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# Employers' Concerns with New FLSA Overtime Rules

**By William Pokorny**

When the U.S. Department of Labor published its long-awaited Final Rule more than doubling the minimum salary thresholds for the executive, administrative, and professional exemptions under the FLSA, labor groups applauded or suggested that the Department should have gone even further in limiting the exemptions, while business and employer groups spoke out in opposition to the new regulatory burden. The DOL responded to criticism from the employer community by minimizing the burden on employers. Wage and Hour Administrator David Weil published a blog post characterizing common employer concerns as "myths." (https://blog.dol.gov/2016/05/26/behind-the-myths-the-truth-about-overtime/, published May 26, 2016, last visited July 25, 2016).

However management lawyers who counsel employers on wage and hour compliance issues every day seem to agree that:

1. Employers have legitimate concerns about the new rules. Their worries are not "myths."

2. The changes resulting from the new rules will not be welcomed by all affected employees.

3. The rules are likely to result in additional litigation, at least in the short-term.

The main concern from employers is that the new rules take away flexibility in how they compensate and manage certain employees. This is actually the point: labor regulations take certain options off the table in order

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# Employees Benefit from New FLSA Overtime Rules

**By Bradley Manewith**

The U.S. Department of Labor's recently announced final rule regarding the overtime exemption for executive, administrative, and professional employees will go a long way towards restoring the ideals behind the Fair Labor Standards Act ("FLSA"). Workers will no longer be forced to work fifty plus hours per week while paid a salary of $30,000 or less per year. This works out to a rate of twelve dollars or less per hour, which is only slightly higher than many states' minimum wage. Retail and restaurant managers, administrative assistants, and customer service representatives are examples of workers that commonly met this description. Often times, these individuals are their families' primary or sole wage earner, and thus cannot afford to be out of a job. As a result, they have little choice but to accept the minimum salary being offered by their employers, and to work the long hours required of them. It is the classic case of a Catch 22.

Given this paradox, the updates are long overdue and necessary. The purpose of the FLSA in general and overtime in particular, is to ensure that employers do not subject their employees to excessive work-hours, unless they are willing to fairly compensate their employees for the time they are forced to work instead of focusing on other important aspects of their lives. The pre-amendment

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# Big Data Solutions in Hiring

**By Elizabeth Stork**

"Big data" can identify promising candidates for employers facing large applicant pools, but using it may run afoul of statutory protections for employees. Because of big data, you might be a job applicant for a particular position and not even know it. The term "big data" refers to data analytics tools that use algorithms to sift through large pools of job applicants or potential job applicants and pull out preferred candidates based on criteria desirable to the employer, such as personality type, engagement with the job, and low risk of turnover.

To assess applicants, some tools pull information from publicly available sources like LinkedIn, and identify candidates that are not applying for a job at a particular company but nonetheless match that company's criteria for successful employees. Others collect data from a group who identify themselves as candidates for a type of position on a platform like Monster.com.

These new data analytics tools are both more of the same and different. In one sense they are simply more refined methods for doing what employers have always done—screen applicants. Through the 1980's, most job assessments or screenings measured aptitude for the job, or "can do" qualities, using paper-and-pencil tests. These "can do" qualities include abilities, skills, knowledge, experience, and accomplishments. Since the 1990's, employers have also looked increasingly at "will do" elements of employee performance—employees' attitudes, motivation, personality, interests and preferences—because these factors affect how employees engage with employers and coworkers, as well as employee tardiness, absenteeism, and turnover. Big data aims to capture both the "can do" and the "will do" aspects of employee performance at a relatively low cost.

Big data presents unique questions, however, about infringing employee protections. Even though big data screening procedures appear more like recruiting measures than selection tools, it is still an employment practice under the Civil Rights Act to cull a synthetic applicant pool. Regardless of whether applicants know they are being considered, the big data screening is a test. Further, the large sample sizes of such pools may make it easier for victims of discrimination to show statistical evidence of adverse impact.

If these big data tools create an adverse impact based on race, sex, religion, or national origin, the employer risks violating Title VII of the Civil Rights Act. In a disparate impact analysis, big data presents the question of who is an "applicant" in a pool of people who may not know their data is being collected. Audit files documenting the screening tools' work may make it easier to determine what the applicant pool is, but the 1991 amendments to the Civil Rights Act and the Uniform Guidelines on Employee Selection Procedures, drafted in 1978 and used by the United States Department of Justice, Equal Employment Opportunity Commission (EEOC) and the United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), did not contemplate the use of "synthetic" applicant pools.

Even if there is an adverse impact on a protected group, the tool may be lawful if it is validated. The validation method that applies to big data tools is called "criterion-related validity." This means showing that performance on the screening tool meaningfully corresponds with performance ratings for actual employees. To apply this to big data, employers would screen incumbent employees the way they screen applicants, and analyze statistically how the incumbents' scores correspond to their actual job performance.

Whether a test has criterion-related validity depends on whether it is competently designed. Unfortunately, big data screening tools are not being developed by industrial psychologists who typically develop employee assessments, but are generally developed by former NSA employees or technology firms.

Test fairness also factors into validity. If certain groups are rated lower by the screening test than they are by their supervisors, the test may be unfairly skewed to favor one group based on criteria not related to the job, such as interest in fantasy football. Test fairness is a particular concern for big data screening tools, which may pick up attributes that correlate to job performance, but that actually describe homophily—supervisors preferring employees who look and act like them. Where the Uniform Guidelines recommend selection procedures premised on knowledge, skills, abilities and other characteristics of the job, big data tends to look at profit-driven organizational-level objectives, such as turnover, that are not tied to the specific requirements of the job but are nonetheless important to the employer.

