Chapter 2

OPERATIONS AND FUNCTIONS   
OF THE DEPARTMENT OF LABOR

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I. Overview

This chapter reviews the role of the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) in administering[[1]](#footnote-2) the Fair Labor Standards Act (FLSA). It also addresses the role of the WHD Administrator (Administrator), appointed by the president to enforce and interpret the FLSA.[[2]](#footnote-3) The chapter focuses on the DOL’s organization and the WHD’s operations and activities, including its interactions with other parts of the DOL, particularly the Office of the Secretary and the Office of the Solicitor. The chapter discusses the WHD’s promulgation of FLSA regulations, interpretations, opinions, and other materials, and reviews whether and how much deference should be given to these materials. The chapter reviews the standards that have been applied by the courts in granting deference to DOL-issued guidance. Finally, the chapter describes the DOL processes for issuing special certificates for certain employment situations.

II. The Department of Labor’s Organization

A. Introduction

The DOL is a cabinet-level department of the federal government that administers and enforces more than 180 federal laws. These statutes and the regulations that implement them cover many workplace activities for about 150 million workers and 10 million workplaces.[[3]](#footnote-4) According to the DOL’s website, some of the principal statutes commonly applicable to businesses and job seekers include

* the Fair Labor Standards Act,
* the Occupational Safety and Health Act,
* the Federal Employees’ Compensation Act,
* the Black Lung Benefits Act,
* the Employee Retirement Income Security Act,
* the Labor Management Reporting and Disclosure Act,
* the Uniformed Services Employment and Reemployment Rights Act,
* the Employee Polygraph Protection Act,
* the Consumer Credit Protection Act,
* the Family and Medical Leave Act,
* the Davis-Bacon Act,
* the McNamara-O’Hara Service Contract Act,
* the Walsh-Healey Public Contracts Act,
* the Migrant and Seasonal Agricultural Worker Protection Act,
* the Immigration and Nationality Act,
* the Mine Safety and Health Administration Act, and
* the Worker Adjustment and Retraining Notification Act.[[4]](#footnote-5)

As an organization with diverse functions, the DOL meets its responsibilities through a number of offices and agencies, organized into major program areas and headed by an Assistant Secretary or other official. The DOL’s organizational chart[[5]](#footnote-6) is as follows:

Diagram

Description automatically generated with medium confidence

A list of the DOL’s agencies and programs can be found on the agency’s website.[[6]](#footnote-7) The four agencies that have primary responsibilities with respect to the FLSA are (1) the Office of the Secretary, (2) the Office of the Solicitor, (3) the Wage and Hour Division, and (4) the Administrative Review Board.

B. Secretary of Labor

The Secretary of Labor is the head of the DOL and, as a political appointee, is the president’s principal adviser charged with responsibility for

* overseeing and managing the functions of the DOL collectively with regard to laws affecting the workplace and unions, and issues pertaining to business-to-employee relationships;
* enforcing current laws;
* making recommendations for new laws;
* enforcing safety standards for the workplace;
* facilitating the analyzing and recording of job statistics;
* overseeing the dispensing of unemployment compensation benefits;
* testifying to Congress on matters having to do with employment and labor; and
* generating legislation and presenting it to Congress through the president.[[7]](#footnote-8)

The Secretary delegates functions to the Deputy Secretary of Labor and to other DOL officials.[[8]](#footnote-9)

C. Solicitor of Labor

The Solicitor of Labor is a Senate-confirmed appointee who reports directly to the Secretary and heads the Office of the Solicitor (SOL).[[9]](#footnote-10) The Solicitor is the third-ranking official in the DOL behind the Secretary of Labor and the Deputy Secretary of Labor.[[10]](#footnote-11) The Solicitor serves as legal advisor to the Secretary and other DOL officials and its legislative programs.[[11]](#footnote-12) The Solicitor has three Deputy Solicitors: the Deputy Solicitor of Labor, the Deputy Solicitor for National Operations, and the Deputy Solicitor for Regional Enforcement.[[12]](#footnote-13) The SOL has 400 lawyers organized into national divisions and seven regional offices and seven subregional offices; the lawyers are divided nearly equally between the national divisions and regional offices.[[13]](#footnote-14)

The SOL attorneys report to the Solicitor, rather than to the head of their assigned agency. Through longstanding delegation of authority from the U.S. Department of Justice (DOJ),[[14]](#footnote-15) the Solicitor represents the Secretary and the client agencies in all necessary litigation, including both enforcement actions and defensive litigation.[[15]](#footnote-16) As a practical matter, the Solicitor is broadly empowered to conduct enforcement litigation in the federal courts, such as civil actions to recover back wages, or to work with the DOJ to do so. The Solicitor also litigates before the DOL’s Office of Administrative Law Judges (OALJ) and administrative appellate tribunals. The SOL makes recommendations to the Solicitor General of the United States concerning whether and how to conduct appeals before the federal circuit courts of appeals and the U.S. Supreme Court. It also briefs and argues most of the DOL’s cases in the federal courts of appeals. Finally, the Solicitor serves as co-counsel with the DOJ in a range of other litigation—such as defense of DOL rulemaking—that implicates the DOL’s activities.[[16]](#footnote-17)

The SOL’s 10 divisions in Washington, D.C., are primarily organized by program-specific areas but “are also structured to provide the client agencies with a single servicing office to the extent possible.”[[17]](#footnote-18) Each division is headed by an Associate Solicitor and a Deputy Associate Solicitor. The Associate Solicitor for Fair Labor Standards (FLS) is responsible for providing legal services in connection with the WHD’s administration and enforcement of a broad range of federal labor standards laws. The FLS Division attorneys handle primarily appellate litigation, as well as the preparation of regulations, interpretations, and opinions pertaining to these statutes, and advise the Solicitor, WHD, and other programs.[[18]](#footnote-19)

The SOL Office is organized into seven regional offices and seven branch offices that handle the trial court litigation.[[19]](#footnote-20) The regional offices are headed by a Regional Solicitor and Deputy Regional Solicitor; each branch office is headed by an Associate Regional Solicitor, who reports to the Deputy Solicitor for Regional Enforcement, who in turn reports directly to the Solicitor.[[20]](#footnote-21) Every SOL Regional Office has a Wage and Hour Counsel who supervises all wage and hour litigation and is the point person for the WHD within that region. The SOL Regional Office attorneys recommend and prosecute litigation at the administrative and district trial court levels, prepare legal interpretations and opinions, assist WHD during investigations, and assist DOJ’s offices within that region in civil and criminal prosecutions.[[21]](#footnote-22)

D. Wage and Hour Administrator

The WHD Administrator directs the activities of the WHD[[22]](#footnote-23) and reports to the Secretary.[[23]](#footnote-24) The Administrator is a Senate-confirmed appointee responsible for enforcing over 13 laws, including the FLSA, that establish labor standards to protect the welfare of the nation’s workforce.[[24]](#footnote-25) The Administrator has four direct reports—a Chief of Staff, a Senior Policy Advisor, and two Deputy Administrators. Reporting to the Deputy Administrator are four additional Policy Advisors, five Associates, and five Regional Administrators.[[25]](#footnote-26)

The Administrator generally is empowered to act either directly by statute or by delegation from the Secretary.[[26]](#footnote-27) The Deputy Administrator for Regional Enforcement and Support has direct authority over the Regional Administrators.[[27]](#footnote-28) Regional Administrators oversee the activities of District Directors in the local district offices in their region. District Directors supervise Assistant District Directors, who supervise WHD’s “front line” investigators.[[28]](#footnote-29) Investigators implement the Administrator’s powers in the field. The traditional role of Wage and Hour investigators has been to investigate employer compliance with the laws enforced by the WHD. Enforcement priorities often change with changes in presidential administrations.

E. Office of Administrative Law Judges/Administrative Review Board

The Office of Administrative Law Judges (OALJ) is the administrative trial court for the DOL. The OALJ hears employers’ contests to the WHD’s assessment of civil money penalties and violations of the FLSA, along with disputes involving 80 other statutes. The OALJ is headquartered in Washington, D.C., and has judges and staff located in eight district offices from which it hears cases nationwide as the third largest administrative law judge (ALJ) office in the federal government.[[29]](#footnote-30) ALJs are appointed under the U.S. Constitution Article II, Section 2, clause 2, and the Administrative Procedure Act, 5 U.S.C. §1305.[[30]](#footnote-31)

In 1996, Secretary Reich created the Administrative Review Board (ARB), to which he delegated his authority to issue final agency decisions regarding decisions issued by the OALJ.[[31]](#footnote-32) The jurisdiction of the Board includes child labor cases. The Board’s cases generally arise on appeal from a decision by the DOL’s ALJ or a determination by the Administrator of the Department’s Wage and Hour Division.[[32]](#footnote-33) In 2020, Secretary Scalia issued Order 01-2020, granting him the right to review ARB decisions of exceptional importance.[[33]](#footnote-34) Under the FLSA, parties may appeal the final agency decisions to federal district or appellate courts and ultimately to the U.S. Supreme Court.[[34]](#footnote-35)

III. Judicial Deference to Agency Actions Taken by the Department of Labor’s Wage   
and Hour Division[[35]](#footnote-36)

Courts may defer—or not—to a federal agency’s interpretation of either a statute that Congress instructed the agency to administer or a regulation promulgated by the agency. This section of the chapter sets forth the categories of deference that have been established by the U.S. Supreme Court and when each is applicable, and then reviews deference cases arising from the DOL’s actions under the FLSA.

A. Overview

This chapter is primarily concerned with the DOL’s rulemaking. Formal rulemaking is subject to the notice-and-comment procedures outlined in 5 U.S.C. §553. Informal rulemaking, which includes “interpretative rules, general statements of policy, rules of agency procedure, or rules of agency practice” is exempt from these procedures.[[36]](#footnote-37)

Three different “levels” of deference can apply in determining whether the agency action should be accorded binding or persuasive weight. First, *Chevron*[[37]](#footnote-38) deference applies to agency actions that carry out an express or implied delegation by Congress to the agency to interpret an ambiguous statute through rules carrying the force of law. The *Chevron* standard is extremely deferential—an interpretation owed *Chevron* deference is binding unless it is unreasonable.[[38]](#footnote-39) Second, deference under *Auer v. Robbins*[[39]](#footnote-40) applies to the agency’s interpretations of its own ambiguous regulations. The *Auer* standard is similar to *Chevron* and is also highly deferential—interpretations under *Auer* are binding unless they are plainly erroneous or inconsistent with the regulation.[[40]](#footnote-41) Third, if a regulation does not warrant deference under *Chevron* or *Auer*, a court may afford a degree of deference under *Skidmore v. Swift*,[[41]](#footnote-42) depending on the persuasiveness of the regulation.[[42]](#footnote-43) Whether, when, and how these various deference levels apply are discussed below.

B. *Chevron* Deference

1. What is Chevron Deference?

In 2001, the Supreme Court, quoting *Chevron*, stated:

When Congress has “explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.[[43]](#footnote-44)

In *Chevron*, the Court upheld the Environmental Protection Agency’s regulation interpreting the Clean Air Act Amendments of 1977 and set forth what is generally referred to as the “*Chevron* two-step test” to determine if deference should apply to an agency’s regulatory interpretation. “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions,” addressed below.[[44]](#footnote-45)

a. Step One—Is the Statute Silent or Ambiguous With Respect to the Precise Issue?

Step one of the *Chevron* deference analysis evaluates whether the statute is silent or ambiguous on the precise issue addressed by the agency as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court … as well as the agency, must give effect to the unambiguously expressed intent of Congress.[[45]](#footnote-46)

The Supreme Court in *Chevron*recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.”[[46]](#footnote-47) In other words, if the statute is silent with respect to the precise issue, *Chevron* deference will apply where Congress has left a “gap” for the agency to fill.

Implicit delegation can be apparent

from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.[[47]](#footnote-48)

b. Step Two—Is the Agency’s Construction of the Statute Reasonable?

If the intent of Congress is unclear, or if the statute lacks direct language on a specific point, then the second step of *Chevron* is triggered:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.[[48]](#footnote-49)

If a court finds “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation … [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”[[49]](#footnote-50) If the delegation by Congress was implicit, then as long as the agency’s interpretation is reasonable, a court cannot substitute its own statutory construction superior to the agency’s construction.[[50]](#footnote-51) The Court concluded:

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[[51]](#footnote-52)

c. To What Agency Actions Does Chevron Apply?

The Supreme Court has observed that, in many of the cases where *Chevron* deference has been invoked, the regulation under review has been the product of notice-and-comment rulemaking.[[52]](#footnote-53)However, the Supreme Court indicated that the absence of formal rulemaking procedures is not determinative of whether a regulation will receive deference.[[53]](#footnote-54) Although agency action that does not have “the force of law” is not entitled to *Chevron* deference,[[54]](#footnote-55) courts and commentators disagree about what this means, and whether and when *Chevron* deference applies to agency action that is not formal notice-and-comment rulemaking.[[55]](#footnote-56)

2. The Supreme Court’s Application of Chevron Deference in FLSA Cases

Applying *Chevron* principles in FLSA cases involving deference shows that the label given to a regulation is not determinative in the level of deference it receives. In *Long Island Care at Home, Ltd. v. Coke*,[[56]](#footnote-57) at issue was a DOL regulation[[57]](#footnote-58) that allowed third-party employers to take advantage of a minimum wage and overtime exemption for companionship service workers. The regulation was drafted by the DOL following Congress’s enactment of Section 213(a)(15), which, in part, exempts from minimum wage and overtime “any employee employed in domestic service employment to provide companionship services for individuals … who … are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).”[[58]](#footnote-59)

The plaintiffs challenged the regulation, arguing that it fell under a section entitled “Interpretations.” But the Supreme Court gave no import to the DOL’s labeling of the regulation as an “interpretation,” instead finding that because Congress had given the Secretary rulemaking authority and the agency had used the full public notice-and-comment procedure in promulgating the rule, the third-party interpretive regulation was entitled to *Chevron* deference because it appropriately filled a statutory gap and was valid and binding.[[59]](#footnote-60)

Under step two of *Chevron,* however, *Chevron* deference will not be granted to a legislative regulation promulgated after notice and comment where an agency has changed its position on a matter and has not provided an adequate reason for the change. Such was the case in *Encino Motorcars, LLC v*. *Navarro (Encino I)*.[[60]](#footnote-61) In *Encino I*, service advisors employed by an auto dealership filed suit seeking overtime compensation for time worked in excess of 40 hours. A district court in California granted the dealership’s motion to dismiss on the ground that service advisors are covered by the statutory exemption from overtime in Section 213(b)(10)(A). The Ninth Circuit granted *Chevron* deference to the DOL’s 2011 regulation providing that service advisors were not exempt, despite noting that the DOL’s position had changed on the issue.[[61]](#footnote-62)

The Supreme Court vacated and remanded the case to the Ninth Circuit.[[62]](#footnote-63) It held that because the DOL’s 2011 interpretation of Section 213(b)(10)(A) “was issued without the reasoned explanation that was required in light of the DOL’s change in position and the significant reliance interests involved,” the provision must be construed without placing controlling weight on that interpretation.[[63]](#footnote-64) The Court noted that one of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.[[64]](#footnote-65) “But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”[[65]](#footnote-66) The Court explained that “agencies are free to change their existing policies as long as they provide a reasoned explanation for the change,”[[66]](#footnote-67) and “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”[[67]](#footnote-68) However, an “agency must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”[[68]](#footnote-69) The Court emphasized thatan agency “must … be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account,’”[[69]](#footnote-70) and pronounced that an “‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,” and not worthy of *Chevron* deference.[[70]](#footnote-71)

C. *Auer* Deference and the *Kisor* Clarification

1. Auer Deference

*Auer* deference is similar to but distinct from *Chevron* deference. In *Auer v. Robbins*,[[71]](#footnote-72) an FLSA case, the Supreme Court took a deferential approach to an agency’s interpretation of its own regulations, asking only (1) is the regulation ambiguous and if so (2) is the agency’s interpretation plainly erroneous or inconsistent with the regulation?[[72]](#footnote-73)

In *Auer*, the Court deferred to the Secretary’s interpretation of the DOL’s salary basis regulations as proffered in a DOL amicus brief, reasoning that “because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”[[73]](#footnote-74) Thus, the Supreme Court gave force of law to the Secretary’s view about when an employee’s compensation is “subject to reduction” so as to bar a finding of salaried status.[[74]](#footnote-75) The Court also deferred to the Secretary’s interpretation of the so-called window of correction (allowing in appropriate circumstances, and under regulations in effect at the time, for the restoration of salaried status despite an impermissible salary deduction) as being applicable even where the employer does not repay improper salary deductions immediately.[[75]](#footnote-76)

The Supreme Court has since refined the contours of *Auer* deference. In *Christensen v. Harris County*,[[76]](#footnote-77) the Court considered whether to afford *Auer* deference to a DOL opinion letter interpreting its own regulation. In declining to do so, the Court cautioned that

*Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.[[77]](#footnote-78)

In 2012, in *Christopher v*. *SmithKline Beecham Corp.*,[[78]](#footnote-79) the Supreme Court again reviewed whether the DOL’s interpretation of its own regulations was entitled to *Auer* deference. There the Supreme Court held that the outside salesperson exemption applied to pharmaceutical sales representatives whose primary duty was to obtain nonbinding commitments from physicians to prescribe their employer’s prescription drugs. The Court first observed that the DOL’s position before the Supreme Court on the issue of what constitutes a “sale” for purposes of the outside sales exemption had changed from the brief it filed in the Second Circuit. With this change of position in mind, the Court determined that the DOL interpretation was not entitled to *Auer* deference because its interpretation was “quite unpersuasive.”[[79]](#footnote-80) In particular, the Court found that the DOL’s position that a “sale” requires a transfer of title “plainly lack[ed] the hallmarks of thorough consideration” and was “flatly inconsistent” with the language of the FLSA, which provides that a sale can include a “consignment for sale,” a transaction that does not involve a transfer of title.[[80]](#footnote-81)

The Court also emphasized that the DOL’s new position on the definition of a “sale” did not provide “fair warning” to stakeholders.[[81]](#footnote-82) It found that deferring to the DOL’s position could impose unanticipated and “potentially massive liability” on pharmaceutical companies,[[82]](#footnote-83) noting that for decades the DOL never initiated any enforcement actions with respect to the misclassification of pharmaceutical sales representatives or otherwise suggested the pharmaceutical industry was violating the law. Such a decades-long silence, the Court suggested, indicated the DOL had acquiesced in the position that the pharmaceutical sales representatives are properly classified as exempt outside salespersons.

