified mail, within forty-five (45) days of the recordation of the notice of acceptance by the owner, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor or service was done or performed. La. R.S. 38:2247.

G. Period of Time for Filing Sworn Statement and Where to File

A claimant must file a sworn statement of claim with the governing authority having the work done and record it in the office of the recorder of mortgages for the parish in which the work is done within forty-five (45) days of the governing authority's recordation of acceptance of the work. La. R.S. 38:2242(B).

H. Formal Requirements for Sworn Statement

Unlike the Private Works Act, the Public Works Act contains no particular formal requirements for the statement of claim, but unlike the Private Works Act, requires the statement to be sworn. La. R.S. 38:2242(B); *see also Dixie Building Material Co., Inc. v. Liberty Somerset, Inc.*, 94-13373 (La. App. 4 Cir.), 656 So.2d 1041, *writ denied*, 95-1828 (10/27/95), 661 So.2d 1346; *Cole's Constr. Co., Inc. v. Knotts*, 619 So.2d 876 (La. App. 3 Cir. 1993).

I. Bond or Other Security Filed to Cancel Sworn Statement

To facilitate cancellation of an already-filed sworn statement of claim, any interested party may deposit with the recorder of mortgages a bond of a lawful surety company licensed to

do business in Louisiana, cash, certified funds, or a federally insured certificate of deposit. La. R.S. 38:2242.2(A). The amount deposited is to guarantee payment of the obligation secured or that portion as may be lawfully due together with interest, costs, and attorneys' fees to which the claimant may be entitled, and therefore, must be up to a total amount of one hundred twenty-five percent of the principal amount of the claim as asserted in the sworn statement. *Id*. Notice must be given to the public entity, the claimant, and the contractor by certified mail. La. R.S. 38:2242.2(C).

If the recorder of mortgages finds that the amount on deposit and the terms of deposit are in conformity with the Act's requirements, he or she is to note his or her approval on the bond and/or other deposit, make note thereof in the margin of the filed statement of claim, and cancel the statement of claim from the mortgage records. La. R.S. 38:2242.2(B). The bond or other deposit is not recorded, but is simply retained in the recorder of mortgages' records. *Id*.

J. Request for Authorization to Cancel Sworn Statement

If a sworn statement is improperly filed, or if the claim preserved thereby is extinguished, the public entity, contractor, or subcontractor, or other interested person may require the claimant to give written authorization to the recorder of mortgages to cancel the sworn statement. La. R.S. 38:2242.1(A). One who, without reasonable cause, fails to deliver the requested written authorization within ten (10) days after receiving the written request, shall be liable for damages suffered by the person requesting cancellation and for attorneys' fees incurred in causing the statement to be canceled. La. R.S. 38:2242.1(B).

K. Concursus Proceeding Instituted by Public Entity

If, at the expiration of the forty-five (45) day period for filing claims, any filed and recorded claims remain unpaid, the public entity shall file a petition in the proper court of the parish where the work was done, citing all claimants and the contractor, subcontractor, and surety on the bond asserting whatever claims it has against any of them and requiring the claimants to assert their claims. La. R.S. 38:2243(A).

L. Instituting an Action to Enforce a Sworn Statement

An action to enforce a sworn statement must be brought against the contractor or surety or both within one (1) year from the registry of acceptance of the work or of notice of default of the contractor. La. R.S. 38:2247.

However, the effect of filing for recordation of a sworn statement of claim ceases as to third parties unless a notice of lis pendens is filed within one (1) year after the date the sworn statement was filed. La. R.S. 38:2242.1(F). In addition to the general requirements of Louisiana Code of Civil Procedure article 3752, the notice must identify the suit to enforce the claim, reference to the notice of contract, if one is filed, or a reference to the recorded statement of claim or privilege if a notice of contract is not filed. *Id*. However, the failure to institute an action within one (1) year of the owner's recordation of acceptance cannot be cured by the institution of an action and filing of a notice of lis pendens within one (1) year of the date the

sworn statement is filed. *See Leblanc & Theriot Equip. Co., Inc. v. H&S Constr. Co., Inc.*, 591 So.2d 1274 (La. App. 3 Cir. 1991).

M. Direct Action Against Owner

If the awarding authority makes final payment to the contractor without deducting the total amount of all outstanding claims that have been served on it or without obtaining a bond from the contractor to cover the total amount of all outstanding claims, the awarding authority can be held liable for the amount of the claims. La. R.S. 38:2242(D).