How employers use the test—e.g., a pass/fail cut-off, or allowing high performance on one part of the test to compensate for low performance on other parts—is also part of the validation study. If the test is imported from another employer, standards for transportability apply. Even if the big data tool they use has been validated, employers must still consider alternative ways of using the test that would reduce adverse impact on protected groups. This might involve dropping certain questions or using weighting and scoring differently.

Though similar to decades-old employee assessment tools, how big data screening tools work is still a black box. It is difficult to demonstrate that the complex algorithms used by these tools are measuring job-related criteria and not characteristics like affinity for sports. In addition to Title VII discrimination concerns, the tools may run afoul of other statutes and regulatory schemes designed to protect employees, including laws regulating use of health information like HIPAA, and laws regulating use of background checks like FCRA. Using big data could also violate the NLRA if the data tools mine employee communications in social media posts. As the technology surrounding big data matures, auditing and accountability measures must mature as well to ensure the screenings do not infringe important employee protections. ■

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# Inconvenient Forum Nixed: A Microsoft Case Study

**By Avi Lipman**

Forum selection clauses in employment contracts purport to limit an employee's ability to bring claims against her employer outside a particular jurisdiction. They are "presumptively valid" in many states, including Washington. However, the Washington State Court of Appeals recently refused, on public policy grounds, to enforce a forum selection clause in *Acharya v. Microsoft Corp.* It also rejected defendant Microsoft Corp.'s reliance on the doctrine of *forum non conveniens*.

Ms. Acharya worked at Microsoft's headquarters in Redmond, Washington for more than fifteen years. For "practical reasons," Microsoft and Acharya decided in 2008 that she should relocate temporarily to London, where she would continue to manage her Washington-based business development team and be supervised by a Washington-based manager. Acharya was required to resign from her job at Microsoft and join Microsoft Global Resources GmbH (MGR), a Swiss subsidiary of Microsoft.

The MGR contract, which Acharya signed, provided that the "terms of this agreement shall be construed in accordance with and governed in all respects by the laws of Switzerland." It further stated that "any dispute, controversy or claim arising under" the employment agreement "shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland."

In London, Acharya began reporting to a Belgium-based supervisor who, Acharya alleged, subjected her to hostile, gender-based conduct. For example, he allegedly told her that "there's a word for women like you," accused her of being a "queen sitting on a throne," and "taunted her for appearing emotional." His negative performance evaluation of Acharya allegedly "varied greatly" from her prior performance reviews. Acharya perceived this evaluation as unfair and motivated by gender-based discrimination. She complained to Microsoft's human resources and legal departments in Washington, whose investigation found no policy violations.

Acharya alleged that she could not find a new position with Microsoft in Washington because her supervisor had been "poisoning the well" by making negative comments to potential hiring managers. She ultimately returned to the U.S. but was unable to find fulltime work. In 2013, she sued Microsoft in King County Superior Court under the Washington Law Against Discrimination ("WLAD"), alleging discrimination, retaliation, and related claims.

Microsoft moved to dismiss under the forum selection clause in Acharya's employment contract with MGR, as well as *forum non conveniens*. At the motion hearing, Microsoft relied in part on *Atlantic Marine Construction Company, Inc. v. United States District Court* (a motion to transfer venue in federal court based on a valid forum selection clause should be granted "except in unusual cases"). The trial court denied Microsoft's motion, and Microsoft appealed.

The Court of Appeals first found the Microsoft was "entitled to invoke the provisions of the employment contract" between Acharya and MGR because her claims against Microsoft "stem from the discrimination she allegedly suffered while performing the employment contemplated by the contract." The court then rejected Microsoft's reliance on *Atlantic Marine*, which it noted involved a contract "between two corporations on equal footing." By comparison, "[t]he parties here are not two corporations, but an individual and a powerful corporation." Finding no evidence of "equal bargaining positions" or "actual negotiations" of the forum selection clause, the court distinguished *Atlantic Marine*'s reasoning that a forum selection clause "may have affected ... [the] agreement to do business together in the first place." The court further rejected Microsoft's position under a "traditional" forum selection analysis. A court may deny enforcement of such a clause, the court held, as unreasonable if "the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court," or "enforcement would contravene a strong public policy of the State where the action is filed." In Acharya's case, the court concluded, her statutory discrimination claim would "not be cognizable" if the forum selection and choice of law provisions were enforced. This, the court held, was unreasonable and contrary to public policy.

AP PHOTOS

Finally, the court analyzed Microsoft's contention that the doctrine of *forum non conveniens* required Acharya to bring her claims in Switzerland. The court considered both "private" and "public interest" factors under *Myers v. Boeing Co*. Private factors, it held, favored Acharya because "[n]one of the alleged discriminatory actions occurred in Switzerland," no evidence was located in Switzerland, and litigating in Switzerland posed a "practical problem" for Acharya in terms of travel and retaining counsel. The court found that "public interest factors," also weighed in favor of Washington. Acharya alleged discrimination in Washington by "a prominent Washington employer, in violation of … a Washington statute." Thus, the court concluded, "Washington would be the proper forum to absorb the burdens of litigation," "there would be a local interest in having" the case decided in Washington, and "Washington would be a forum at home with the state law that must govern the case." The court thus rejected Microsoft's reliance on *forum non conveniens*. The Court of Appeals subsequently granted Acharya's motion to publish its opinion, and the Washington State Supreme Court denied Microsoft's petition for review. The case has since been remanded and set for trial in 2017. ■

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# THE SECTION

By Gail Golman Holtzman

I was born on the south side of Chicago, lived in various neighborhoods throughout the City and have many wonderful memories of my life in Chicago. When I was asked to select a venue for the 10th Annual Section Conference, it is not surprising that I selected Chicago. I wanted to share my love of Chicago with the approximately 1,400 Conference attendees. In addition, I was mindful that as a Midwestern city with two major airports, Chicago would be accessible, cost-effective and convenient for our Section members. Our venue has offered Conference attendees the chance to view the Chicago River next to the Conference hotel and to glimpse nearby Navy Pier with its Ferris Wheel inspired by the 1893 World's Columbian Exposition overlooking beautiful Lake Michigan!