Because the DOL’s interpretation was neither entitled to *Auer* deference nor persuasive in its own right, the Court used “traditional tools of interpretation” to determine whether pharmaceutical sales representatives fell within the outside sales exemption.[[83]](#footnote-84)

2. Kisor Clarification

In a 2019 case that did not involve the FLSA, *Kisor v. Wilkie*,[[84]](#footnote-85) the Supreme Court considered whether to overrule the *Auer* doctrine. In declining to do so, the Court explained that *Auer* deference imparts “predictability to the administrative process” and serves to ensure consistency in regulatory law.[[85]](#footnote-86) However, the Court acknowledged that its past decisions sent “mixed messages” and that the Court had applied *Auer* deference in a seemingly “reflexive” way without significant analysis of or careful attention to the nature and context of the interpretation.[[86]](#footnote-87) The *Kisor* Court proceeded to clarify the principles for applying *Auer* deference. First, the Court noted that *Auer* deference requires that the agency regulation at issue be “genuinely ambiguous.”[[87]](#footnote-88) Second, the Court instructed that, before concluding that a regulation is genuinely ambiguous, the court must exhaust all “traditional tools” of construction, as with *Chevron* deference.[[88]](#footnote-89) To make that effort, the court must “carefully consider the text, structure, history, and purpose of the regulation.”[[89]](#footnote-90) Third, where ambiguity exists, the agency’s reading is not worthy of deference unless it is “within the bounds of reasonable interpretation,” again, as is the case when applying *Chevron* deference.[[90]](#footnote-91)

The Court in *Kisor* went on to emphasize that not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference.[[91]](#footnote-92) A court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.[[92]](#footnote-93) The interpretation must be the agency’s “authoritative” or “official position” and it must at least “emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context.”[[93]](#footnote-94) Conversely, it may not be an ad hoc statement, as is seen in informal memoranda or speeches.[[94]](#footnote-95) Likewise, the interpretation must in some way implicate the particular agency’s substantive expertise.[[95]](#footnote-96) “When an agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it authority.”[[96]](#footnote-97) Finally, the agency’s reading of the regulation must reflect “fair and considered judgment” to receive *Auer* deference.[[97]](#footnote-98) This means that a court should decline to defer to a “convenient litigating position” or “post hac rationalization” advanced to defend agency action from attack.[[98]](#footnote-99) A court should not defer to a new interpretation that creates an unfair surprise to regulated parties, and rarely will *Auer* deference be given to an agency construction that conflicts with a prior one.[[99]](#footnote-100)

The *Kisor* Court emphasized that *Auer* deference will not always apply, but when it does, it “gives an agency significant leeway to say what its own rules mean. In doing so, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But the phrase ‘when it applies’ is important—because it often doesn’t.”[[100]](#footnote-101)

D. *Skidmore* Deference

In *Christensen v. Harris County*,[[101]](#footnote-102) the Court held that “interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”[[102]](#footnote-103) The Court went on: “Instead, interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co*., but only to the extent that those interpretations have the ‘power to persuade.’”[[103]](#footnote-104)

In *Skidmore v. Swift & Co*.,[[104]](#footnote-105) an FLSA case, the employer challenged an interpretive bulletin issued by the Administrator. At issue was whether “waiting time” spent on the employer’s premises by fire guards, subject to call, could be considered “working time” under the FLSA. The district court and the Fifth Circuit ignored the Administrator’s interpretive bulletin on that subject, determining that “waiting time” could never be considered work time under the FLSA.[[105]](#footnote-106)

The Supreme Court, by contrast, sought guidance from the Administrator’s “waiting time” bulletin, noting that

the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and [the Administrator’s] Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. [examples omitted] … the answer depends ‘*upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work*.’[[106]](#footnote-107)

The Supreme Court concluded that “the rulings, interpretations and opinions of the Administrator under this Act [FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants could properly resort for guidance.”[[107]](#footnote-108) It noted, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”[[108]](#footnote-109)

Applying these standards to the DOL’s “waiting time” interpretive bulletin, the Court found that since the waiting time of the fire hall employees in question did not fall within any of the specific examples provided, the general rule in the bulletin (referenced in italics above) should be applied. Applying the agency’s guidance “would exclude sleeping and eating time of these employees, but include as compensable time all other on-call time.”[[109]](#footnote-110) The Court deemed the interpretive bulletin persuasive:

There is no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions. And while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. *But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case*. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the [FLSA] and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. *The fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect*. This Court has long given considerable, and in some cases decisive, weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.[[110]](#footnote-111)

The Third Circuit in *Secretary United States Department of Labor v. American Future Systems, Inc.*[[111]](#footnote-112) adopted a “‘sliding-scale’ test” for application of *Skidmore*deference.[[112]](#footnote-113) Under this test, the weight afforded to an interpretation varies depending on whether the interpretation was “(1) issued contemporaneously with the statute; (2) consistent with other agency pronouncements; (3) reasonable given the language and purposes of the statute; (4) within the expertise of the relevant agency; and (5) part of a longstanding and unchanging policy.”[[113]](#footnote-114)

E. Deference As Applied to Actions by the Department of Labor

The DOL issues regulations (both legislative and interpretive), opinion letters, amicus briefs, a *Field Operations Handbook*,[[114]](#footnote-115) bulletins, and other DOL material. Whether and to what extent any of these materials are entitled to *Chevron, Auer,* or *Skidmore* deference depends upon the nature of the issue and whether they were subjected to notice and comment. The tests set forth in Sections III.B, III.C, and III.D above are applicable to each of these materials. In addition, when reviewing material for *Auer* deference, *Kisor*’s multifactor test will come into play.

1. Regulations

Regulations issued by the WHD can be found in 29 C.F.R. Parts 500–899. These regulations are divided into two subchapters. Subchapter A is titled “Regulations” and consists of regulations from 29 C.F.R. §500.0 to 29 C.F.R. §697.4. Commonly cited regulations in this subchapter include

* 29 C.F.R. §§516.0–516.34—Records to Be Kept by Employers;
* 29 C.F.R. §§531.1–531.60—Wage Payments Under the FLSA;
* 29 C.F.R. §§541.0–541.710—Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees;
* 29 C.F.R. §§552.1–552.110—Application of the FLSA to Domestic Service;
* 29 C.F.R. §§553.1–553.233—Application of the FLSA to Employees of State and Local Governments;
* 29 C.F.R. §§570.1–570.142—Child Labor Regulations, Orders and Statements of Interpretation; and
* 29 C.F.R. §§578.1–578.4—Minimum Wage and Overtime Violations—CMPs.

Subchapter B is titled “Statements of General Policy or Interpretations Not Directly Related to Regulations,” and consists of regulations from 29 C.F.R. §775.0 to 29 C.F.R. §794.144. Commonly cited statements of general policy in this sub-chapter include

* 29 C.F.R. §§776.0–776.30—Interpretive Bulletin on the General Coverage of the Wage and Hour Provisions of the FLSA;
* 29 C.F.R. §§778.0–778.603—Overtime Compensation;
* 29 C.F.R. §§779.0–779.515—The FLSA As Applied to Retailers of Goods or Services;
* 29 C.F.R. §§785.1–785.50—Hours Worked; and
* 29 C.F.R. §§791.1–791.3—Joint Employer Status Under the FLSA.

Despite what might appear to be a clear distinction between “Regulations” in Subchapter A[[115]](#footnote-116) and “Statements of General Policy or Interpretation Not Directly Related to Regulations” in Subchapter B,[[116]](#footnote-117) sorting out what is properly considered a legislative rule from an interpretive rule has been the source of debate and litigation.[[117]](#footnote-118) Like other federal administrative agencies, the DOL follows the Administrative Procedure Act (APA),[[118]](#footnote-119) and distinguishes between “legislative rules” and “interpretive rules,” as described below.[[119]](#footnote-120)

a. Legislative Regulations

Under the APA, “legislative regulations” are issued through notice-and-comment rulemaking procedures.[[120]](#footnote-121) Where the FLSA delegates to the Secretary the authority to craft regulations and those regulations are promulgated pursuant to notice and comment, they are generally given the force and effect of law if they meet the *Chevron* standards. For example, in Section 213(a)(1), the FLSA expressly authorizes the Secretary to “define and delimit by regulation” the scope of the white-collar exemptions.[[121]](#footnote-122) In conformance with this authority the DOL issued implementing regulations at 29 C.F.R. §541, titled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees,” and subjected the regulations (and their updated amendments) to the notice-and-comment procedure. The Supreme Court has found that the 2004 version of the 541 regulations was entitled to *Chevron* deference because it was validly promulgated.[[122]](#footnote-123)

In general, legislative regulations will be accorded *Chevron* deference so long as they satisfy the two-step *Chevron* test.[[123]](#footnote-124) For example, in *Nevada v. U.S. Department of Labor*,[[124]](#footnote-125) at issue were changes that the DOL made to the 29 C.F.R. §541 regulations that define white-collar exempt employees. One of the changes made to the regulations was to increase the minimum salary from $455/week to $913/week. Because of the far-reaching effect of the increase, 22 states and more than 50 businesses sought an injunction to stop implementation of the amended DOL regulations.[[125]](#footnote-126) The district court held that the proposed amendments to the regulation, which had been subject to substantial notice and comment, did not meet the first step of *Chevron* because the statute was not ambiguous, finding that nothing in 29 U.S.C. §213(a)(1) indicated Congress intended the DOL to define or delimit the exemptions by reference to a minimum salary level.[[126]](#footnote-127) In doing so, the court reasoned that the DOL “exceeds its delegated authority” when it “ignores Congress’s intent by raising the minimum salary level such that it supplants the duties test.”[[127]](#footnote-128) The district court later granted the plaintiffs’ summary judgment motion on the same grounds.[[128]](#footnote-129)

Courts were split on whether the DOL’s 2011 tip credit regulation, 29 C.F.R. §531.52, should be given any deference. Like the regulation in *Nevada*, the 2011 tip credit regulations were subject to notice-and-comment rulemaking. At issue was who owned the tips.

In *Oregon Restaurant & Lodging Association v*. *Perez*,[[129]](#footnote-130) the Ninth Circuit afforded *Chevron* deference to the DOL’s 2011 regulations restricting tip-pooling practices where an employer does not take a tip credit. The court found that Section 203(m) of the FLSA was silent regarding the DOL’s ability to regulate tip-pooling practices for employers who do not take a tip credit and, therefore, the DOL had “room for agency discretion” under *Christensen*.[[130]](#footnote-131) Moreover, the court found that the DOL’s rule interpreting Section 203(m) as restricting tips from being provided to nontipped employees even when the tip credit is not utilized is consistent with the FLSA’s language, legislative history, and purpose.[[131]](#footnote-132) After Section 203(m) was amended by Congress,[[132]](#footnote-133) the DOL took the position in a petition for Supreme Court review that it lacked authority to promulgate the 2011 regulations,[[133]](#footnote-134) and courts have differed on whether to defer to the DOL’s new view.[[134]](#footnote-135)

The Tenth Circuit, in *Marlow v. New Food Guy, Inc*.,[[135]](#footnote-136) rejected the Ninth Circuit’s analysis, and instead held no deference should be afforded the tip credit regulation insofar as it extended to the circumstances in which an employer does not take a tip credit. The court found that there was no statutory language directing the DOL to regulate the ownership of tips when the employer is not taking the tip credit.[[136]](#footnote-137) It rejected the premise that Section 203(m)’s “silence” about employers who decline the tip credit implicitly empowered the agency to fill the “gap.”[[137]](#footnote-138) Thus, the court concluded the DOL was without authority to regulate as to the ownership of tips absent the employer taking the tip credit.[[138]](#footnote-139) Other courts also declined to grant *Chevron* deference to the DOL’s 2011 tip credit regulation.[[139]](#footnote-140)

b. Interpretive Regulations

Interpretive rules, in contrast with regulatory rules, are exempted from the APA’s notice-and-comment procedures.[[140]](#footnote-141) They are generally “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”[[141]](#footnote-142) The process of issuing interpretive rules is “comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”[[142]](#footnote-143)

Interpretive rules that have not been promulgated through notice and comment may, nevertheless, still be afforded some lesser level of deference by the courts. As noted above, the rationale and analytic framework for applying deference to rulings, interpretations, and opinions of the Administrator under the FLSA were first set out by the Supreme Court in *Skidmore v. Swift & Co*.[[143]](#footnote-144)

Courts may grant some level of *Skidmore* deference to interpretative regulations.[[144]](#footnote-145) Where the agency’s position is not reasonable, however, no deference is due.[[145]](#footnote-146)

c. What Rules Apply—Legislative or Interpretive—When an Agency Changes Its Position on an Interpretive Regulation?