N. Attorneys' Fees

After amicable demand has been made on the principal and surety and thirty (30) days have elapsed without payment being made, a claimant recovering the full amount of a timely and properly recorded claim is entitled to ten percent (10%) attorneys' fees. La. R.S. 38:2246(A). To the contrary, if the court finds that a claimant's action was brought without just cause or in bad faith, the principal and surety can be awarded a reasonable amount of attorneys' fees for defending the action. La. R.S. 38:2246(B).

IV. OTHER POTENTIAL STATUTORY PAYMENT CLAIMS AVAILABLE

A. Prompt Pay Claims

Under Louisiana law, if a contractor receives payment from an owner for improvements to an immovable, with our without issuance a certificate of payment from the architect, the contractor must promptly pay the money received to each of its subcontractors and suppliers in proportion to the percentage of work completed prior to the issuance of payment. La. R.S. 9:2784(A). If less than full payment is received, the contractor must disburse only the funds received on a prorated basis with the contractor, subcontractors, and suppliers, each receiving a prorated portion based on the amount due on the payment. La. R.S. 9:2784(B). Likewise, when a subcontractor receives payment from the contractor, the subcontractor must pay promptly the money received to each sub-subcontractor and supplier in proportion to the work completed. La. R.S. 9:2784(A).

If, without reasonable cause, the contractor or subcontractor fails to make any payment to his subcontractors or suppliers within fourteen (14) days of receipt of payment from the owner, the contractor or subcontractor must pay to the subcontractors and supplier, in addition to the payment, a penalty in the amount of one-half of one percent of the amount due, per day, from the expiration of the fourteen (14) day period, plus attorneys' fees. La. R.S. 9:2784(C). However, the total amount of penalties cannot exceed fifteen percent (15%) of the total outstanding amount. *Id*.

Note that the "reasonable cause" must relate to the project at issue. When a general contractor withholds payment from a subcontractor based on disputes regarding an unrelated project, courts have held that such withholding is unreasonable under the statute, and the award

of attorneys' fees and penalties is proper. *See Unis v. JTS Constructors/Managers, Inc.*, 541 So.2d 278, 282 (La. App. 3 Cir. 1989).

If the court finds the claim to be without merit, the claimant shall be subjected to the reasonable costs and attorneys' fees for the defense of the claim. *Id*. Further, the statute is not applicable to improvements to an immovable used for residential purposes. *Id*.

The Private Works Act also contains its own prompt pay statute. If a contractor, subcontractor, or agent of a contractor or subcontractor has received money on account of a contract for the construction erection, or repair of a building, structure, or other improvement and knowingly fails to apply the money received as necessary to settle claims of sellers of movables or laborers due for the construction, it may be liable for damages, plus costs, attorneys' fees, and civil penalties. La. R.S. 9:4814. The civil penalties are as follows:

1) When the amount misapplied is one thousand dollars ($1,000) or less, the civil penalties shall not be less than two hundred fifty dollars ($250) or more than seven hundred fifty dollars ($750). La. R.S. 9:4814(B).

2) When the amount misapplied is greater than one thousand dollars ($1,000), the civil penalties shall not be less than five hundred dollars ($500) or more than one thousand dollars ($1,000) for each one thousand dollars in misapplied funds. La. R.S. 9:4814(C).

V. CONCLUSION

Although we hope today's presentation has provided you a brief overview of the statutory claims and rights available on both public and private construction projects in Louisiana, we recognize that all projects and disputes are different. Therefore, should a dispute arise, we encourage you to contact an attorney. Of course, if you have any questions concerning today's presentation or the material covered herein, please do not hesitate to contact us.

About the Presenter:

Michael F. Weiner, shareholder in the Mandeville office, practices litigation and counseling with special emphasis in construction and employment law. In his construction practice, Mr. Weiner represents owners, contractors, subcontractors and design professionals regarding claims involving defective work, extra work, delay and disruption, acceleration and liens. Mr. Weiner also represents employers in all aspects of employment law before state and federal courts and agencies and counsels clients on federal and state employment laws regarding discrimination, leave, wage and hour and other issues. Mr. Weiner can be contacted at 985-819-8404 or mweiner@bakerdonelson.com.

Christy Kane, Executive Director

909 Poydras St., Suite 1550

New Orleans, LA 70112

Phone: 504.561.1046

Fax: 504.566.1926

http://louisiana.appleseednetwork.org