With this incredible urban backdrop and on the day following our Presidential election, our Conference again distinguished itself as the "go-to" meeting for practitioners from around the world and from every constituent group in the field of labor and employment law, including law students. Attendees know that they can count on balanced presentations on cutting-edge topics, such as millennials in the workplace, closing the gender gap and labor relations in law enforcement post-Ferguson. Also, representatives from all of the labor and employment agencies appreciate that by attending our Conference, they can engage in meaningful outreach to discuss new initiatives, including regulations and government studies. Our Section is fortunate to have as its Secretary Tom Goldstein, SCOTUSBlog-founder and Supreme Court litigator, to present the Supreme Court Review of labor and employment cases. Congratulations also to award recipients at the Conference for their distinguished contributions to our Section!

All of this would not have been possible without so many committed contributors to this Conference. Thank you to our talented and diligent 2016 Conference Planning Committee members, our Track Coordinators, our Conference Host Committee; to our Committee leaders who have planned, promoted and supported Conference programs; to our sponsors; to our many speakers and moderators; to all of our volunteers who have supported the success of this Conference; to our amazing Section staff; and to all of our attendees who made this Conference so successful!

We hope that during the Conference Committee Expo you found valuable information about our Section's programs, publications and Committees, including our 15 Standing Committees, and that you are registering to attend one or more Midwinter Meetings between next January and May. Perhaps you also were inspired by the work of the Pro Bono Committee and Diversity in the Legal Profession Committee after attending those Committee Luncheons or after enjoying the Diversity and Inclusion Networking Reception at the architecturally-distinctive House of Blues filled with outsider art and artifacts.

I knew that when I returned to Chicago for our Section's 10th Anniversary Conference, I would be coming home, not only to my family and roots, but to my ABA family, the community of friends that has enhanced my family's life throughout more than 30 years of involvement in our Section that began when I joined the Employment Rights & Responsibilities ("ERR") Committee. I encourage all of you who attended the Conference to consider your attendance as a springboard to expanded involvement in our amazing Section!

For all of our members, I encourage you to visit our Section's website at www.americanbar.org/laborlaw to see our various initiatives and upcoming events. Learn more about how you can write articles or chapters for Section treatises, participate in webinars, become involved in our trial advocacy program or trial institute, its human trafficking initiatives or its outreach programs, which are just a sampling of Section programs and initiatives. You also have the opportunity to introduce yourself to other Section members on the "Section Spotlight", which features members and their work with the Section and Committees.

Our leadership is open to connecting with you regarding ways that you can be involved. Our Strategic Planning Committee members Immediate Past Chair Wayne Outten, Chair-Elect Don Slesnick, Vice Chairs Joe Tilson and Christopher Hexter and I, all hope to see you at future Section meetings and events. We encourage you to become part of our Section "family," and hope to meet you sometime soon! ■

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# NAALC and Transnational Employment Issues

**By Sarah Paoletti and Lilián López Gracián**

The debates that took place more than twenty years ago leading up to the passage of NAFTA are being revisited in present-day debates about the Trans-Pacific Partnership (TPP) trade agreement. The Obama Administration asserts that the TPP "renegotiates NAFTA, putting fundamental labor rights at the core of the agreement." Protecting Workers Fact Sheet, available at: https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf. This article takes a snapshot look at the North American Agreement on Labor Cooperation (NAALC), the side-agreement implemented alongside NAFTA, through the examination of two case studies, both involving the labor and employment rights of migrant workers. These case studies demonstrate how the NAALC has been used to bring together stakeholders in an effort to strengthen the system of labor and employment laws for all workers, and inform how to assess design and implementation of similar provisions in other multinational trade agreements, such as the TPP.

Through the NAALC, the NAFTA parties—Canada, Mexico and the United States—agree to promote eleven core labor principles, including associational and union rights, equal pay for men and women, rights of migrant workers, minimum wage and overtime standards, and rights related to occupational health and safety. Notably, the NAALC does not create its own set of enforceable labor standards, or set baseline minimums for wages or other employment rights and benefits. Instead, it calls for the promotion of those rights through the implementation and enforcement of domestic laws, and explicitly recognizes the importance of ensuring access to justice for the adjudication of workplace rights. As with other international treaties, the mechanisms for enforcement are targeted at the member countries, and not at individual actors or employers.

Each country has an identified national administrative office (NAO) that receives public communications from individuals and organizations raising issues under the eleven core labor principles, and highlighting the failures of the particular country to implement and enforce its own laws in a manner consistent with those

principles. The NAO undertakes an initial review and determines whether the petition will be submitted for ministerial consultations, consistent with the NAALC's stated goal of pursuing cooperative engagement and dialogue for the promotion and realization of labor and employment rights. The NAALC does hold out the ultimate threat of trade sanctions against a country that fails to satisfactorily engage in the process and respond in a manner consistent with its principles.