Prior to *Kisor,* the Supreme Court, in *Perez v. Mortgage Bankers Association*,[[146]](#footnote-147) took up the DOL’s change of opinion regarding whether mortgage loan officers were exempt under the “541 regulations.” The 2004 version of the 541 regulations listed as an example of exempt administrative employees “employees in the financial services industry” who, depending upon the nature of their day-to-day work, “generally meet the duties requirements for the administrative exemption.”[[147]](#footnote-148) Following the issuance of the 2004 regulations, the Mortgage Bankers Association requested an opinion letter from the DOL interpreting the revised regulations with respect to the position of mortgage loan officer. In 2006, the DOL issued an opinion letter finding that mortgage loan officers fell within the administrative exemption under the 2004 regulations.[[148]](#footnote-149)

However, four years later, the DOL revised its position and in an administrative interpretation concluded that mortgage loan officers “have a primary duty of making sales for their employers, and therefore do not qualify” for the administrative exemption.[[149]](#footnote-150) The Mortgage Bankers Association challenged the administrator’s interpretation as being inconsistent with the 2004 regulations it purported to interpret, and thus arbitrary and capricious in violation of Section 10 of the APA. The Supreme Court did not agree. It held that a federal administrative agency is not required to use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from the one the agency has previously adopted,[[150]](#footnote-151) thereby finding that the *Paralyzed Veterans* doctrine was contrary to the clear text of the APA’s rulemaking provisions.[[151]](#footnote-152) The Court held that by mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress’ standards.[[152]](#footnote-153)

2. Opinion Letters and Non-Administrator Letters

The DOL, before March 2010 and starting again in January 2018, issues Opinion Letters from the Administrator in response to particular inquiries about compliance under the FLSA, as well as Non-Administrator Letters from the WHD.[[153]](#footnote-154) The last Non-Administrator Letters were issued in 2009.[[154]](#footnote-155)

Opinion letters have two forms of legal significance. First, the Portal-to-Portal Act of 1947[[155]](#footnote-156) provides a defense to a back wage claim based on good faith reliance on “any written administrative regulation, order, ruling, approval, or interpretation” of the Administrator, or “any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.”[[156]](#footnote-157) This defense is available even if the opinion letter is not given *Chevron* deference.[[157]](#footnote-158) The good faith defense is more fully discussed in Chapter 16, Litigation Issues. Second, when offered by someone other than the party to whom it was issued, such a letter may be used, if the matter is sufficiently similar, to show the DOL’s reasoning on a specific issue.[[158]](#footnote-159)

In some cases, courts have found the DOL’s opinion letters to be persuasive authority,[[159]](#footnote-160) but in other cases courts have found deference unwarranted.[[160]](#footnote-161)

3. Administrator Interpretations

From 2010 through 2016, the Administrator issued seven “administrator interpretations” (rather than opinion letters).[[161]](#footnote-162) The Administrator explained that the use of administrator interpretations instead of opinion letters was “to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees” when determined, in the Administrator’s discretion, that “further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate.”[[162]](#footnote-163)

Effective June 7, 2017, the WHD announced that its “2015 and 2016 informal guidance on joint employment and independent contractors were withdrawn,” noting “[r]emoval of the two administrator interpretations does not change the legal responsibilities of employers under the” FLSA or Migrant and Seasonal Agricultural Worker Protection Act “as reflected in the Department’s long-standing regulations and case law.”[[163]](#footnote-164)

In some cases, courts have found the administrator interpretations persuasive,[[164]](#footnote-165) and in other cases, courts have not.[[165]](#footnote-166)

4. Amicus Briefs

The Fair Labor Standards Division attorneys in the Office of the Solicitor handle primarily appellate litigation as well as filing amicus briefs in both federal and state appellate courts. In some of these cases, the appellate court has requested that the DOL submit a brief outlining the position of the DOL.[[166]](#footnote-167) Other briefs have been filed because the DOL actively encourages litigants to seek the support of the DOL when filing appeals that involve significant FLSA matters. Although the DOL’s position as articulated in an amicus brief may be entitled to deference, whether any deference is owed depends on the circumstances. In some situations, courts have deferred to positions taken in amicus briefs,[[167]](#footnote-168) and in other situations courts have not deferred.[[168]](#footnote-169) Illustrative of these differing outcomes are the Supreme Court’s decisions in *Auer v. Robbins*[[169]](#footnote-170)and *Christopher v*. *SmithKline Beecham Corp.*;[[170]](#footnote-171) deference was afforded to a DOL amicus brief position in the former case but not in the latter.

5. Field Operations Handbook

The *Field Operations Handbook* is an “operations manual” that provides WHD investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. The *Field Operations Handbook* (FOH) was developed by the WHD under the general authority to administer laws the agency is charged with enforcing. “The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretative policy.”[[171]](#footnote-172)

In March 2018, as a result of a Freedom of Information Request, the WHD’s Disclosure Officer provided information about the *Field Operations Handbook* and responded as follows to the request for “copies of all documents regarding the WHD Field Operations Handbook”:

The WHD no longer uses the following FOH Chapters: 1–9, 17–19, 26–29, 34–35, 37–38. 40–45, 55, 66, 70, 72, 74–75, and 77–79.

Next, the following FOH chapters 10-16, 20-25, 30-33, 36, 46, and 64 have … been made available on the WHD website at [https://www.dol.gov/agencies/whd/field-operations-handbook.][[172]](#footnote-173)

Furthermore, we are providing you with partially redacted copies under Exemption 7(E) for FOH Chapters 50–54, 56–63, 65, 67–71, 73, 76, and 80–86.[[173]](#footnote-174)

On its website the DOL notes that it is publishing the *Field Operations Handbook* on the Internet pursuant to its obligation under the Freedom of Information Act to make available administrative staff manuals and instructions to staff that affect members of the public,[[174]](#footnote-175) and as a public service to provide public access to information regarding DOL programs. Users of both the website and the hard-copy versions of the *Field Operations Handbook* should remember that the material may not always be current and should always check the provisions to determine if they are up to date.

In some cases, courts have accorded *Auer* deference to the interpretations in the *Field Operations Handbook*. For example, the Fifth Circuit accorded *Auer* deference to the 1994 *Field Operations Handbook* provisions, which were identical to a 1974 opinion letter interpreting the ambiguous definition of the medical-professional exemption found in Section 541.3(e):

The DOL’s interpretive statements come to this court in a wide variety of formats, and we must decide what weight to give them under our precedents. We conclude that *Auer* applies, so we give controlling weight to the DOL’s position adopted in the 1974 opinion letter, 1994 Handbook, and *amicus* brief, excluding [physician assistants] (and by extension, [nurse practitioners]) from the professional exemption to the FLSA overtime rules.[[175]](#footnote-176)

Other courts have also granted deference to various *Field Operations Handbook* provisions.[[176]](#footnote-177)

Similarly, the First Circuit also granted deference to the DOL’s own “enforcement memorandum” interpreting 29 C.F.R. §785.23, the sleep-time regulation.[[177]](#footnote-178)

However, certain aspects of the *Field Operations Handbook* have not been affordeddeference.[[178]](#footnote-179) For example, in *Solis v*. *Laurelbrook Sanitarium & School, Inc*.,[[179]](#footnote-180) the Sixth Circuit refused to defer to the DOL’s six-factor test created to distinguish between employees and trainees as set out in the WHD’s *Field Operations Handbook* and in a publication issued to the general public.[[180]](#footnote-181) The court noted that the DOL’s six-factor test was designed “for persons participating in employer-sponsored training programs,”[[181]](#footnote-182) and reasoned that it was “a poor method for determining employee status in a training or educational setting.”[[182]](#footnote-183)

6. Wage and Hour Field Assistance Bulletins

In addition to its other compliance assistance materials, starting in 2005, the DOL has issued “advisory memoranda” to provide investigators and staff with guidance on enforcement positions and clarification of policies or changes in policy of the WHD. On March 1, 2006, the WHD began referring to these memoranda as field assistance bulletins (FABs) and advised the public that the FABs[[183]](#footnote-184)

[p]rovide Wage and Hour Division (WHD) investigators and staff with guidance on enforcement positions and clarification of policies or changes in policy of WHD. These bulletins are developed under the general authority to administer the various laws enforced by WHD. They typically provide positions reflecting changes or clarifications in the administration of these laws and related regulations based upon court decisions, legislative changes and opinions of the WHD Administrator.

The Department of Labor (DOL) is providing this information as a public service. The requirements of the laws enforced by WHD are set by statutes and regulations. The Federal Register and the Code of Federal Regulations remain the official resources for regulatory information published by the DOL.[[184]](#footnote-185)

Some district courts have afforded deference to FABs.[[185]](#footnote-186) The Fifth Circuit has held that FABs issued after the events in question will not be applied retroactively.[[186]](#footnote-187)

7. Fact Sheets

The DOL has published more than 80 numbered and a few unnumbered fact sheets that address a wide range of FLSA-related issues; some of the fact sheets are available in several languages other than English.[[187]](#footnote-188)

In certain cases, district courts have afforded some level of deference to fact sheets issued by the DOL.[[188]](#footnote-189) However, in other cases no deference has been afforded to the fact sheets.[[189]](#footnote-190) For example, the Second Circuit in *Glatt v. Fox Searchlight Inc.*[[190]](#footnote-191) declined to give deference to the DOL’s Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act. The DOL argued in its amicus brief that its fact sheet, requiring that each of six factors be present for an employer to properly treat interns as unpaid, was entitled to *Skidmore* deference.[[191]](#footnote-192) The court found that because the fact sheet was “essentially a distillation of the facts” discussed in the Supreme Court’s *Portland Terminal*[[192]](#footnote-193) decision, no deference was warranted. “Unlike an agency’s interpretation of ambiguous statutory terms or its own regulations, ‘an agency has no special competence or role in interpreting a judicial decision.’”[[193]](#footnote-194)

8. Results of Field Investigations

Sometimes a party will argue that the court should defer to the results of a DOL field investigation. For example, in *Koellhoffer v. Plotke-Giordani*,[[194]](#footnote-195) the defendant asked the court to defer to the findings of a field investigation held eight years earlier involving the same company and the same tip-pooling policy. The field investigator had found that the employer’s tip-pooling policy was compliant with the FLSA. The court refused to give any deference to the “results of a field investigation, i.e.,the notes and conclusions of a single [DOL] investigator,”[[195]](#footnote-196) explaining that “such an investigation does not even rise to the level of an opinion letter or other statement of agency enforcement policy. Therefore … it is not entitled to deference by the Court.”[[196]](#footnote-197)

9. Other Department of Labor Materials

The DOL has authored other materials to guide the public in complying with the requirements of the FLSA. There has been little litigation regarding the level of deference to be given to the materials listed below:

* *The Compliance Assistance Library and Toolkits:* WHD offers a wide variety of materials to help employers understand their rights and responsibilities under the law, including compliance assistance materials addressing minimum wage, hours of work, pay practices, and overtime,[[197]](#footnote-198) as well as a series of interactive step-by-step tools to walk employers through a variety of scenarios, in-depth guides to help employers navigate the requirements of the Family and Medical Leave Act, and fact sheets that detail how the FLSA applies to many specific types of employment.[[198]](#footnote-199) It also provides free guidance from knowledgeable professionals, workplace posters and forms, and informational materials employers can share with their workers.[[199]](#footnote-200)
* *Employment Law Guide, prepared by the Office of the Assistant Secretary for Policy:* Describes the statutes and regulations administered by the DOL that affect businesses and workers. “The Guide is designed mainly for those needing ‘hands-on’ information to develop wage, benefit, safety and health, and nondiscrimination policies for businesses” in general industry.[[200]](#footnote-201)
* *Workplace Posters:* A variety of posters, including “Employee Rights Under the Fair Labor Standards Act,” are available in English and other languages.[[201]](#footnote-202)
* *Preambles to Regulations Issued Under APA Notice-and-Comment Procedures:* The DOL sometimes provides additional commentary in a preamble to final regulations it issues pursuant to the APA. Courts have cited to and deferred to these preambles.[[202]](#footnote-203)
* *E*-*Laws Advisors:* This is an interactive tool on the DOL’s websitethat provides easy-to-understand information about a number of federal employment laws. Each Advisor simulates the interaction the user might have with an employment law expert. It asks questions and provides answers based on responses given.[[203]](#footnote-204)
* *Frequently Asked Questions (FAQs):* The DOL has drafted questions and answers on specific questions that are often asked of the WHD.[[204]](#footnote-205)

10. Department of Labor Website

The DOL maintains a website providing a variety of resources regarding its administration and enforcement of the FLSA. The site includes

* the DOL home page,[[205]](#footnote-206)
* the Wage and Hour Division home page,[[206]](#footnote-207)
* information concerning current regulatory activity,[[207]](#footnote-208)
* materials relating to overtime,[[208]](#footnote-209)
* access to pertinent provisions of the *Code of Federal Regulations*,[[209]](#footnote-210)
* contact information for the district and regional Wage and Hour Division offices,[[210]](#footnote-211)
* compliance reference guides,[[211]](#footnote-212)
* portions of the Wage and Hour Division *Field Operations Handbook*,[[212]](#footnote-213)
* field assistance bulletins,[[213]](#footnote-214)
* opinion letters since 2001,[[214]](#footnote-215)
* summary information concerning current regulatory activity,[[215]](#footnote-216) and
* administrative law judge and Administrative Review Board decisions.[[216]](#footnote-217)

IV. Industrial Homework Certificates

Section 211(d) of the FLSA empowers the Administrator “to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate.”[[217]](#footnote-218) The DOL defines “industrial homework” as the “production [of goods] … in or about a home, apartment, tenement, or room in a residential establishment … , regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker.”[[218]](#footnote-219)

DOL regulations ban industrial homework in women’s apparel[[219]](#footnote-220) and in hazardous jobs in jewelry.[[220]](#footnote-221) Homework is permitted in the following six industries, but only if a certificate is obtained from the DOL:

* nonhazardous jewelry manufacturing,[[221]](#footnote-222)
* knitted outerwear,[[222]](#footnote-223)
* gloves and mittens,[[223]](#footnote-224)
* button and buckle manufacturing,[[224]](#footnote-225)
* handkerchief manufacturing,[[225]](#footnote-226) and
* embroidery.[[226]](#footnote-227)

All other work at home is not subject to the DOL’s certification system and is permitted provided that the FLSA’s requirements with respect to minimum wage, overtime, child labor, and recordkeeping are met.

With respect to the six covered industries set forth above, either the employer or the individual homeworker may obtain a certificate authorizing such work.[[227]](#footnote-228) Certified employers of homeworkers in these industries are required to renew their certificate every two years.[[228]](#footnote-229) Homeworker employees are subject to the FLSA’s minimum wage and overtime requirements.[[229]](#footnote-230)

There are extensive DOL regulations relating to the process for applying for an industrial homework certificate,[[230]](#footnote-231) handbook and recordkeeping requirements for industrial homeworkers,[[231]](#footnote-232) and employer assurances and bonding.[[232]](#footnote-233) The DOL regulations also address investigation of employers with homework certificates[[233]](#footnote-234) and the denial and revocation of certificates (including administrative procedures for appealing the denial, refusal to renew, or revocation of certificates).[[234]](#footnote-235)

State and other local law always must be reviewed to determine whether the state or some local entity has imposed homeworker limits where the federal government has not. For example, New Jersey enacted legislation that banned industrial homework in the manufacture of both men’s and women’s apparel.[[235]](#footnote-236)

V. Special Certificates Allowing Subminimum Wage

Section 214 of the FLSA directs the Secretary to issue regulations to prevent curtailment of opportunities for employment for certain categories of workers. These workers may be paid less that the statutory minimum wage when working under a certificate issued by the Secretary.[[236]](#footnote-237) The categories of workers included in the certificate program are full-time students, messengers, apprentices, learners (including student-learners), and disabled workers.[[237]](#footnote-238)

Pursuant to its statutory directive, the WHD drafted separate regulations for each of these subminimum wage categories with many provisions common to all.[[238]](#footnote-239) The regulations at 29 C.F.R. Part 520, Student-Learner Regulations; 29 C.F.R. Part 521, Apprentice Regulations; 29 C.F.R. Part 522, Learner Regulations; 29 C.F.R. Part 523, Messenger Regulations; 29 C.F.R. Part 525, Workers with Disabilities Regulations; and 29 C.F.R. Part 527, Student-Worker Regulations established a certificate system for employment of these classes of workers at subminimum wages. The statute[[239]](#footnote-240) calculates the subminimum wage in a different manner depending upon the category of worker.[[240]](#footnote-241)

By 1996, very few employers had applied for special certificates, except in the student-learner program.[[241]](#footnote-242) In view of this development, in early 1997, the DOL proposed to consolidate and streamline several of the Section 214 certificate programs and to eliminate the student-worker program because it had not been used since 1974.[[242]](#footnote-243) The DOL’s final rule regarding Section 214 certificate programs, which became effective on February 9, 1998,[[243]](#footnote-244) eliminated 29 C.F.R. Part 527 and consolidated former Parts 520, 521, 522, and 523 into a single Part 520. The revamped regulations address the conditions for issuance of certificates, the rates of pay, and other employment terms for each type of employee.[[244]](#footnote-245) The certificates do not exempt employers from paying overtime as required under the FLSA, nor from maintaining records. Indeed, the FLSA’s certification programs impose recordkeeping requirements beyond those that apply generally to employers subject to the FLSA.[[245]](#footnote-246)

The following regulations are directly relevant to the Special Certificate programs:

* 29 C.F.R. Part 519, Full-Time Student Regulations;
* 29 C.F.R. Part 520, Student-Learner Regulations;
* 29 C.F.R. Part 525, Employment of Workers With Disabilities Under Special Certificates; and
* 29 C.F.R. Part 528, Regulations for Withdrawal of Special Certificates.