At least 40 submissions have been made under the NAALC to date, and of those, reports were issued in 21 cases and ministerial agreements were reached in 12 of those. Included among those was a communication filed with Mexico in 2011 by Centro de los Derechos del Migrante, Inc. (CDM), on behalf of three Mexican migrant workers and joined by thirteen other organizations, arguing the U.S. government had failed to enforce labor laws governing the rights of H-2B visa-holders working in the fair and carnival industry. The Mexican Secretariat of Labor and Social Welfare, which serves as the NAO under the NAALC, issued an extensive report in 2012, addressing the 2011 communication, as well communications submitted in 2003 and 2005 on behalf of guestworkers under both the H-2A and H-2B visa programs, highlighting the United States' shortcomings in promoting, implementing and enforcing the labor principles set forth under the NAALC, including: freedom of association and protection of the right to organize; right to collective bargaining; prohibition of forced labor; minimum employment standards; elimination of job discrimination; prevention of and compensation for occupational injuries and illnesses; and protection of migrant workers. Recognizing its limited jurisdiction, the Mexican NAO recommended the matters raised therein be addressed through ministerial consultations.

The NAALC proceedings brought on behalf of the H-2B workers were particularly timely, in that regulations pertaining to the administration of the H-2B visa program issued by the U.S. Department of Labor in 2008 were tied up in federal court litigation challenges under the Administrative Procedures Act, 2012 regulations were subsequently stayed through litigation, and a Circuit Court split was pending. The NAALC created an alternative forum to address the need for regulation, rights promotion and enforcement, where federal court litigation had created confusion, at best, and a complete regulatory void, at worst.

While the public communications addressed in the three consolidated cases focused primarily on the violations of the rights of H-2B workers in the United States, it was evident that such violations—particularly those related to unlawful recruitment practices—could be partially ameliorated by actions undertaken by, or at least with the cooperation of the Mexico. Efforts were therefore undertaken to improve systems of temporary work from both countries. Following ministerial consultations, the Secretaries of Labor for Mexico and the United States issued a work plan in May 2014 outlining outreach, education and training activities in both countries. In addition, Mexico reformed its regulations governing the actions of recruitment agencies and their agents. to mandate recruiters to register specifically as recruiters to hire workers for employment abroad, and pay a deposit to cover the cost of the return of workers in

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# The Future of For-Profit Online Charter Schools

## By C.R. Gorman

*Author's Note: On August 24, 2016, as the article below was being prepared for publication and as privately-operated online charter schools continued to face scrutiny for their use of public funds, the National Labor Relations Board issued a pair of decisions addressing whether charter school employees, including those of the Pennsylvania Cyber Charter School, were to be considered public- or private-sector employees. The NLRB's holdings were consistent with its earlier decision in 2012, in which it exercised jurisdiction over charter school organizing in Chicago Mathematics & Science Academy (359 NLRB No. 41 (Dec. 14, 2012)), a decision later impacted by the Supreme Court's ruling in Nat'l Labor Relations Bd. V. Noel Canning, 134 S. Ct. 2550 (2014).*

*The recent decisions from New York and Pennsylvania, involving both labor and management advocating for and against the classification of charter teachers as public employees, found that charter schools in both states were not political subdivisions but private employers. While the matter of jurisdiction seems settled in two states, it is apparent that the lack of uniformity in state oversight of privately-operated and publicly-funded charter schools will continue to raise concerns and questions in the field of labor and employment law and beyond.*


Reeling from the release of the National Study of Online Charter Schools (the "National Study"), an in-depth study by three prominent research organizations published in October 2015, the for-profit sector of publicly-funded privately-run virtual schools has found itself rocked by a domino effect of intensifying public scrutiny and state action.

And the stakes are high, with disputed industry practices and lapses in oversight diverting millions of dollars in state and local funds from traditional public schools.

Before the study's release, antagonism had grown heated in California, with legislators introducing four charter reform bills in 2015, all supported by California's largest teachers' unions. Among the proposed reforms was Assembly Bill 787 (AB 787), which aimed to abolish a handful of for-profit charter operators in California by requiring all charters to be established as state-chartered nonprofit corporations, a reform that would reclassify charter teachers as public employees.

Charter industry advocates, including the California Charter School Association, characterized the effort as misrepresentative of charter school performance in California, noting that proposed reforms were redundant with existing law. More importantly, advocates worried that AB 787 could compel industry-wide change in targeting a handful of for-profit operators.

On October 12, 2015, California Governor Jerry Brown offered reprieve. In announcing his veto of AB 787, Governor Brown explained the case "[had not] been made to eliminate for-profit charter schools in California," sparing the industry but exposing policymakers' inclination to use too broad a brush in painting charter reforms.

By the end of October, the National Study offered relief to the charter industry but proved a calamity for the online sector.

Funded by the Walton Family Foundation, the National Study was an extensive, three-volume examination of online charters, whose exponential growth had ballooned to an enrollment of 180,000 full-time students nationwide.

The study drew on quantitative statistical analyses of the academic performance of students who attend online charters, using statistical modeling that aligned the students' characteristics with those of peers attending brick-and-mortar schools.

The study's findings are not easily summarized but were unambiguous. Growth and achievement at online charters was appallingly low when compared to traditional public schools—only online students in Georgia and Wisconsin achieved better performance outcomes than statistically-modeled students.

Perhaps the most somber finding for online charters was that it was the *online* nature of the schools impacting academic achievement.

"Comparing online charter school students to brick-and-mortar charter students produced results which were nearly identical to the results derived from comparisons of online charter students and [traditional public school students]," researchers wrote.

Researchers nevertheless emphasized that reform was possible, even in spite of findings that school-based practices and state-level regulatory policy had little impact on academic performance.

Although supporters of online charter schools have argued that traditional assessment measures are poorly-suited to assess the sector's distinctive pedagogy and unique student characteristics (e.g., home- and hospital-bound pupils), broader

charter proponents began to distance themselves from online charter operators in the wake of the study.

On June 16, 2016, the National Alliance for Public Charter Schools (NAPC) published *A Call to Action to Improve the Quality of Full-Time Virtual Charter Public Schools,* proposing changes in industry policies and practices to remedy "notable" and well-documented problems with online charter instruction and oversight.

The message from NAPC was clear—low-performing online charters should be shuttered.

"If traditional public schools were producing such results, we would rightly be outraged. We should not feel any different just because these are charter schools," the NAPC wrote.

On July 8, 2016, several months after a two-part investigative report by the *San Jose Mercury News* scrutinized the use of public funds by educational management company K12, Inc., one of the nation's two largest for-profit online charter operators, opponents secured another victory.

California Attorney General Kamala D. Harris announced that K12 and California Virtual Academies ("CAVA"), a network of not-for-profit online charters founded by K12, had agreed to settle claims brought by the California Department of Justice and Susie Kaplar, a teacher once employed by CAVA campuses.

The allegations suggested more wrongdoing on the part of K12 than it did incompetence. Not only did K12 potentially commit consumer fraud by overstating key measures from student performance on standardized testing to a post-secondary pipeline, it may have flouted programmatic and financial controls, defrauding the State by overstating student attendance.

K12 settled the lawsuits by agreeing to provide $160 million in debt relief to the nonprofit schools it manages and an $8.5 million payment on claims ranging from consumer fraud to securities violations. To remedy any misgivings, K12 also agreed to sweeping reforms.

Despite the settlement, proponent Dr. Nicole Conragan, President of California Parents for Public Virtual Education, opined on July 27, 2016, that "[a]cademic standards for online schools are just as high as those at other public school…[and progress] is rigorously monitored by state education officials" in the Sacramento-based *Capitol Weekly*.

Whether K12 or other for-profit online operators can vindicate supporters like Conragan may depend on whether agreed-upon reforms extend beyond state lines.

The day after the publication of Conragan's op-ed, questions began to surface about K12 affiliate Georgia Cyber Academy, which state regulators described as among the state's poorest performers in student achievement. By August 10, 2016, t*he Atlanta Journal-Constitution* began to raise familiar questions about the charter's attendance policies, reporting practices, and use of public funds.

Whether the industry can react before dominos begin to fall in Georgia has yet to be seen. ■

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## Employers' Concerns

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to impose arrangements that the government has determined are preferable to those that would otherwise exist in the labor market.

These new limitations on compensation arrangements will have real consequences for how certain workplaces operate. For the first time, employers will be required to closely track hours worked by formerly exempt employees. While the rules do not necessarily require newly non-exempt employees to "punch in" and "punch out," many employers will feel compelled to impose such requirements in order to avoid being hit with claims for "off the clock" work. Employers will also have to monitor employee productivity to ensure that they are not unnecessarily incurring overtime. Although nothing in the rules prohibits employers from allowing flexible work hours, mobile access to electronic communications, or telecommuting, employers of newly non-exempt employees will have to carefully consider whether these arrangements are compatible with their obligation to properly track and compensate such employees for all hours worked under the FLSA. Many employers will conclude that the risk of "off the clock" claims and the difficulty of managing overtime is simply not worth whatever benefit they may derive from providing these employees with flexible work arrangements.

While some employers will likely be able to manage this shift with relative ease, others will face greater difficulties. Unfortunately, the employers who seem to be having the most difficulty figuring out how to address these changes are those that are already struggling: small businesses, nonprofits, and educational institutions. Many colleges and universities, for example, employ admissions personnel who are currently exempt but whose salaries fall below the new minimum salary level. These jobs may involve frequent travel and significant but unpredictable overtime during certain parts of the year. Simply tracking work hours for traveling non-exempt employees presents a significant challenge, and many colleges and universities are struggling to develop compensation plans that balance newly re-classified non-exempt employees' preferences for a predictable paycheck with increasingly strained budgets.

**On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to update the regulations defining which ``white collar" workers are protected by the FLSA's overtime standards.** AP PHOTOS

Employers are also rightly concerned that many of their employees will not welcome the changes required by the new rules. Many employees believe that being reclassified as "non-exempt" amounts to a demotion, even if it means they will now

be eligible for overtime pay. Further, many employees place a higher value on workplace autonomy than they do on additional compensation. Employees who are used to working at their own pace and having flexibility in their hours may not appreciate the additional scrutiny and control that will inevitably come as a result of rules that impose new financial burdens on employers who do not restrict work hours.

While some of the DOL's publicity around the new rules seems to suggest that they will result in an automatic pay increase for most affected employees, conversations with employers suggest otherwise. To the contrary, most employers seem to be looking at budget-neutral options. While this may involve reducing an employee's work hours, even that is not necessarily the case. If an employee works fairly regular hours, an employer can simply calculate an hourly rate that will match an employee's existing pay once any overtime is taken into consideration. Some employees may even see their pay reduced as employers set conservative hourly rates to hedge against unexpected overtime.