A. Full-Time Students—29 C.F.R. Part 519

Under Section 214(b) of the FLSA and the authority and responsibility delegated to the Administrator of the WHD by the Secretary of Labor, the Administrator is authorized, to the extent necessary in order to prevent curtailment of opportunities for employment, to provide by regulation or order for the employment, under certificates, of full-time students in retail or service establishments,[[246]](#footnote-247) agriculture,[[247]](#footnote-248) and institutions of higher education where those students are enrolled.[[248]](#footnote-249) A full-time student is someone who receives primarily daytime instruction at the physical location of a bona fide educational institution, in accordance with that institution’s definition of “full-time student,”[[249]](#footnote-250) or who meets the accepted definition of a full-time student of the institution of higher education that employs him or her.[[250]](#footnote-251)

Separate applications must be made “for each farm or establishment in which authority to employ full-time students at subminimum wage rates is sought”[[251]](#footnote-252) and for each separate campus.[[252]](#footnote-253) An employer must apply for a certificate before hiring a full-time student at a subminimum wage.[[253]](#footnote-254) An application that is completed and submitted in a timely manner is a condition for obtaining a certificate.[[254]](#footnote-255) Another condition is the posting of a copy of the certificate in the establishment, farm, or institution of higher learning.[[255]](#footnote-256) The work location also must not have abnormal labor conditions such as a strike or lockout.[[256]](#footnote-257)

The regulations provide the following procedures for obtaining a certificate for a “full-time student” in retail or service establishments and agriculture[[257]](#footnote-258)or in an institution of higher education:[[258]](#footnote-259)

* application for a full-time student certificate;[[259]](#footnote-260)
* procedure for action upon an application;[[260]](#footnote-261)
* conditions governing issuance of full-time student certificates;[[261]](#footnote-262)
* terms and conditions of employment under full-time student certificates and under temporary authorization;[[262]](#footnote-263)
* records to be kept;[[263]](#footnote-264)
* amendment or replacement of a full-time certificate;[[264]](#footnote-265) and
* reconsideration and review.[[265]](#footnote-266)

The regulations that apply to these three sectors—retail or service establishments, agriculture, and institutions of higher education—are substantially similar in their provisions for reconsidering a decision of the WHD that either grants or denies certification: 15 days after denial or 60 days after grant of a certificate, any person aggrieved may file for reconsideration with the authorized official who made the decision or with the Administrator.[[266]](#footnote-267) The request for reconsideration must be accompanied by evidence that may materially affect the decision, as well as a showing as to why that evidence was not originally presented.[[267]](#footnote-268) An unfavorable decision on reconsideration by the authorized official may be reviewed by the Administrator when a request for review is filed in a timely manner.[[268]](#footnote-269) In other respects, as explained below, the required conditions vary among the three sectors.

1. Retail and Service Establishments

Employment of full-time students at subminimum wages in a retail or service establishment is generally limited in proportion to the rest of the establishment’s workforce. In particular, the permissible extent of full-time student employment depends on whether the employer proposes (1) to employ no more than six full-time students at subminimum wages, (2) to hire students for no more than 10 percent of the total work hours in a month, or (3) to hire students for more than 10 percent of the total work hours in a month.[[269]](#footnote-270) The certification becomes progressively more exacting for each of these categories in terms of facts that require attestation and documentation on the part of the employer.[[270]](#footnote-271) It is not enough for an employer to obtain an unofficial “certificate” from a school administrator in lieu of a proper DOL certification.[[271]](#footnote-272) An employer may, however, obtain temporary authorization by forwarding a properly completed application to the WHD.[[272]](#footnote-273) The temporary authorization is effective for one year from the date the application is forwarded, unless the Administrator denies the application, issues a certificate with modified terms and conditions, or expressly extends the 30-day period of review.[[273]](#footnote-274) The subminimum wage that is authorized may not be less than 85 percent of the otherwise generally applicable minimum wage.[[274]](#footnote-275)

When school is in session, full-time student-workers are not permitted to work more than 20 hours per week.[[275]](#footnote-276) When school is not in session, full-time students are not permitted to work at the subminimum wage for more than eight hours per day or for more than 40 hours per week.[[276]](#footnote-277)

Retail and service employers must maintain segregated payroll information for certificated employees that indicates for each such worker the type of certificate involved.[[277]](#footnote-278) This information must be on file at the time of hiring.[[278]](#footnote-279) Employers also must maintain information from the school the student attends that indicates the employee’s school attendance is in conformity with the substantive requirements for a certificate.[[279]](#footnote-280) Finally, employers must maintain monthly records that compare students’ hours to other employees’ hours.[[280]](#footnote-281) All records must be kept for a period of three years from the last date of entry[[281]](#footnote-282) and must be made available for inspection by the WHD.[[282]](#footnote-283)

2. Agriculture

Generally, the restrictions and regulations that apply to the retail and service employers of full-time students, including the differentiations depending on the extent of the employer’s use of such workers, apply to full-time student agricultural workers. Both types of certificates are treated in the same subpart of the regulations,[[283]](#footnote-284) and both types of certifications are conditioned on compliance with child labor laws, although there are major differences in those laws in the farm and nonfarm contexts. The recordkeeping requirements are identical to those for the retail and service sector, except that the records that compare students’ to others’ hours need not include those employed in agriculture who come within one of the other exemptions from the minimum wage provisions of the FLSA.[[284]](#footnote-285)

3. Educational Institutions

Full-time students who are employed by institutions of higher education are subject to regulations that are similar to those in the retail and service sector, except that, for educational institutions, the six-person and 10-percent limitations described above do not apply. Instead, certificates issued to institutions of higher learning are conditioned on the requirement that full-time student employment will not create a “substantial probability” of reducing full-time employment opportunities for others.[[285]](#footnote-286) Under this certificate, full-time students may not be employed in a trade or business unrelated to that of the institution of higher education within the meaning of the Internal Revenue Code.[[286]](#footnote-287)

In addition to complying with the general recordkeeping requirements of Part 516, the institution must maintain records of the total number of full-time students employed on a campus, compared with the total number of employees subject to the FLSA’s minimum wage provisions.[[287]](#footnote-288) Under certain conditions, including the submission of a properly executed application and the posting of a notice,[[288]](#footnote-289) an institution has temporary authority, not exceeding one year, to employ full-time students at subminimum wage.[[289]](#footnote-290)

B. Messengers, Apprentices, and Learners (Including Student-Learners)—29 C.F.R. Part 520

Section 214(a) authorizes the issuance of special certificates for the subminimum wage employment of workers employed as messengers, learners (including student-learners), and apprentices.[[290]](#footnote-291) 29 C.F.R. Part 520[[291]](#footnote-292) defines each of these classifications of workers,[[292]](#footnote-293) how an employer applies for a certificate for these workers,[[293]](#footnote-294) the records needed to be kept for these workers,[[294]](#footnote-295) and how an employer can appeal a denial or withdrawal of a certificate for these workers.[[295]](#footnote-296) No special certificate excuses noncompliance with any other federal or state law or municipal ordinance or collective bargaining agreement establishing higher standards.[[296]](#footnote-297)

The qualifications for messengers, apprentices, and learners (including student-learners) are set out in 29 C.F.R. Part 520.

1. Messengers

The final rule limited the availability of special certificates for messengers to those establishments engaged in the business of providing messenger services, i.e., the delivery of letters and messages.[[297]](#footnote-298)

A messenger means a worker who is primarily engaged in delivering messages.[[298]](#footnote-299) Before a subminimum wage can be paid to a messenger, an employer, employee, or any representative groups thereof must file an application with the Administrator of the WHD’s Regional Office.[[299]](#footnote-300) Applications must identify the industry in which the messengers are to be employed, the proposed hourly wage rate at which they are to be paid, the reasons for the messengers being employed at the lower rate, and any other pertinent information.[[300]](#footnote-301) Applications filed by groups or organizations deemed to be representative of the interests of a whole industry receive preferential treatment.[[301]](#footnote-302) The regulations specify that an applicant bears the burden of proving that subminimum wages will prevent curtailment of employment opportunities.[[302]](#footnote-303) In addition to complying with the general recordkeeping requirements of Part 516, the messenger regulations require an employer to designate certificated messengers on the employer’s payroll records and maintain a file of materials supporting the certificate application.[[303]](#footnote-304) The subminimum wage rate for messengers is 95 percent of the applicable minimum wage required by Section 206(a) of the FLSA.[[304]](#footnote-305)

2. Apprentices

The final rule provided that the authorization to employ apprentices at subminimum wages will only be granted if permitted by the Bureau of Apprenticeship and Training (BAT) regulations, 29 C.F.R. Part 29.[[305]](#footnote-306) The regulations further provide that the employer or apprenticeship committee must submit a copy of the registered apprenticeship program,[[306]](#footnote-307) and the apprenticeship program must conform with or substantially conform with the “standards of apprenticeship,” as that term is defined in Subpart C of the Section 520 regulations.[[307]](#footnote-308)

Apprentice means a worker, at least 16 years of age unless a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction. The term excludes pre-apprentices, trainees, learners, and student-learners.[[308]](#footnote-309)

If the apprenticeship agreement and other available information indicate that the requirements of the regulations are satisfied, the Administrator shall issue a special certificate.[[309]](#footnote-310) The special certificate, if issued, shall be mailed to the employer or the apprenticeship committee and a copy shall be mailed to the apprentice. If a special certificate is denied, the employer or the apprenticeship committee, the apprentice, and the recognized apprenticeship agency shall be given written notice of the denial and the employer shall pay the apprentice the minimum wage applicable under Section 6 of the FLSA from the date of receipt of notice of such denial.[[310]](#footnote-311)

An apprenticeship program that has been registered with a recognized apprenticeship agency shall constitute a temporary special certificate authorizing the employment of an apprentice at the wages and under the conditions specified in such program until a special certificate is issued or denied.[[311]](#footnote-312) This temporary authorization is, however, conditioned on the requirement that within 90 days from the beginning date of employment of the apprentice, the employer or the apprenticeship committee shall send one copy of each apprenticeship agreement to the appropriate regional office of the WHD.[[312]](#footnote-313) The wage rate specified by the apprenticeship program becomes the special minimum wage rate that must be paid, unless the Administrator issues a certificate modifying the terms and conditions of employment of apprentices at special minimum wages.[[313]](#footnote-314)

Each special apprentice certificate shall specify the conditions and limitations under which it is granted, including the periods of time during which subminimum wage rates may be paid pursuant to a registered apprenticeship program.[[314]](#footnote-315) Every employer who employs apprentices under temporary or special certificates shall preserve for three years from the last effective date of the certificate copies of the apprenticeship program, apprenticeship agreement, and special certificate under which such an apprentice is employed.[[315]](#footnote-316) In addition, every apprenticeship committee that holds a certificate must keep certain records under its control and supervision.[[316]](#footnote-317)

3. Learners (Excluding Student-Learners)

Section 214 of the FLSA authorizes subminimum wages for learners.[[317]](#footnote-318) A learner means a worker who is being trained for an occupation that is not customarily recognized as an apprenticeable trade, for which skill, dexterity, and judgment must be learned, and who, when initially employed, produces little or nothing of value.[[318]](#footnote-319) Except in extraordinary circumstances, an employee cannot be considered a “learner” once he or she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a “learner” may only be trained in two qualifying occupations.[[319]](#footnote-320) A learner is unlike a student-learner, who is required to attend an accredited school. Learners need not attend a school; they are considered to be workers who, with respect to an industry and a particular “authorized learner occupation,” have not yet worked as long as the “time allowed as a learning period” in that occupation during the preceding three years.[[320]](#footnote-321)

An employer that seeks learner certification must submit an application to the Administrator of the regional office of the WHD.[[321]](#footnote-322) An employer that has applied for a certificate must post a copy of at least the first page of the application.[[322]](#footnote-323) A learner certificate will issue except where there is an adequate supply of qualified experienced workers available for employment.[[323]](#footnote-324) Employers must make reasonable efforts to recruit experienced workers before receiving a certificate.[[324]](#footnote-325) The DOL will not issue a certificate if it impairs wages or work standards that are established for experienced workers in a particular industry or if it tends to create unfair competitive labor cost advantages.[[325]](#footnote-326) Learners generally work in occupations that require appreciable initial training;[[326]](#footnote-327) as a condition of special certification, employers must also afford learners every reasonable opportunity for continued employment when their designated learning period ends.[[327]](#footnote-328)

Special certificates generally are not good for more than one year.[[328]](#footnote-329) Without a clear showing that certificate conditions remain prevalent, a renewal certificate will not be granted.[[329]](#footnote-330)

By regulation, applications for learner certificates are not granted in shoe manufacturing, men’s and boy’s clothing, and those portions of the apparel industry known as rainwear, leather and sheep-lined clothing, women’s apparel, and robes.[[330]](#footnote-331) No certificates will be granted authorizing the employment of learners at subminimum wage rates: as homeworkers; in maintenance occupations such as guard, porter, or custodian; in office and clerical occupations in any industry; or in operations of a temporary or sporadic nature.[[331]](#footnote-332) Although various numbers of subminimum wage hours, ranging from 160 to 960, were previously allowed for learners in various industries, the DOL’s 1997 proposed rules called for replacing the industry-specific requirements with a standardized period of 240 hours, “absent extraordinary circumstances.”[[332]](#footnote-333)

In addition to complying with the general recordkeeping requirements of Part 516, the learner regulations require an employer to identify any worker who is employed as a learner on the employer’s payroll records, including each learner’s occupation.[[333]](#footnote-334) An employer must also have a signed statement on file from the learner that indicates “all applicable experience which the learner had in the employer’s industry … during the preceding three years”;[[334]](#footnote-335) the statement also must contain certain other work experience and vocational training information.[[335]](#footnote-336) An employer must also maintain information pertaining to the filling or cancellation of job orders placed with the local state or territorial public employment service office for occupations to be performed by learners.[[336]](#footnote-337) The subminimum wage rate for learners is not less than 95 percent of the applicable minimum wage required by Section 206(a) of the FLSA.[[337]](#footnote-338)

4. Student-Learners

A student-learner means a student who is at least 16 years of age (or at least 18 years of age if employed in an occupation that the Secretary has declared to be particularly hazardous), who is receiving instruction pursuant to a bona fide vocational training program at an accredited school, college, or university.[[338]](#footnote-339) The student-learner’s employment must be on a part-time basis.[[339]](#footnote-340)

A “bona fide vocational training program” means a program authorized and approved by a state board of vocational education or other recognized educational body that provides part-time employment training.[[340]](#footnote-341) The scheduled employment of a student-learner may take place during part of the workday or workweek for alternating weeks or other limited periods throughout the year.[[341]](#footnote-342) The work scheduled must be supplemented by and integrated with a defined, organized plan of instruction,[[342]](#footnote-343) and the student-learner must receive instruction in technical knowledge and related industrial information given as a regular part of the student-learner’s course work by an accredited school, college, or university.[[343]](#footnote-344)

Employers of student-learners must apply for certificates to the Administrator at the WHD’s regional office.[[344]](#footnote-345) An application must be signed by the prospective employer, school officials, and the student-learner.[[345]](#footnote-346) The application must be made on the official form furnished by the WHD[[346]](#footnote-347) and must contain

* a statement clearly outlining the vocational training program and showing, particularly, the processes in which the student-learner will be engaged when in training on the job;
* a statement clearly outlining the school instruction directly related to the job;
* the total number of workers employed in the establishment;
* the number and hourly wage rates of experienced workers employed in the occupation in which the student-learner is to be trained;
* the hourly wage rate or progressive wage schedule that the employer proposes to pay the student-learner;
* the age of the student-learner;
* the period of employment training at subminimum wages;
* the number of hours of employment training per week and the number of hours of school instruction per week; and
* a certification by the appropriate school official that the student named on the application form will be receiving instruction in an accredited school, college, or university and will be employed pursuant to a bona fide vocational training program, as well as meeting other specified conditions.[[347]](#footnote-348)

The school certification constitutes a temporary authorization for the employment of the student-learner at subminimum wages and becomes the permanent special student-learner certificate at the end of 30 days unless the Administrator denies the application, issues a certificate with modified terms and conditions, or expressly extends the period of review.[[348]](#footnote-349) Notification of a denial by the WHD must be made within 30 days following the date the application was forwarded, unless the WHD considers additional time for review to be necessary or appropriate;[[349]](#footnote-350) in that event, the employer and student will be notified.[[350]](#footnote-351)