Lastly, the DOL has suggested that it expects the updated regulations to reduce the amount of FLSA litigation by creating a "bright line" exemption analysis for many employees. However, non-exempt employees file FLSA claims too. The basis for their claims may differ—for example, they may allege that employers failed to properly track their work hours, or incorrectly calculated overtime pay. Such claims are no less problematic for employers than misclassification claims. Moreover, the publicity surrounding the new rules is likely to draw additional attention to wage and hour issues, which seems highly likely to increase litigation at least in the short-term. This is may be good news for wage and hour lawyers, but it's certainly less than welcome for employers. ■

### The Salary Basis Test

The new white collar exemptions regulation overhauls the FLSA's Salary Basis Test. The Department of Labor opted not to alter The Duties Test for these overtime exemptions, which requires that an employee's most important duty be exempt in nature. The Department has long recognized that the salary paid to an employee is the best single test of exempt status and, since it provides an objective bright line, simplifies enforcement. The salary basis test requires that the white collar employee receive a fixed predetermined amount of compensation each week without variations due to quality or quantity of work performed. Currently, the required salary is $455/week. For purposes of the Highly Compensated Employee ("HCE") exemption, the employee must still be paid at least $455/week on a salary or fee basis, but the Duties Test is more relaxed so long as the HCE receives at least $100,000 per year in total compensation which may include commissions, nondiscretionary bonuses and other payments (including a one time "topping off" payment).

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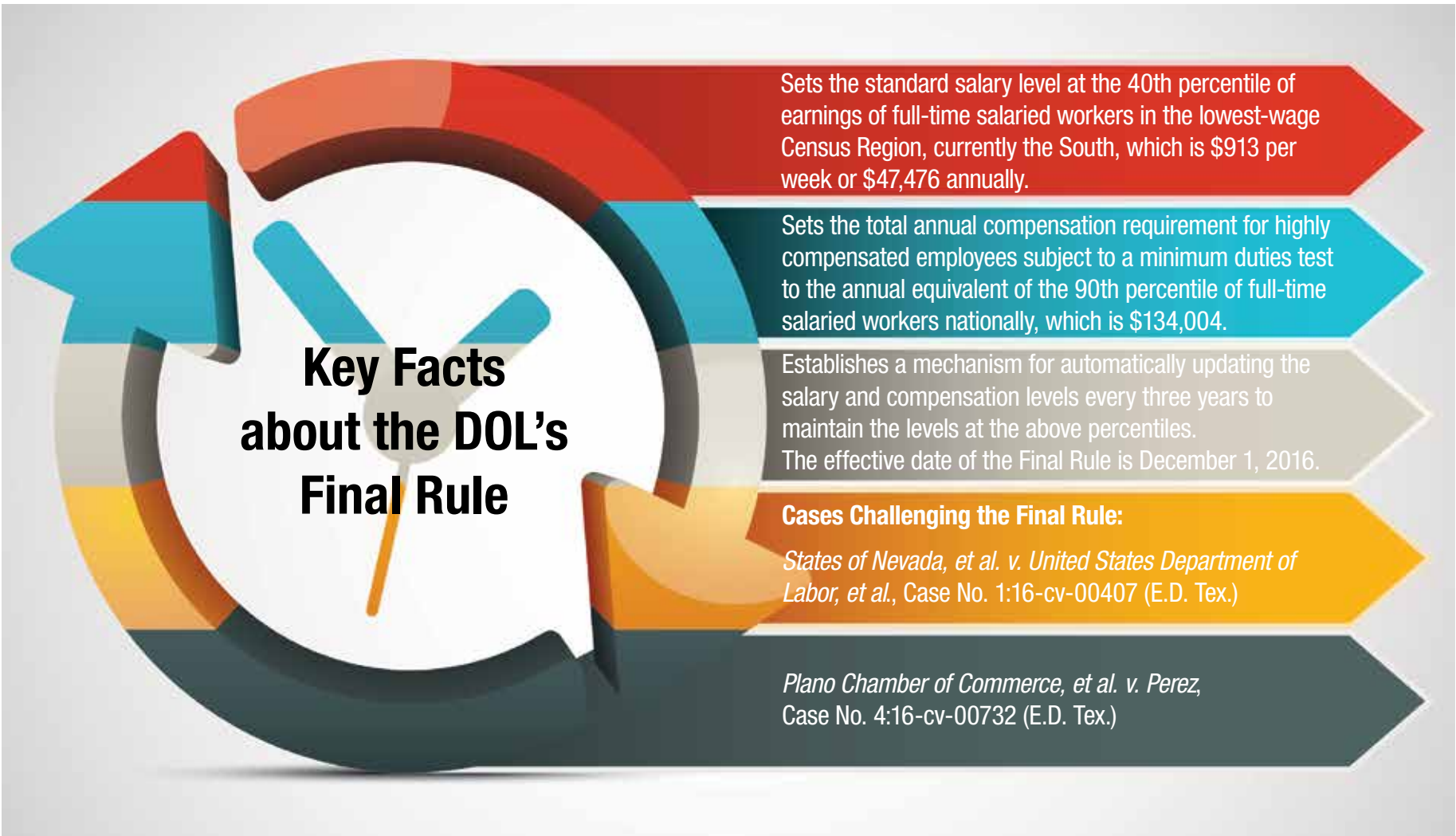

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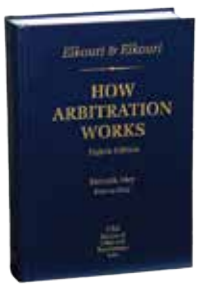


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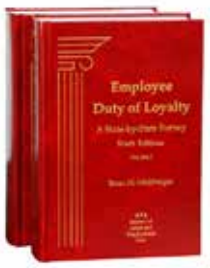


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## Employees Benefit

*continued from page 1*

regulations simply do not strike the proper balance needed to protect employees from having to work excessively long hours for a low wage. In fact, according to the U.S. Department of Health and Human Services, a worker earning $23,600 in 2016 would fall below the federal poverty line of $24,300 for a family of four. *See* 81 Fed. Reg. 4036 (Jan. 25, 2016). Yet, that same worker may currently be forced to work fifty, sixty, or even seventy plus hours per week without being paid overtime.