An employer cannot obtain a student-learner certificate if the training is designed for the purpose of acquiring manual dexterity and high production speed in repetitive operations.[[351]](#footnote-352) No certificate will be issued if the student-learner’s employment will displace workers already employed in the establishment.[[352]](#footnote-353) Moreover, a special certificate must meet the occupational needs of the community and industry, and the subminimum wages established must not impair or adversely affect the wage rates or working standards established for experienced workers.[[353]](#footnote-354) The number of student-learners employed in any one establishment cannot be more than a “small proportion” of the total workforce.[[354]](#footnote-355) According to Part 520, the WHD will not issue certificates where there are serious outstanding violations of a previously issued student-learner certificate or of any other provisions of the FLSA, as long as those violations provide reasonable grounds to conclude that the terms of the certificate would not be complied with if issued.[[355]](#footnote-356) Absent extraordinary circumstances, the student-learner certificate is effective for a period of no more than one school year.[[356]](#footnote-357)

Student-learners may not be paid less than 75 percent of the applicable minimum wage under Section 206(a) of the FLSA.[[357]](#footnote-358) The number of hours of employment training each week when added to school instruction hours may not exceed 40 per week, except as otherwise authorized and granted by the Administrator in extraordinary circumstances.[[358]](#footnote-359) When school is not in session on a school day, student-learners may work hours in addition to the combined 40 hours, but the total number of hours worked cannot exceed eight in any day.[[359]](#footnote-360) In this situation, the employer must make appropriate notations in its records to indicate that the additional hours worked resulted from the fact that school was not in session.[[360]](#footnote-361) A student-learner may work additional hours during the school term, when school is not in session for an entire week, as long as the total number of hours does not exceed 40 in any such week.[[361]](#footnote-362) An appropriate notation must be made to the employer’s records stating that the reason for additional hours worked was that school was not in session.[[362]](#footnote-363) Issuance of a student-learner certificate does not authorize payment of subminimum wages to the student-learner for hours in excess of those authorized under the certificate, except under the circumstances described in this paragraph.[[363]](#footnote-364) The process for seeking reconsideration of a student-learner certification denial is similar to that for full-time student certificates.[[364]](#footnote-365)

In addition to complying with the general recordkeeping requirements of Part 516, the student-learner regulations require an employer to identify any worker employed as a student-learner on the employer’s payroll records, including each student-learner’s occupation and rate of pay, and notations in the records when additional hours are worked by reasons of school not being in session.[[365]](#footnote-366)

C. Disabled Workers

1. Background

The FLSA has always provided for a subminimum wage for disabled workers.[[366]](#footnote-367) This exemption occasioned little discussion during the debates over the various versions of the FLSA bills put before Congress.[[367]](#footnote-368) The final enactment provided the following in Section 214:

The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for … (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.[[368]](#footnote-369)

Throughout the years since the FLSA’s enactment, the requirements for workers with disabilities have changed and Congress has gone back and forth as to whether to impose a floor on the wages of those workers who were not entitled to be paid a minimum wage.[[369]](#footnote-370) In 1986 Congress resolved the matter by eliminating any floor on the wages of persons with disabilities who are paid a subminimum wage.[[370]](#footnote-371) Section 214(c) of the FLSA provides that individuals whose earnings or productive capacity is impaired by age, physical or mental deficiency, or injury may be paid at wages that are

(a) lower than the minimum wage applicable under section 206 of the FLSA;

(b) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individual under the certificates is employed, for essentially the same type, quality, and quantity of work; and

(c) related to the individual’s productivity.[[371]](#footnote-372)

Some assert Section 214(c) of the FLSA appears to be at odds with the Americans with Disabilities Act (ADA).[[372]](#footnote-373) The FLSA authorizes subminimum wages “commensurate with those paid to nonhandicapped workers … for essentially the same type, quality, and quantity of work.”[[373]](#footnote-374) By contrast, the ADA broadly mandates “reasonable accommodation” rather than differential pay based on a disabled individual’s allegedly lesser productivity.[[374]](#footnote-375) Certification under the FLSA does not excuse noncompliance with the ADA.[[375]](#footnote-376)

In 2022, the Acting Administrator for the WHD issued a field assistance bulletin to provide WHD field staff with additional guidance regarding enforcement of Section 511 of the Rehabilitation Act of 1973, which limits subminimum wage payments otherwise provided for under Section 14(c) of the FLSA.[[376]](#footnote-377) The 2022 bulletin emphasizes that an employer must provide the mandated resources and information to workers with disabilities covered by Section 511 to lawfully pay the subminimum wages under FLSA Section 214(c). The bulletin also addresses the timing and documentation requirements of the mandatory support and services required by employers in order to avail themselves of the subminimum wage provisions.

Besides authorizing the Section 214(c) certificates described below, DOL regulations authorize the Veterans Administration and state disability and vocational rehabilitation programs to issue their own temporary 90-day subminimum wage certificates for employment of on-the-job trainees.[[377]](#footnote-378) These temporary certificates may not be renewed or extended.[[378]](#footnote-379)

An individual whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the applicable minimum wage may be paid a commensurate wage, but only after the employer has obtained a certificate authorizing payment of special minimum wages from the appropriate office of the WHD.[[379]](#footnote-380)

The overwhelming majority of workers with disabilities who are paid commensurate rates work in sheltered workshops (now called “center-based” employment programs).[[380]](#footnote-381) According to a General Accounting Office survey, “work centers employed about 95% of all 14(c) workers.”[[381]](#footnote-382) In 2011, due to the effect of Section 214(c) and the Javits-Wagner-O’Day Act, which requires the government to purchase certain goods from sheltered workshops, there were more than 2,500 employers (the overwhelming majority of which are sheltered workshops) certified to pay more than 350,000 employees a subminimum wage under Section 214(c).[[382]](#footnote-383)

In 2016, WH Administrator David Weil issued Administrator’s Interpretation No. 2016-2 (AI-2).[[383]](#footnote-384) The subject of AI-2 was the effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of Section 214(c) of the FLSA. The AI-2 concluded that the issuance of a certificate under the provisions of Section 214(c) of the FLSA did not excuse noncompliance with any state law establishing higher minimum wage requirements. The AI-2 also addressed the issuance of Section 214(c) certificates in states that prohibit the payment of subminimum wages to workers with disabilities. In those circumstances, says the AI-2, the WHD may issue Section 214(c) certificates where appropriate, if the employer demonstrates a reasonable basis for the use of certificates that does not conflict with the requirements of the applicable state law. For example, in a state that requires the payment of no less than the state minimum wage to workers with disabilities, there may be circumstances in which a Section 214(c) certificate holder may pay commensurate wage rates to workers with disabilities under certificate and remain in compliance with state law, e.g.,where the certificate holder has a contract with the federal government that is covered by the McNamara-O’Hara Service Contract Act.[[384]](#footnote-385)

2. Specifications for the Employment of Workers With Disabilities Under Certificates

The regulations interpreting FLSA Section 214(c) explain the certificate application process and the requirements for payment of subminimum wages under a certificate.[[385]](#footnote-386) Subminimum wage rates permitted by Section 214(c) must be based on the prevailing wage for the job and must be commensurate with the worker’s productivity as compared to the productivity of an experienced worker who is not disabled for the work to be performed.[[386]](#footnote-387)

Workers with disabilities include those who “experience impairment of their earning or productive capacity by virtue of their age, physical or mental deficiencies or injuries.”[[387]](#footnote-388) DOL regulations provide that disabilities that may affect such earning or productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction.[[388]](#footnote-389) A disability with respect to the performance of one type of work does not necessarily adversely affect the capacity for another type of work.[[389]](#footnote-390) In one case, a court required the DOL to inform psychiatric institutions that their patient-workers were subject to the FLSA, although they were potentially subject to subminimum wages under Section 214(c).[[390]](#footnote-391) The Ninth Circuit has held, however, that Section 214’s provision of subminimum wage certificates does not broaden or otherwise alter the FLSA’s definition of “employee.”[[391]](#footnote-392) Thus, the court rejected the contention of a participant in a six-month work rehabilitation program that, because the program resembled a Section 214 certification program, he was an employee subject to the FLSA’s minimum wage and overtime protections.[[392]](#footnote-393)

Upon application, the Administrator may issue a special subminimum wage certificate primarily founded on the nature and extent of an individual’s disability as it relates to the individual’s productivity.[[393]](#footnote-394) An employer must provide written assurances that it will pay disabled workers at rates commensurate with those paid to nondisabled workers for the work to be performed in the vicinity for essentially the same type, quality, and quantity of work.[[394]](#footnote-395) Employers must also provide written assurance that wage rates for disabled individuals paid on an hourly basis will be reviewed at least once every six months and that the wages of all employees will also be reviewed at least annually to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed in the locality.[[395]](#footnote-396)

Employers must be able to demonstrate that the prevailing wage rate is objectively determined according to the regulatory guidelines.[[396]](#footnote-397) Employers with a workforce of primarily nondisabled workers may use the wage rate paid to the experienced, nondisabled employees who perform similar work as the prevailing wage rate.[[397]](#footnote-398) Employers with a workforce consisting primarily of disabled workers may ascertain the prevailing wage rate by conducting surveys of comparable firms in the geographic area that primarily employ nondisabled workers doing similar work.[[398]](#footnote-399) The survey should include no fewer than three firms, unless there are fewer firms performing similar work.[[399]](#footnote-400) Employers are permitted to contact the DOL’s Bureau of Labor Statistics (or other private or state employment services) if conducting such a survey is impractical.[[400]](#footnote-401) Tabulating the weighted or unweighted average of survey results is acceptable, because there are no prescribed methods of tabulation.[[401]](#footnote-402)

Employers must adjust the disabled workers’ pay at periodic intervals, a minimum of once per year, as a condition for issuance of a certificate.[[402]](#footnote-403) DOL regulations specify the manner in which commensurate piece-rate and hourly wages are to be calculated and applied.[[403]](#footnote-404)

Disabled workers (and their representatives) have the right to obtain a review of the special minimum rate paid to the disabled worker. The procedures provide for a hearing before an ALJ, a written decision of the ALJ, and upon a timely request a review of the decision by the Secretary.[[404]](#footnote-405) If the Secretary does not grant review, the ALJ’s decision becomes final agency action for purposes of judicial review.[[405]](#footnote-406)

The employer must keep the records required under all of the applicable provisions of Part 516 of the Act, “except that any provision pertaining to homeworkers handbooks shall not be applicable to workers with disabilities who are employed by a recognized nonprofit rehabilitation facility and working in or about a home, apartment, tenement, or room in a residential establishment.”[[406]](#footnote-407) The employer must also keep records verifying the workers’ disabilities;[[407]](#footnote-408) evidence of the productivity of each worker gathered on a continuous or periodic basis;[[408]](#footnote-409) evidence of the prevailing wage paid to nondisabled workers in the workplace or vicinity, as discussed earlier;[[409]](#footnote-410) and the production standards and supporting documentation for nondisabled workers for each job subject to certification.[[410]](#footnote-411) The regulations address the standards for revoking certificates[[411]](#footnote-412) and the review procedures for challenging such a revocation.[[412]](#footnote-413)

The regulations also address “work activity centers” and provide that “[n]othing in these regulations should be interpreted to prevent an employer from maintaining or establishing work activities centers to provide therapeutic activities for workers with disabilities as long as the employer complies with” the requirements of Part 525.[[413]](#footnote-414) Work activity centers include centers planned and designed to provide therapeutic activities for workers with severe disabilities affecting their productive capacity.[[414]](#footnote-415)

Finally, the regulations provide that an Advisory Committee on Special Minimum Wages shall be established with the members appointed by the Secretary. The Committee shall advise and make recommendations to the WH Administrator concerning the administration and enforcement of the Section 214(c) regulations and the need for amendments thereof.[[415]](#footnote-416)

D. Section 214(d)

In 1974, Congress amended Section 214 of the FLSA by adding subsection (d):

The Secretary may by regulation or order provide that sections 206 and 207 of this title shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under the regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.[[416]](#footnote-417)

The DOL did not issue any regulations under this statutory amendment. Rather, in the *Field Operations Handbook*, the DOL wrote:

Until final regulations implementing the provisions of Sec. 14(d) are adopted, the WHD will take no enforcement action with respect to minimum wage or overtime for private elementary or secondary students employed by any school in their school district in various school-related work programs, provided that such employment is in compliance with applicable child labor provisions.[[417]](#footnote-418)

In 1992, the DOL filed suit against the Shiloh Vocational Training Program (SVTP) alleging that the program violated the FLSA’s provisions governing child labor, minimum wage, and recordkeeping.[[418]](#footnote-419) SVTP asserted its religious belief that children should receive meaningful vocational training, and that it effectuated that belief through its training program.[[419]](#footnote-420) It argued, *inter alia*, that the DOL’s failure to issue regulations under Section 214(d) meant that schools lacked guidance on whether their vocational program violated the FLSA.[[420]](#footnote-421) As a result, the SVTP asserted, the DOL could not prosecute actions against vocational programs for violations of the Act. In addition, the SVTP argued that under the DOL’s no-enforcement policy the DOL could not enforce the FLSA against it and that under Section 259, such good faith reliance should preclude application of the Act.[[421]](#footnote-422)

The Fourth Circuit, affirming the decision of the district court, did not agree, finding that Section 214(d) says that the Secretary “may promulgate” regulations but it did not require that they do so.[[422]](#footnote-423) Moreover, the court found that the no-enforcement policy did not apply to SVTP because the policy is only implemented if the employer has complied with all applicable child labor provisions. Since the district court had found SVTP had violated child labor laws, SVTP’s administrative defense “must fail.”[[423]](#footnote-424)

Less than a year after the SVTP decision was issued, the DOL, as part of its overall reorganization of the Special Certificate regulations,[[424]](#footnote-425) included the elimination of regulations that provided certificates for student-workers.[[425]](#footnote-426) The preamble to the regulatory changes provided:

This rule proposes to remove the regulations at 29 CFR Part 527, Employment of Student-Workers, and reserve the part. … Since section 14(d) of the FLSA was enacted in 1974, no applications for student-worker certificates have been submitted by any type of school, elementary, secondary or any other. The existing rule is unnecessary.[[426]](#footnote-427)

E. Certificate Annulment or Withdrawal[[427]](#footnote-428)

The regulations provide, in Part 528, for the annulment or withdrawal of any certificate, except a temporary certificate, that has been issued for the employment of

* student-learners,
* apprentices,
* learners,
* messengers,
* disabled persons, or
* full-time students in agriculture or in retail or service establishments.

A certificate may be withdrawn if an employer fails to comply with the limitations set forth in the certificate or otherwise violates the FLSA.[[428]](#footnote-429) Similarly, a certificate may be annulled if it was issued as a result of a mistake that the employer knowingly induced or knowingly took advantage of.[[429]](#footnote-430) Where there was no knowing inducement or advantage being taken by an employer, a new certificate will issue, with limitations as would normally have appeared but for the mistake.[[430]](#footnote-431) Certificates may also be withdrawn in the public interest if any part of the exemption provided is no longer necessary to prevent curtailment of opportunities.[[431]](#footnote-432)

Prior to instituting proceedings for the withdrawal of a certificate, except in cases of willfulness, an area director shall notify the employer setting forth the alleged facts or conduct that may warrant withdrawal of the certificate and arrange for a conference at which the employer will be accorded an opportunity to show that no cause for withdrawal exists or that compliance has been achieved. Upon the conclusion of the conference, the area director shall report to the authorized representative any conclusions reached as to whether the employer demonstrated or achieved compliance.[[432]](#footnote-433)

If the authorized representative is not satisfied with the employer’s response, he or she is authorized to withdraw or annul a certificate by instituting proceedings under 29 C.F.R. §528.5. An employer who timely objects to the proposed action from the proceedings prior to the issuance of an order of annulment or withdrawal may obtain review limited to the question of whether the findings of fact support the order under the regulations.[[433]](#footnote-434)

An order that annuls or withdraws a certificate makes the employer ineligible to obtain or exercise privileges granted under the certificate until the employer satisfies the issuing officer that there will be no further cause given for an annulment or withdrawal if the DOL issues a new certificate.[[434]](#footnote-435)

VI. Other Functions of the Department of Labor

A. Conducting Studies

The Secretary conducts studies, research, and evaluations to determine compliance with the FLSA, enhance enforcement of statutes, and gather information.[[435]](#footnote-436) Based on these studies, the Secretary may advise Congress regarding potential changes to existing law. The Secretary also may use the results in support of amendments to the DOL’s regulations.