Now, under the new regulations, employers will have to either raise their employees' salaries above the new $47,476 minimum threshold in order for them to remain exempt, pay employees overtime when they work more than forty hours in a week, or hire additional employees to ensure that workloads are appropriately managed and employees do not work more than forty hours per week. In short, workers will either earn more money for their hard work and long hours, or they will have more time to spend with their families and to pursue their interests outside of work. Either way, the new regulations will have a profoundly positive impact on these workers' everyday lives.

The DOL's decision to include within the final rule an automatic update to the salary threshold every three years is also a welcomed addition. It has been twelve years since the current salary minimum of $23,600 was adopted in 2004. Prior to that, the short test salary threshold of $250 per week stood for nearly thirty years. It does not take an economist to understand that inflation depresses the real value of any fixed minimum salary over time. An annual salary of $23,600 simply is not worth the same amount today as it was in 2004. However, because the minimum salary was not adjusted to account for these valuation changes, today's hard-working employees continued to be paid the same low salary as employees in 2004, without the benefit of overtime. As a result, the minimum salary threshold became a useless measure for determining which employees truly should be exempt from the FLSA's overtime requirement.

By indexing the minimum threshold salary to the fortieth percentile of full-time salaried employees in the lowest-wage Census Region, and requiring that it be automatically updated every three years, the final rule ensures that the fixed minimum salary will maintain its value going forward. As a result, future employees will not face the same issue of being unfairly deprived overtime simply due to administrative and/or political delay. Rather, they will earn the same equivalent salary as today's employees.

Finally, many employers are objecting to the final rule because they are unprepared to deal with the higher fixed minimum salary, and other related issues. This problem is invariably caused by the number of years it has been since the last increase. To that end, by requiring the minimum salary to automatically update every three years, the final rule will allow employers to better prepare for all such increases in the future. Employers will not be caught off guard by, or unprepared to deal with, future increases to the minimum salary. Rather, they will need to budget for the increases, and adjust their business plans accordingly. Ultimately, this should result in a more stable workforce that strikes the proper balance between employer profitability *and* fairly compensating employees for their hard work. ■

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## Transnational

*continued from page 5*

the event of breach of contract, while also ensuring the proper monitoring of recruiters.

Building on the above success, CDM filed a NAALC communication with Mexico in the summer of 2016 addressing discrimination women confront in accessing the U.S. guestworker program, in their job placement under the program, and in their ultimate place of employment. Where U.S. courts are split on the jurisdictional reach of federal anti-discrimination laws, the NAALC again provides an opportunity for an extrajudicial response. The submission was filed simultaneously with a submission submitted by partner organizations addressing gender discrimination in the Canadian guestworker program. The inclusion of all three parties to the NAALC allows for transnational collaborations and strategies aimed at improving temporary worker programs.

These case studies demonstrate how advocates can maximize the space created under trade agreements such as the NAALC to promote cooperative activities between and among countries. While recognizing the limitations of mechanisms that are inherently political, they present important opportunities to advance the rights of workers generally invisible to the public discourse on trade and globalization. ■

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# Hard Decisions About Soft Footballs

**By Mark Risk**

Indianapolis Colts linebacker D'Qwell Jackson made a very "heads up" play. In the second quarter of the AFC Championship Game in January 2015, Jackson intercepted a pass thrown by legendary New England Patriots quarterback Tom Brady. Noticing that the ball felt soft, he showed it to Colts officials on the sideline, who immediately advised the NFL. Thus began the strangest sports labor dispute of this century.

The NFL tests the footballs before every game to make sure that they are inflated at the league standard. But when the Patriots' game balls were inspected at halftime, all eleven of them were below the standard. The Patriots defeated the Colts in a 45–7 blowout. Four days later, the NFL retained Theodore Wells of the New York Law Firm, Paul, Weiss, Rifkind, Wharton & Garrison to investigate whether there had been improper ball tampering. Wells issued a 139 page report that concluded that it was "more probable than not" that two Patriots employees had been part of a deliberate effort to release air from the game balls after the referee's pre-game examination of them.

The report found that shortly before the game a Patriots employee had removed the balls from the referee's locker room, taken them to a small bathroom, and deflated them with a needle before bringing them to the field. The Report concluded that it was "more probable than not" that Brady had been "at least generally aware" of the tampering.

NFL Commissioner Roger Goodell announced a four game suspension of Brady, exercising his authority under Article 46 of the Collective Bargaining Agreement between the NFL and its players association the NFLPA. Goodell's letter cited the Wells Report's findings as well as Brady's failure to provide his own emails and text messages to Paul Weiss. The NFLPA appealed, under a procedure unique to the NFL. Article 46 empowers the commissioner to impose discipline on players, and permits the NFLPA to appeal such decisions—to the Commissioner as hearing officer.

Tom Brady of the New England Patriots AP PHOTOS

Commissioner Goodell presided over a ten hour hearing, took 300 exhibits, and ultimately issued a decision affirming the four game suspension. Goodell's decision also drew an adverse inference based on new information that Brady had destroyed his own cell phone during the Wells investigation. Goodell's decision analogized Brady's conduct to that of a player using steroids for competitive advantage, noting that the four game suspension was the discipline typically imposed on first-time steroid users.