Certain federal statutes specifically command the Secretary to conduct studies. For example, Section 204(d)(2) requires the Secretary to conduct a study regarding exemptions to the federal minimum wage and overtime laws.[[436]](#footnote-437) Furthermore, the FLSA commands the Secretary to conduct a continuing study on how to prevent curtailment of employment opportunities for groups of employees with historically high unemployment, such as disadvantaged minorities, youth, elderly, and other groups that the Secretary designates.[[437]](#footnote-438)

B. Reports and Testimony to Congress

The FLSA requires the DOL to regularly prepare two reports. First, the DOL must provide an annual report to Congress each January that includes a description of the WHD’s activities in the preceding year, recommendations for further legislation, an evaluation of the minimum wage and overtime coverage established under the FLSA, and a summary of the special certificates issued in the preceding year.[[438]](#footnote-439) Second, the DOL must submit a report to Congress every two years on how to prevent the curtailment of employment opportunities for groups with historically high unemployment, such as the elderly, youth, and disadvantaged minorities.[[439]](#footnote-440) Additionally, the DOL’s Chief Evaluation Office prepares myriad reports.[[440]](#footnote-441)

The Secretary may also be called to testify or offer opinion on proposed legislation.

C. Budgetary Process

The DOL and WHD also participate in the government’s budgetary process. Of obvious significance and importance to the DOL is securing funding from Congress to support its efforts and activities under the FLSA. As part of its participation in the budgetary process, the DOL publishes a comprehensive agenda of how it intends to target its spending of taxpayer dollars. The budgetary process thus provides insight on the DOL’s regulatory and enforcement agendas.

The budgetary process begins with the president’s formulation of a budget submitted to Congress each fiscal year. With assistance from Office of Management and Budget (OMB), the president establishes general budget and fiscal policy guidelines. Based on the president’s decisions, OMB gives federal agencies instructions for budget preparation, along with budget ceilings and economic assumptions. The DOL gathers budget submissions for its various agencies and submits its budget request to OMB. OMB then reviews, holds hearings, gives “passback” decisions to agencies, and makes decisions on agency appeals. Federal agencies then prepare final budget materials for the president’s budget.

The president submits his or her full budget for the upcoming fiscal year to Congress shortly after the Congress convenes in January. The DOL and WHD’s participation in the budgetary process, along with the proposed budget and commentary submitted by the president, testimony offered by the Secretary to Congress, etc., foreshadow how the administration intends to focus its efforts for the coming year. The congressional review process and the journey from proposed budget to actual budget is frequently lengthy, contentious, and politically charged. When Congress completes action on the appropriation and spending bills, they are sent to the president for approval or veto. As is often the case, if action on the appropriation bills is not completed by the end of the prior fiscal year (September 30), or if Congress fails to override a presidential veto of the bills, the government operates under a series of continuing resolutions until a budget is passed and signed.

D. Strategic Plans, Performance Reports, Conference Reports, and Regulatory Agendas

To meet the requirements of the Government Performance Results Act Modernization Act (GPRAMA), the DOL drafted a Strategic Plan.[[441]](#footnote-442) In that plan the DOL identified three strategic goals and one management goal to achieve during the Strategic Plan’s five-year span from 2018 to 2022. In addition, the DOL set forth five Agency Priority Goals for the period 2020–2021.[[442]](#footnote-443)

On an annual basis the DOL publishes a Performance Report on its progress and actual performance in achieving the goals identified in its Strategic Plan. These Performance Reports can be found on its website.[[443]](#footnote-444)

The DOL’s annual Conference Report sets out a list of conferences and trainings that exceed $100,000 from grantee trainings to agency leadership meetings that are designed to set the stage for the Department’s significant initiatives for the next fiscal year. The list is available on the DOL website.[[444]](#footnote-445)

In addition, the DOL promulgates various reports, including its Semi-Annual Regulatory Agenda.[[445]](#footnote-446)

1. For discussion of judicial review of civil money penalties and DOL enforcement actions, see Chapter 15, Department of Labor Enforcement and Remedies,§§III.D [Civil Money Penalties; Judicial Review of Civil Money Penalties]. [↑](#footnote-ref-2)
2. 29 U.S.C. §204(a). [↑](#footnote-ref-3)
3. *Summary of the Major Laws of the Department of Labor,* U.S. Dep’t of Labor, www.dol.gov/general/aboutdol/majorlaws (last visited Sept. 10, 2023). [↑](#footnote-ref-4)
4. *See id.*  [↑](#footnote-ref-5)
5. *See* Organizational Chart, U.S. Dep’t of Labor, https://www.dol.gov/general/aboutdol/orgchart (last visited Sept. 10, 2023). [↑](#footnote-ref-6)
6. *See* *Agencies and Programs,* U.S. Dep’t of Labor, https://www.dol.gov/general/dol-agencies (last visited Sept. 5, 2023). [↑](#footnote-ref-7)
7. *See* *Office of the Secretary,* U.S. Dep’t of Labor, https://www.dol.gov/agencies/osec (last visited Sept. 10, 2023). [↑](#footnote-ref-8)
8. *See* National Archives & Records Admin., Office of the Federal Register, United States Gov’t Manual 464 (Dec. 2018). [↑](#footnote-ref-9)
9. *Id.* [↑](#footnote-ref-10)
10. *See* *Organizational Chart,* U.S. Dep’t of Labor, https://www.dol.gov/general/aboutdol/orgchart (last visited Sept. 10, 2023). [↑](#footnote-ref-11)
11. *See* *About,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/agencies/sol/about (last visited Sept. 10, 2023). [↑](#footnote-ref-12)
12. *See* *Organizational Chart,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/agencies/sol/about/organizational-chart (last visited Sept. 10, 2023). [↑](#footnote-ref-13)
13. *See* *id.* [↑](#footnote-ref-14)
14. *See* Letter from Attorney General Frank Murphy to Admin. Elmer F. Andrews (Jan. 13, 1939). [↑](#footnote-ref-15)
15. *See* *About,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/agencies/sol/about (last visited Sept. 10, 2023). [↑](#footnote-ref-16)
16. *See Office of the Solicitor of Labor*, U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sites/dolgov/files/SOL/PDFs/SOL-Brochure.pdf (last visited Sept. 10, 2023). [↑](#footnote-ref-17)
17. *See* *SOL National Divisions,* U.S. Dep’t of Labor, Office of the Solicitor, http://www.dol.gov/sol/divisions/ (last visited Sept. 10, 2023). [↑](#footnote-ref-18)
18. *See* *Division of Fair Labor Standards,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sol/divisions/fls.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-19)
19. *See* *SOL Regional Offices,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sol/regions/ (last visited Sept. 10, 2023). [↑](#footnote-ref-20)
20. *See* *SOL Organizational Chart,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sol/contacts/orgchart.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-21)
21. *See* *SOL Regional Offices,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sol/regions/ (last visited Sept. 10, 2023). [↑](#footnote-ref-22)
22. *See* *Organizational Chart,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/about/org/whdchart.htm (last visited Sept. 10, 2023). In 2009, the DOL’s Employment Standards Administration (ESA) was abolished and the four major components of ESA—the Office of Federal Contract Compliance Programs, the Office of Labor-Management Standards, the Office of Workers’ Compensation Programs, and the Wage and Hour Division—became stand-alone programs reporting directly to the Secretary. The purpose of the reorganization was “to improve the efficiency of all four programs by eliminating a layer of review and decision-making, which allows DOL leadership to more quickly attend to policy matters in each program without having an added organization component review between the program heads and senior leadership.” *History,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/about/history/whdhist.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-23)
23. *See* *Organizational Chart,* U.S. Dep’t of Labor, https://www.dol.gov/general/aboutdol/orgchart (last visited Sept. 10, 2023). [↑](#footnote-ref-24)
24. *See WHD History,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/about/history(last visited Sept. 10, 2023)*; see also* *WHD Major Laws Administered/Enforced,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/regs/statutes/summary.htm (last visited Sept. 10, 2023). The WHD has administrative and enforcement responsibilities under the following nine statutes: (1) Fair Labor Standards Act (1938) (codified as amended at 29 U.S.C. §§201–219); (2) Walsh-Healey Public Contracts Act (1936) (codified as amended at 41 U.S.C. §§35–45); (3) Davis-Bacon Act (1931) (codified as amended at 40 U.S.C. §§276(a) *et seq*.) and related acts; (4) Service Contract Act (1965) (codified as amended at 41 U.S.C. §§351–357); (5) Migrant and Seasonal Agricultural Worker Protection Act (1983) (codified at 29 U.S.C. §§1801–1872); (6) Immigration and Nationality Act, as amended by the Immigration Reform and Control Act (1986) (codified at 8 U.S.C. §§1101(a), 1184(c), 1324, 1824, and 29 U.S.C. §§1802, 1813(a)); (7) Employee Polygraph Protection Act (1988) (codified at 29 U.S.C. §§2001 *et seq*.); (8) Family and Medical Leave Act (1993) (codified at 29 U.S.C. §§2601 *et seq*.); and (9) the wage garnishment provisions of the Consumer Credit Protection Act (Title III—Restriction on Garnishment) (1968) (15 U.S.C. §§1671–1677). [↑](#footnote-ref-25)
25. *See* *Organizational Chart,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/about/org/whdchart.htm (last visited Sept. 10, 2023); *see also* Decision Memo. for the Deputy Secretary re Approval to Reorganize [WHD], National Office Programs (approved Aug. 16, 2019) (on file with DOL). [↑](#footnote-ref-26)
26. *See* Reorganization Plan No. 14 of 1950, 5 U.S.C. app. 1 (1990). [↑](#footnote-ref-27)
27. *Id.* There are five regional administrators covering the Northeast Region, the Southeast Region, the Midwest Region, the Southwest Region, and the Western Region. *Id.* [↑](#footnote-ref-28)
28. *See* Western Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659 (7th Cir. 1998). [↑](#footnote-ref-29)
29. *See* *About the Office of Administrative Law Judges,* U.S. Dep’t of Labor, Office of Admin. Law Judges, https://www.dol.gov/agencies/oalj/about/ALJMISSN (last visited Sept. 10, 2023). [↑](#footnote-ref-30)
30. *Id.* [↑](#footnote-ref-31)
31. *See* *Establishment and Mission of the Board,* U.S. Dep’t of Labor, Admin. Review Bd., https://www.dol.gov/arb/mission.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-32)
32. *See* *id*. [↑](#footnote-ref-33)
33. *See* Press Release, U.S. Dep’t of Labor, U.S. Secretary of Labor Eugene Scalia Signs First Secretary’s Orders and Announces Department Management Decisions (Feb. 21, 2020), https://www.dol.gov/newsroom/releases/osec/osec20200221; *see also* Discretionary Review by the Secretary,85 Fed. Reg. 13024 (Mar. 6, 2020), https://www.federalregister.gov/documents/2020/03/06/2020-04017/discretionary-review-by-the-secretary. [↑](#footnote-ref-34)
34. *See Establishment and Mission of the Board,* U.S. Dep’t of Labor, Admin. Review Bd., https://www.dol.gov/arb/mission.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-35)
35. For discussion of judicial review of civil money penalties, see Chapter 15, Department of Labor Enforcement and Remedies, §III.D [Civil Money Penalties; Judicial Review of Civil Money Penalties]. [↑](#footnote-ref-36)
36. 5 U.S.C. §553(b)(3)(A). [↑](#footnote-ref-37)
37. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). [↑](#footnote-ref-38)
38. See Section III.B [Chevron Deference] below. [↑](#footnote-ref-39)
39. 519 U.S. 452 (1997). [↑](#footnote-ref-40)
40. See Section III.C [*Auer* Deference] below. [↑](#footnote-ref-41)
41. 323 U.S. 134 (1944). [↑](#footnote-ref-42)
42. See Section III.D [*Skidmore* Deference] below. [↑](#footnote-ref-43)
43. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (quoting *Chevron*, 467 U.S. at 843–44). [↑](#footnote-ref-44)
44. *Chevron*, 467 U.S. at 842 (footnotes omitted). [↑](#footnote-ref-45)
45. *Id*. at 842–43 (footnotes omitted). [↑](#footnote-ref-46)
46. *Mead*, 533 U.S. at 229 (quoting *Chevron*, 467 U.S. at 844). [↑](#footnote-ref-47)
47. *Id.* (quoting *Chevron,* 467 U.S. at 845). [↑](#footnote-ref-48)
48. *Chevron,* 467 U.S. at 843 (footnotes omitted). [↑](#footnote-ref-49)
49. *Id.* at 844. [↑](#footnote-ref-50)
50. *Id.* at 845*.* [↑](#footnote-ref-51)
51. *Id*. at 844 (footnotes omitted). [↑](#footnote-ref-52)
52. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001). [↑](#footnote-ref-53)
53. *Id.* at 231. [↑](#footnote-ref-54)
54. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000). [↑](#footnote-ref-55)
55. *See, e.g.,* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking pt. IV, ch. 2, at 530–49 (6th ed. 2018). [↑](#footnote-ref-56)
56. 551 U.S. 158 (2007). [↑](#footnote-ref-57)
57. 29 C.F.R §552.109(a). This regulation was revised in 2013 and now prohibits third-party employers from claiming the §213(a)(15) exemption. [↑](#footnote-ref-58)
58. FLSA Amendments of 1974 §29(b), codified at 29 U.S.C. §213(a)(15). [↑](#footnote-ref-59)
59. *Long Island Care*, 551 U.S. at 176. [Note: In its October 1, 2013 final rule regarding domestic services employment, the DOL changed its position regarding third-party employers. Its regulations now provide that third-party employers are not entitled to the §213(a)(15) or §213(b)(21) exemptions, and this change in position was upheld by the District of Columbia Circuit Court, which cited to *Long Island Care at Home* for the proposition that the statutory exemption is ambiguous leaving a “gap” for the agency to fill, and found that the agency’s changed position was reasonable given changes within the health care industry*.* Home Care Ass’n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015).] [↑](#footnote-ref-60)
60. 136 S. Ct. 2117 (2016). [↑](#footnote-ref-61)
61. Navarro v. Encino Motorcars, LLC, 780 F.3d 1267 (9th Cir. 2015), *vacated and remanded*, 136 S. Ct. 2117 (2016). [↑](#footnote-ref-62)
62. *Encino I*, 136 S. Ct. 2117 (2016). [↑](#footnote-ref-63)
63. *Id*.at 2126. [↑](#footnote-ref-64)
64. *Id*. at 2125. [↑](#footnote-ref-65)
65. *Id*. at 2126. [↑](#footnote-ref-66)
66. *Id*. (citing National Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984)). [↑](#footnote-ref-67)
67. *Id*. (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). [↑](#footnote-ref-68)
68. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016). [↑](#footnote-ref-69)
69. *Id*. [↑](#footnote-ref-70)
70. *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 227 (2001)). [Note: On remand, the Ninth Circuit, using the distributive canon of statutory construction, matched “salesman” with “selling” and “partsman and mechanic” with “servicing,” and again held that §213(b)(10)(A) did not exempt service advisors from the FLSA’s overtime pay requirements. Encino Motorcars, LLC v. Navarro, 845 F.3d 925 (9th Cir. 2017). The Supreme Court again reversed, *Encino Motorcars, LLC v*. *Navarro (Encino II),* 138 S. Ct. 1134 (2018), finding service advisors exempt from overtime: “[u]nder the best reading of the text, service advisors are ‘salesmen,’ and they are ‘primarily engaged in … servicing automobiles.’ The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.” *Encino II*, 138 S. Ct. at 1140.] [↑](#footnote-ref-71)
71. 519 U.S. 452, 3 WH Cases2d 1249 (1997). [↑](#footnote-ref-72)
72. *Id.* at 461. [↑](#footnote-ref-73)
73. *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945) (“Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”). [↑](#footnote-ref-74)
74. *Auer*, 519 U.S. at 461. [↑](#footnote-ref-75)
75. *Id*. at 463–64; see alsoChapter 5, White-Collar Exemptions, §V.F.1 [The Salary Basis Test; Effect of Improper Deductions; Generally]. [↑](#footnote-ref-76)
76. 529 U.S. 576 (2000). [↑](#footnote-ref-77)
77. *Id.* at 588. [↑](#footnote-ref-78)
78. 567 U.S. 142 (2012). [↑](#footnote-ref-79)
79. *Id*. at 159. [↑](#footnote-ref-80)
80. *Id*. at 159–60. [↑](#footnote-ref-81)
81. *Id*. at 155–56. [↑](#footnote-ref-82)
82. *Id*. at 155–57. [↑](#footnote-ref-83)
83. *Id*. at 161. For a further discussion of that aspect of the Supreme Court’s decision in *Christopher* addressing the substance of the outside sales exemption as applied to pharmaceutical sales representatives, see Chapter 5, White-Collar Exemptions, §X.A [The Outside Sales Exemption; “Making Sales”]. [↑](#footnote-ref-84)
84. 139 S. Ct. 2400 (2019). [↑](#footnote-ref-85)
85. *Id*. at 2414. [↑](#footnote-ref-86)
86. *Id.* [↑](#footnote-ref-87)
87. *Id*. at 2415. [↑](#footnote-ref-88)
88. *Id.* [↑](#footnote-ref-89)
89. *Id.* [↑](#footnote-ref-90)
90. Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019)*.* [↑](#footnote-ref-91)
91. *Id.* [↑](#footnote-ref-92)
92. *Id.* [↑](#footnote-ref-93)
93. *Id.* [↑](#footnote-ref-94)
94. *Id.* at 2416–17. [↑](#footnote-ref-95)
95. *Id.* at 2417. [↑](#footnote-ref-96)
96. Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)*.* [↑](#footnote-ref-97)
97. *Id.* [↑](#footnote-ref-98)
98. *Id.* [↑](#footnote-ref-99)
99. *Id.* at 2417–18. [↑](#footnote-ref-100)
100. *Id*. at 2418. [↑](#footnote-ref-101)
101. 529 U.S. 576 (2000). [↑](#footnote-ref-102)
102. *Id.* at 587. [↑](#footnote-ref-103)
103. *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). [↑](#footnote-ref-104)
104. 323 U.S. 134. [↑](#footnote-ref-105)
105. Skidmore v. Swift & Co.,136 F.2d 112 (5th Cir. 1944). [↑](#footnote-ref-106)
106. *Skidmore*, 323 U.S. at 138 (emphasis added). [↑](#footnote-ref-107)
107. *Id.* at 140. [↑](#footnote-ref-108)
108. *Id.* [↑](#footnote-ref-109)
109. *Id.* at 139. [↑](#footnote-ref-110)
110. *Id.* at 139–40 (emphasis added). [↑](#footnote-ref-111)
111. 873 F.3d 420 (3d Cir. 2017). [↑](#footnote-ref-112)
112. *Id.* at ­­­427 (quoting Hagans v. Comm’r of Soc. Sec., [694 F.3d 287, 304](https://casetext.com/case/hagans-v-commr-of-soc-sec#p304) (3d Cir. 2012)). [↑](#footnote-ref-113)
113. *Id.* (citing *Hagans*, 694 F.3d at 304–05; Cleary *ex rel.* Cleary v. Waldman, [167 F.3d 801, 808](https://casetext.com/case/cleary-v-waldman#p808) (3d Cir. 1999)). Applying those factors in *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021), the district court found that there was nothing in the limited record before it to support those factors. [↑](#footnote-ref-114)
114. *Field Operations Handbook*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Sept. 10, 2023). [↑](#footnote-ref-115)
115. 29 C.F.R. pts. 500–697. [↑](#footnote-ref-116)
116. 29 C.F.R. pts. 775–794. [↑](#footnote-ref-117)
117. *See*