The NFLPA went to federal court seeking to vacate the award. Judge Harold Berman of the Southern District of New York granted the NFLPA's motion, finding that Brady lacked notice that his conduct could result in a suspension and not merely a fine, and that the NFLPA should have been granted production of the Paul Weiss internal notes and records. In April, 2016, however, the Second Circuit reversed Judge Berman's decision by a 2-1 vote.

Judge Barrington Parker's majority opinion noted the broad deference afforded to arbitration awards, and stated that Goodell's decision was "plausibly grounded" in the collective bargaining agreement, "which is all the law requires." The court was not troubled by the analogy to the steroid policy, stating that Brady was not entitled to advance notice that the arbitrator might make that analogy and that the Commissioner had the power to impose the suspension with or without reference to the steroid policy. The court rejected the NFLPA's contention that the Commissioner was limited to the Wells Report's conclusions, stating that "the point of a hearing in any proceeding is to establish a complete factual record." Commissioner Goodell had the right to draw a negative inference from Brady's destruction of his cell phone, and to decline to permit discovery of the Paul Weiss notes.

Chief Judge Robert Katzmann argued in dissent that the authority of the Commissioner sitting as arbitrator is limited under the Collective Bargaining Agreement to the appeal of the initial decision, "that is, whether the initial disciplinary decision was erroneous." Judge Katzmann argued that the Goodell decision characterized Brady's culpable conduct more harshly than the Wells report, and therefore was a departure from his authority under Article 46 to rule on an appeal of the initial suspension decision. Katzmann argued that the severity of the penalty imposed on Brady supported this conclusion, and that the Commissioner should have at least considered other penalties already incorporated in the collective bargaining agreement. He said that the NFL's standard $8000 fine for the use of "stickum", a substance used to help player hold the ball, should have been the starting point, since both are aimed at enhancing the player's grip on the ball. Judge Katzman argued that Goodell's decision undercut the Article 46 appeal process, which is intended to place limits on the Commissioner's authority to impose discipline.

In July, the Second Circuit denied the NFLPA's motion for rehearing en banc, and Brady and the Patriots made ready for him to serve the four game suspension at the beginning of the 2016 season. ■

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Labor AND Employment Law

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AMERICAN BAR ASSOCIATION
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# Calendar of Events

## 2016

October 29–30
**Law Student Trial Advocacy Competition**
U.S. Courthouse
Los Angeles, California
Miami, Florida
Washington, D.C.

November 5–6
**Law Student Trial Advocacy Competition**
U.S. Courthouse
Chicago, Illinois
Dallas, Texas

November 9–12
**10th Annual Section Conference**
Sheraton Chicago Hotel & Towers
Chicago, Illinois

November 19–20
**Law Student Trial Advocacy Competition**
U.S. Courthouse
New York, New York
Philadelphia, Pennsylvania
San Francisco, California

**For more event information, contact the Section office at 312/988-5813 or visit *www.americanbar.org/laborlaw*.**

## 2017

January 26–28
**State & Local Government Bargaining & Employment Law Committee Midwinter Meeting**
Westin Resort & Spa
Puerto Vallarta, Mexico

January 26–29
**ADR in Labor & Employment Law Committee Midwinter Meeting**
Westin Resort & Spa
Puerto Vallarta, Mexico

January 28–29
**Law Student Trial Advocacy Competition—National Finals**
U.S. Courthouse
New Orleans, LA

February 7–8
**Federal Sector Labor & Employment Law Committee Midwinter Meeting**
Marriott Marquis
Washington, D.C.

February 8–11
**Employee Benefits Committee Midwinter Meeting**
Hilton Austin
Austin, Texas

February 22–24
**Federal Labor Standards Legislation Committee Midwinter Meeting**
Grand Hyatt Playa del Carmen
Playa del Carmen, Mexico

February 26–March 1
**Committee on Development of the Law Under the NLRA Midwinter Meeting**
Westin Mission Hills Resort
Rancho Mirage, California

February 28–March 4
**Committee on Practice & Procedure Under the NLRA Midwinter Meeting**
Westin Mission Hills Resort
Rancho Mirage, California

March 7–10
**Occupational Safety & Health Law Committee Midwinter Meeting**
Wyndham Grand Jupiter
Jupiter, Florida

March 8–10
**Railway & Airline Labor Law Committee Midwinter Meeting**
Fairmont Sonoma Mission Inn
Sonoma, California

March 16–18
**Workers' Compensation Committee Midwinter Seminar & Conference**
*Co-Sponsored by the Tort, Trial and Insurance Practice Section*
Pointe Hilton Tapatio Cliffs
Phoenix, Arizona

March 21–25
**Employment Rights & Responsibilities Committee Midwinter Meeting**
Westin Resort
Puerto Vallarta, Mexico

March 23–25
**Ethics & Professional Responsibility Committee Midwinter Meeting**
Westin Resort
Puerto Vallarta, Mexico

March 29–April 1
**National Conference on Equal Employment Opportunity Law**
*Presented by the Equal Employment Opportunity Committee*
Loews New Orleans
New Orleans, Louisiana

April 5–7
**National Symposium on Technology in Labor & Employment Law**
Pres*ented by the Technology in the Practice and Workpl*ace Committee
Hotel Palomar
Washington, D.C.

May 7–11
**International Labor & Employment Law Committee Midyear Meeting**
The Westbury Hotel
Dublin, Ireland