     *Supreme Court:* Long Island Care At Home, Ltd. v. Coke, 551 U.S. 158, 12 WH Cases2d 1089 (2007) (discussing whether general regulations and interpretations of the companionship exemption were interpretive or legislative rules).

     *Third Circuit:* Madison v. Resources for Human Dev. Inc., 233 F.3d 175, 187, 6 WH Cases2d 961 (3d Cir. 2000) (holding trial court mistook interpretive guideline for regulation).

     *Eighth Circuit:* Wisnewski v. Champion Healthcare Corp., 2000 BL 780, 2000 WL 1474414, 141 Lab. Cas. ¶34,095 (D.N.D. Jan. 11, 2000) (setting forth distinction that provisions of 29 C.F.R. pt. 778 regarding calculation of overtime are an interpretative bulletin, rather than a regulation); Speer v. Cerner Corp., 2016 BL 316471, 2016 WL 5395268 (W.D. Mo. Sept. 26, 2016) (holding that the fluctuating workweek provision of §778.114 was entitled to a heightened degree of deference; recognizing that it had undergone the process of notice and comment-making and remained unchanged).

     *Eleventh Circuit:* Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1268 n.5 (11th Cir. 2008) (discussing the lower level of deference due an interpretive bulletin).

     *D.C. Circuit:* American Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (determining whether a given agency action is interpretive or legislative is a “case specific endeavor”); Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (calling distinction “fuzzy” and “enshrouded in considerable smog”); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (determining EPA rule requiring recall of vehicles to be interpretive rule not subject to APA notice-and-comment process).

     *See also* Richard J. Pierce, Jr., Administrative Law Treatise §6.4 (2002) (explaining distinction between legislative rules and interpretive rules and potential for confusion); Manning, *Nonlegislative Rules*, 72 Geo Wash. L. Rev. 893 (2004); Pierce, *Distinguishing Legislative Rules From Interpretative Rules*, 52 Admin L. Rev. 547 (2000); R. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992) [↑](#footnote-ref-118)
118. 5 U.S.C. §551. [↑](#footnote-ref-119)
119. *Id*. §553. [↑](#footnote-ref-120)
120. *Id.* [↑](#footnote-ref-121)
121. 29 U.S.C. §213(a)(1). [↑](#footnote-ref-122)
122. In *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 153 (2012), the parties agreed that the “541 regulation” defining an “outside salesman” was validly promulgated and entitled to deference under *Chevron,* but the parties disagreed about whether the DOL’s interpretation of the regulations was owed deference under *Auer.*  [↑](#footnote-ref-123)
123. *See, e.g.*,

     *Fourth* *Circuit:* Stricker v. Eastern Off Rd. Equip., Inc., 935 F. Supp. 650, 654, 3 WH Cases2d 748 (D. Md. 1996) (“[R]egulations promulgated by the [DOL] establish binding standards for determining whether an employee is employed in a ‘bona fide executive, administrative, or professional capacity.’”).

     *Fifth Circuit:* Dufrene v. Browning-Ferris, Inc., 207 F.3d 264, 5 WH Cases2d 1697 (5th Cir. 2000) (calculation of overtime based on §778.112 affirmed based on *Chevron* deference to DOL interpretation).

     *Sixth Circuit:* Rutlin v. Prime Succession, Inc., 220 F.3d 737, 741, 6 WH Cases2d 359 (6th Cir. 2000) (noting that §541 regulations are “controlling” in the context of finding state-licensed funeral home director to be exempt); Roberson v. Texas Roadhouse Mgmt. Corp., 2020 BL 481106, 2020 WL 7265860, at \*4 (W.D. Ky. Dec. 9, 2020) (applying *Chevron* deference to dual jobs regulation, 29 C.F.R. §531.56(e)).

     *Ninth Circuit:* Roces v. Reno Housing Auth., 300 F. Supp. 3d 1172, 1184–85 (D. Nev. 2018) (*Chevron* deference afforded DOL interpretive regulations, 29 C.F.R. §§531.3, 531.33(a), which allow employers to determine appropriate set-offs from wages for “reasonable cost” of board, lodging, and other facilities afforded employees, as DOL granted authority under §203(m) to regulate the determination of such set-offs).

     *Tenth Circuit:* Spradling v. City of Tulsa, 95 F.3d 1492, 1498, 3 WH Cases2d 823 (10th Cir. 1996) (upholding the salary basis test as applied to public sector employees).

     *Eleventh Circuit:* Herman v. Suwannee Swifty Stores, Inc., 19 F. Supp. 2d 1365, 1374 (M.D. Ga. 1998) (holding DOL permissibly construed congressional intent in interpreting §207(i)’s requirement of a “bona fide commission rate”) [↑](#footnote-ref-124)
124. 218 F. Supp. 3d 520 (E.D. Tex. 2016). [↑](#footnote-ref-125)
125. Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737, 18,737 (Mar. 13, 2014). [↑](#footnote-ref-126)
126. *Nevada*, 218 F. Supp. 3d at 530. [↑](#footnote-ref-127)
127. *Id*. [↑](#footnote-ref-128)
128. 275 F. Supp. 3d 795 (E.D. Tex. 2017). On appeal, the Fifth Circuit granted the government’s motion to hold the appeal in abeyance while the DOL undertook further rulemaking to determine what the salary level should be. *See* Nevada v. U.S. Dep’t of Labor, No. 16-41606 (5th Cir. Nov. 6, 2017). The DOL ultimately issued a final rule, effective January 1, 2019. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (Sept. 27, 2019) (to be codified at 29 C.F.R. pt. 541). [↑](#footnote-ref-129)
129. 816 F.3d 1080 (9th Cir. 2016). [↑](#footnote-ref-130)
130. *Id*. at 1088 (citing Christensen v. Harris Cnty., 529 U.S. 576 (2000)). [↑](#footnote-ref-131)
131. *Id*. at 1090.

     *But see*

     *Second Circuit:* Trinidad v. Pret a Manger (USA) Ltd., 2013 BL 184545, 2013 WL 3490815 (S.D.N.Y. July 11, 2013) (declining to afford *Chevron* deference to the same 2011 regulation regarding tip practices; regulation fails step one of the *Chevron* analysis because it departs from Congress’s clear intent that tips are the property of the employee only when the employer takes a tip credit).

     *Fourth Circuit:* Mould v. NJG Food Serv., Inc., 2014 BL 167035, 2014 WL 2768635 (D. Md. June 17, 2014) (same).

     *Tenth Circuit:* Brueningsen v. Resort Express, Inc., 2015 BL 17521, 2015 WL 339671, at \*3–4 (D. Utah Jan. 26, 2015) (same); Stephenson v. All Resort Coach, Inc., 2013 BL 226255, 2013 WL 4519781, at \*8 (D. Utah Aug. 26, 2013) (same) [↑](#footnote-ref-132)
132. In 2018, Congress amended the FLSA to prohibit an employer from keeping an employee’s tips irrespective of whether the employer takes the tip credit. 29 U.S.C. §203(m)(2)(B), adopted by the Consolidated Appropriations Act of 2018, Pub. L. 115-141, Div. S., Tit. XII, §1201(c), 132 Stat. 348, 1149 (2018). SeeChapter 9, Minimum Wage Requirements, for a full discussion regarding tips. [↑](#footnote-ref-133)
133. Brief for Respondents, No. 16-920, at 13, National Rest. Ass’n v. Department of Labor, 138 S. Ct. 2697, 2018 WL 2357725, at \*13 (2018). [↑](#footnote-ref-134)
134. *Compare* Cesarz v. Wynn Las Vegas LLC, 2019 BL 14901, 2019 WL 237389, at \*2 (D. Nev. Jan. 16, 2019) (deferring to DOL’s position that it was not authorized to issue 2011 regulation) *with* Norsoph v. Riverside Resort & Casino, Inc., 611 F. Supp. 3d 1058 (D. Nev. 2020) (ruling it was bound by Ninth Circuit’s decision in *Oregon Restaurant & Lodging Ass’n,* 816 F.3d 1080 (9th Cir. 2016), which deferred to DOL’s 2011 regulation, and, because that regulation was never rescinded, rejecting defendant’s argument that Ninth Circuit’s decision was undermined by DOL’s subsequent position that it lacked authority to issue 2011 regulation and would not enforce it;declining to defer to DOL’s revised interpretation of 2011 regulation). [↑](#footnote-ref-135)
135. 861 F.3d 1157 (10th Cir. 2017). [↑](#footnote-ref-136)
136. *Id*. at 1163–64. [↑](#footnote-ref-137)
137. *Id*. at 1164. [↑](#footnote-ref-138)
138. *Id.* [↑](#footnote-ref-139)
139. *See, e.g.*,

     *Second Circuit:* Trinidad v. Pret a Manger (USA) Ltd., 2013 BL 184545, 2013 WL 3490815 (S.D.N.Y. July 11, 2013).

     *Fourth Circuit:* Trejo v. Ryman Hospitality Props., Inc., 795 F.3d 442, 448 (4th Cir. 2015); Mould v. NJG Food Serv., Inc., 2014 BL 167035, 2014 WL 2768635 (D. Md. June 17, 2014).

     *Tenth Circuit:* Stephenson v. All Resort Coach, Inc., 2013 BL 22625, 2013 WL 4519781, at \*8 (D. Utah Aug. 26, 2013); Brueningsen v. Resort Express, Inc., 2015 BL 17521, 2015 WL 339671, at \*3–4 (D. Utah Jan. 26, 2015). [↑](#footnote-ref-140)
140. 5 U.S.C. §553(b)(A) [↑](#footnote-ref-141)
141. Perez v. Mortgage Bankers Ass’n, 575 U.S. 92, 97 (2015) (quotingShalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995)). [↑](#footnote-ref-142)
142. *Id.* [↑](#footnote-ref-143)
143. 323 U.S. 134, 140 (1944). [↑](#footnote-ref-144)
144. *See, e.g.,*

     *Second Circuit:* Hasan v. GPM Invs., LLC, 896 F. Supp. 2d 145, 149 (D. Conn. 2012) (acknowledging that the DOL regulations were drafted without entertaining comments from outside stakeholders, but finding that the DOL was the institution with the greatest body of experience with the FLSA and that its informed judgment should have the power to persuade).

     *Third Circuit:* Madison v. Resources for Human Dev., Inc., 233 F.3d 175, 6 WH Cases2d 961 (3d Cir. 2000) (remanding so that district court could apply *Christensen* deference to §778.215(a)(5), which was determined to be an informal interpretive guideline).

     *Fifth Circuit:* Griffin v. S&B Eng’rs & Constructors, Ltd., 507 F. App’x 377, 383 (5th Cir. 2013) (finding that the DOL’s interpretive statements on travel time, while not promulgated regulations, are “insightful guidance” in evaluating FLSA claims), *cert. denied*, 134 S. Ct. 111 (2013).

     *Ninth Circuit:* Miller v. Farmers Ins. Exch., 481 F.3d 1119, 1129 (9th Cir. 2007) (giving *Christensen* deference to DOL interpretation of §541.203(a) in ruling that insurance claims adjusters were exempt as administrative employees because agency interpretations were “consistent” over the years); Burden v. SelectQuote Ins. Servs., 848 F. Supp. 2d 1075 (N.D. Cal. 2012) (rejecting defendant’s argument that 29 C.F.R. §779.317 was outdated interpretation of what is considered retail or service establishment, finding that regulation was persuasive embodiment of DOL’s body of experience and informed judgment entitled to *Skidmore* deference).

     *Tenth Circuit:* Chavez v. City of Albuquerque, 630 F.3d 1300 (10th Cir. 2011) (giving *Skidmore* deference to interpretive bulletins §§778.219(a) and 778.211(c), and agreeing with DOL that vacation buy-back should not be included when calculating regular rate but that sick leave buy-back should be included when calculating regular rate because sick leave buy-back is analogous to an attendance bonus).

     *Eleventh Circuit:* Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1269 (11th Cir. 2008) (“[N]either party has offered any reason why we should not defer to the DOL’s interpretative bulletin in determining what an employee’s ‘regular rate’ of pay is.”) [↑](#footnote-ref-145)
145. *See, e.g.*,

     *Second Circuit:* Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106, 115–17 (2d Cir. 2013) (affirming New York district court’s dismissal of plaintiffs’ “gap time” claims, finding that 29 C.F.R. §778.315 was not persuasive and conflicted with prior circuit precedent and therefore did not deserve deference).

     *Fourth Circuit:* North Carolina Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755, 771 (4th Cir. 2012) (rejecting as unpersuasive and lacking the “power to persuade” DOL’s long-established and consistent interpretive regulations defining Christmas tree farming as covered “forestry” given current industry practices and state regulations treating businesses as agricultural); Troutt v. Stavola Bros., Inc., 107 F.3d 1104, 3 WH Cases2d 1400 (4th Cir. 1997) (declining to defer to DOL’s interpretive bulletin defining “loader” as used in the motor carrier exemption [§213(b)(1)] since the DOL was not authorized to define positions under the Motor Carrier Act, which conferred such authority upon the Interstate Commerce Commission).

     *Ninth Circuit*: Padilla v. City of Richmond, 2020 BL 500914, 2020 WL 7643235, at \*6–12 (N.D. Cal. Dec. 23, 2020) (finding that 29 C.F.R. §778.219, which addresses when pay in lieu of accrued time off can be excluded from regular rate of pay calculation, to be interpretive rule that is owed only *Skidmore* and not *Chevron* deference, but finding cited example from rule to be unpersuasive as to city’s “holiday-in-lieu payment” scheme). [↑](#footnote-ref-146)
146. 575 U.S. 92 (2015). [↑](#footnote-ref-147)
147. 29 C.F.R. §541.203(b). [↑](#footnote-ref-148)
148. WH Op. FLSA2006-31(Sept. 8, 2006) (withdrawn by Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010)). [↑](#footnote-ref-149)
149. Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010). [↑](#footnote-ref-150)
150. *Mortgage Bankers Association*, 575 U.S. at 101. The Court noted that the District of Columbia Circuit Court of Appeals had held in a line of cases beginning with *Paralyzed Veterans of America v. DC Arena L.P*., 117 F.3d 579 (D.C. Cir. 1997), that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The issue in *Mortgage Bankers Association* was whether the rule announced in *Paralyzed Veterans* was consistent with the APA. The Court ruled that it was not. *See* *Mortgage Bankers Association*,575 U.S. at 102–03. [↑](#footnote-ref-151)
151. *Id.* at 102. [↑](#footnote-ref-152)
152. *Id.* [↑](#footnote-ref-153)
153. *See* *Final Rulings & Opinion Letters,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/opinion/guidance.htm (last visited July 12, 2020). To gain comprehensive access to opinion letters, informal contact with the WHD’s national office is appropriate, with possible follow-up by means of a request pursuant to the Freedom of Information Act, 5 U.S.C. §552. [↑](#footnote-ref-154)
154. *See Non-Administrator Letters,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/opinion/search/index\_non.htm (last visited July 12, 2020). [↑](#footnote-ref-155)
155. 29 U.S.C. §§251 *et seq*. [↑](#footnote-ref-156)
156. *Id*. §259. [↑](#footnote-ref-157)
157. EEOC v. Home Ins. Co., 672 F.2d 252, 263 (2d Cir. 1982). [↑](#footnote-ref-158)
158. Reich v. Gateway Press, 13 F.3d 685, 1 WH Cases2d 1313 (3d Cir. 1994) (addressing weight given to inconsistent or older opinion letters). [↑](#footnote-ref-159)
159. *See, e.g.,*

     *Fourth Circuit:* Calderon v. GEICO Gen. Ins. Co., 809 F.3d 111 (4th Cir. 2015) (deferring to opinion letters regarding whether conducting factual investigations is related to management or general business operations for overtime exemptions); Ketner v. Branch Banking & Tr. Co., 2015 BL 356495, 2015 WL 6553995 (M.D.N.C. Oct. 29, 2015) (affording Auer deference and finding reasonable a 2006 DOL WH Opinion Letter regarding out-of-pocket reimbursements).

     *Fifth Circuit:* Belt v. Emcare, Inc., 444 F.3d 403, 11 WH Cases2d 553 (5th Cir. 2006) (interpreting §541.3(e) by relying on 1974 opinion letter from WHD to exclude nurse practitioners and physician assistants from professional exemption where regulation was ambiguous and DOL interpretation had been consistent in Field Operations Handbook (FOH) and amicus briefing).

     *Sixth Circuit:* Misewicz v. City of Memphis, 771 F.3d 332 (6th Cir. 2014) (deferring to opinion letters on compensability of training time); Beck v. City of Cleveland, 390 F.3d 912, 10 WH Cases2d 65 (6th Cir. 2003) (relying on opinion letter because underlying regulation was ambiguous); Fazekas v. Cleveland Clinic Found. Health Care, 204 F.3d 673, 5 WH Cases2d 1569 (6th Cir. 2000) (deferring to opinion letter because not inconsistent with regulation or plainly erroneous).

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (DOL’s interpretation of its own dual jobs regulations set forth in several opinion letters was entitled to Auer deference); Helmert v. Butterball, LLC, 805 F. Supp. 2d 655 (E.D. Ark. 2011) (deferring to DOL opinion letter instead of seemingly contrary statement in DOL FOH).

     *Ninth Circuit:* Nigg v. United States Postal Serv., 829 F. Supp. 2d 889, 906–07 (C.D. Cal. 2011) (deferring to 2007 opinion letter instead of 1976 opinion letter because 2007 letter interpreted facts similar to facts in the case).

     *Tenth Circuit:* Ellis v. J.R.’s Country Stores, 779 F.3d 1184 (10th Cir. 2015) (finding that district court properly deferred to DOL opinion letter and preamble to regulation in applying the salary basis requirement); Chavez v. City of Albuquerque, 630 F.3d 1300 (10th Cir. 2011) (granting deference to DOL opinion letter that vacation buy-back is not part of regular rate but that sick leave buy-back is part of regular rate because sick leave buy-back is analogous to an attendance bonus); In re Wal-Mart Stores, Inc., 395 F.3d 1177, 10 WH Cases2d 481 (10th Cir. 2005) (relying in part on DOL opinion letters stating that reducing schedules of salaried employees for operational reasons along with corresponding reduction in pay does not impact “salary basis” test).

     *Eleventh Circuit:* Billingslea v. Brayson Homes, Inc., 2007 BL 60912, 2007 WL 2118990 (N.D. Ga. July 20, 2007) (holding that because facts in a DOL opinion letter were similar in every relevant respect to case at hand and DOL opinion letters should be followed “so long as it is reasonable,” plaintiffs were “outside sales employees” exempt from the FLSA’s minimum wage and overtime pay requirements); Kitchings v. Florida United Methodist Children’s Home, 393 F. Supp. 2d 1282 (M.D. Fla. 2005)((relying on two DOL opinion letters in holding that private charitable nonprofit institution providing care for neglected and dependent children is not an enterprise if the entity does not operate in conjunction with a hospital, covered institution, or preschool/daycare) [↑](#footnote-ref-160)
160. *See, e.g.,*

     *First Circuit:* Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364 (D. Mass. 2019) (declining to defer to opinion letter that all time in a sleeper berth is presumptively noncompensable because it did not address the facts presented in this case, and the new interpretation was unreasonable).

     *Third Circuit:* Parker v. NutriSystem, Inc., 620 F.3d 274, 282 (3d Cir. 2010) (court did not “find that the opinion letters at issue here provide sufficiently thorough reasoning, consistency, or factual similarities to the instant case to warrant deference”); Packard v. Pittsburg Transp. Co., 418 F.3d 246 (3d Cir. 2005) (declining to defer to DOL opinion letter as to scope of Motor Carrier Exemption because Department of Transportation rather than DOL had authority to interpret the Motor Carrier Act); Sicklesmith v. Hershey Ent. & Resorts Co., 440 F. Supp. 3d 391, 400 (M.D. Pa. 2020) (declining to defer to Opinion Letter FLSA 2018-27 interpreting dual jobs regulation, 29 C.F.R. §531.56(e)); Roberson v. Texas Roadhouse Mgmt. Corp., 2020 BL 481106, 2020 WL 7265860, at \*5–6 (W.D. Ky. Dec. 9, 2020) (declining to apply *Auer* or *Skidmore* deference to WH Op. FLSA2018-27 and FOH interpreting dual jobs regulation, 29 C.F.R. §531.56(e)).

     *Fourth Circuit*: Flores v. HMS Host Corp., 2019 BL 407338, 2019 WL 5454647, at \*5 (D. Md. Oct. 23, 2019) (declining to defer to WH Op. FLSA 2018-27 interpreting dual jobs regulation, 29 C.F.R. §531.56(e)).

     *Sixth Circuit*: Waters v. Pizza to You, LLC, 2021 BL 170867, 2021 WL 1839974, at \*10 (S.D. Ohio May 7, 2021) (declining to defer to WH Op. FLSA2020-12, which allowed for employer’s “reasonable approximations” of mileage costs for determining whether minimum wage requirements were met, noting, among other things, that letter was contrary to DOL’s Field Operations Handbook’s guidance under 29 C.F.R. §531.35, the “anti-kickback regulation,” that, absent proof of actual expenses, IRS mileage rate should be used for calculating out-of-pocket expenses incurred by delivery drivers using their own vehicles); O’Neal v. Denn-Ohio, LLC, 2020 BL 12502, 2020 WL 210801, at \*5–8 (N.D. Ohio Jan. 14, 2020) (declining to apply *Auer* or *Skidmore* deference to Opinion Letter FLSA2018-27 and FAB No. 2018-2 interpreting dual jobs regulation, 29 C.F.R. §531.56(e)).

     *Seventh Circuit:* Sehie v. City of Aurora, 432 F.3d 749, 11 WH Cases2d 129 (7th Cir. 2005) (declining to defer under *Christensen* in travel time case based on existence of conflicting opinion letters).

     *Eighth Circuit:*Cope v. Let’s Eat Out, Inc., 354 F. Supp. 3d 976 (W.D. Mo. 2019) (holding that DOL opinion letter interpreting the dual jobs regulations was not entitled to *Auer* deference because it directly conflicted with the DOL’s prior guidance that the Eighth Circuit had accepted as a reasonable interpretation of the regulation, and thus constituted unfair surprise to litigating parties; holding that it was not entitled to *Skidmore* deference because the DOL did not offer any reasoning for reversing its previous position);Petrone v. Werner Enters., Inc., 2017 BL 478619, 2017 WL 510884 (D. Neb. Feb. 2, 2017) (declining to defer to advisory opinions because the plain language of the truck driver regulation was unambiguous and the advisory opinions conflicted with the regulation).

     *Tenth Circuit:* Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 9 WH Cases2d 513 (10th Cir. 2004) (declining to defer to opinion letter given conflicting investigator report and unpersuasive analysis of scope of agricultural exemption) [↑](#footnote-ref-161)
161. *See Administrator Interpretations Letter—Fair Labor Standards Act,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm (last visited Aug. 15, 2020). [↑](#footnote-ref-162)
162. *See Resources for Employees,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/employers (last visited Sept. 18, 2020). [↑](#footnote-ref-163)
163. *See Administrator Interpretations Letter—Fair Labor Standards Act,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm (last visited Aug. 15, 2020). [↑](#footnote-ref-164)
164. *See, e.g.*, Lewis v. Huntington Nat’l Bank, 838 F. Supp. 2d 703, 718–23 (S.D. Ohio 2012) (deferring to DOL’s 2010-1 administrator interpretation regarding mortgage loan officers). [↑](#footnote-ref-165)
165. *See, e.g.*, Franklin v. Kellogg Co., 619 F.3d 604, 614 (6th Cir. 2010) (refusing to defer to Administrator Interpretation No. 2010-2 because “[t]he DOL’s position on this issue has changed repeatedly in the last twelve years”); Henry v. Quicken Loans, Inc., 2009 BL 294209, 2009 WL 3270771, at \*20, 22 (E.D. Mich. July 16, 2009) (concluding that administrator interpretation that reflected change in DOL’s interpretation applied only prospectively). [↑](#footnote-ref-166)
166. *See Office of the Solicitor Brief Bank,* U.S. Dep’t of Labor, Office of the Solicitor, https://www.dol.gov/sol/media/briefs\_new/index.htm (last visited Aug. 15, 2020).

     [↑](#footnote-ref-167)
167. *See, e.g.*,

     *Supreme Court:* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) (noting DOL reaffirmed its views in amicus brief and that its views are reasonable, consistent with Act, and held for long period of time).

     *Second Circuit:* Mullins v. City of N.Y., 653 F.3d 104, 113–14 (2d Cir. 2011) (finding first responder regulation ambiguous and deferring to DOL amicus brief, which stated that police sergeants do not qualify under executive exemption); Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 4 WH Cases2d 335 (S.D.N.Y. 1997) (deferring to Secretary’s interpretation in amicus brief of §541.118 regulation on window of correction issue).

     *Third Circuit:* Smiley v. E.I. Dupont De Nemours & Co., 839 F.3d 325 (3d Cir. 2016) (deferring to position in amicus brief).

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (DOL’s amicus brief in support of plaintiff was given *Auer* deference).

     *Ninth Circuit:* Marsh v. J. Alexander’s LLC, 905 F.3d 610, 627 (9th Cir. 2018) (“It is well-settled law that courts may afford an agency’s interpretation *Auer* deference if the interpretation is advanced through an amicus brief.”).

     *Eleventh Circuit:* Ramos-Barrientos v. Bland*,* 661 F.3d 587 (11th Cir. 2011) (giving *Auer* deference to the Secretary’s interpretation that the employer could not credit the cost of housing in the wages paid to workers, set forth in an amicus brief) [↑](#footnote-ref-168)
168. *See, e.g.*,

     *Third Circuit:* Parker v. NutriSystem, Inc., 620 F.3d 274 (3d Cir. 2010) (refusing to defer to the DOL’s conclusions in an amicus brief regarding requirements for a bona fide commission plan because the court found that opinion letters and other interpretations underlying the amicus brief were not sufficiently thorough or consistent to warrant deference under *Skidmore*).

     *Fifth Circuit:* Houston Police Officers’ Union v. City of Houston, 330 F.3d 298, 8 WH Cases2d 1121 (5th Cir. 2003) (holding court not obliged to defer to DOL amicus brief interpreting statute rather than regulation); Moore v. Hannon Food Serv., Inc., 317 F.3d 489, 8 WH Cases2d 681 (5th Cir. 2003) (rejecting deference in salary basis test case where the regulation was unambiguous and the DOL’s interpretation in an amicus brief conflicted with the regulation’s plain language). [↑](#footnote-ref-169)
169. 519 U.S. 452 (1997) (upholding application of the disciplinary deduction element of the DOL’s salary basis test to public sector employees); *see also* Balgowan v. New Jersey Dep’t of Transp., 115 F.3d 214, 3 WH Cases2d 1703 (3d Cir. 1997); Childers v. City of Eugene, 120 F.3d 944, 3 WH Cases2d 1831 (9th Cir. 1997); Stanley v. City of Tracy, 120 F.3d 179, 3 WH Cases2d 1833 (9th Cir. 1997); Carpenter v. City & Cnty. of Denver, 3 WH Cases2d 1869 (10th Cir. 1997). See further discussion of *Auer* in Section III.C.1 above. [↑](#footnote-ref-170)
170. 567 U.S. 142 (2012). [↑](#footnote-ref-171)
171. *See Field Operations Handbook*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (last visited July 12, 2020). As part of an FOH modernization project, technical, nonsubstantive revisions were made to the entire FOH in 2016. Accordingly, those chapters were published with the same substantive content at an earlier time. As a result of FOH modernization, FOH chapters are now in a digital-native format and will no longer be page-based. Therefore, FOH headers, which previously provided historical revision information, will be removed as subsequent revisions are incorporated. Revision information will be tracked in two places: (1) information for revisions published after the 2016 FOH modernization revision are tracked within each chapter’s content with a notation below any revised subsection indicating the effective date of new modifications to that subsection; and (2) information on revisions published prior to the 2016 FOH modernization revision can be found at the link below each chapter title. *Id.* [↑](#footnote-ref-172)
172. *Id.* [↑](#footnote-ref-173)
173. U.S. Dep’t of Labor, Wage & Hour Div., Department of Labor (DOL) Wage and Hour Division (WHD) Field Operations Handbook (FOH), Chapters 50–54, 56–63, 65, 67–71, 73, 76, and 80–86, 1982–2016 (Mar. 1, 2018), https://www.governmentattic.org/27docs/DOL-WHD-FOH\_2016.pdf. [↑](#footnote-ref-174)
174. *See Field Operations Handbook*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (citing 5 U.S.C. §552(a)(2)) (last visited July 12, 2020). [↑](#footnote-ref-175)
175. Belt v. EmCare, Inc., 444 F.3d 403, 415 (5th Cir. 2006). [↑](#footnote-ref-176)
176. *See, e.g.*,

     *First Circuit:* Newman v. Advanced Tech. Innovation Corp., 749 F.3d 33 (1st Cir. 2014) (treated FOH as persuasive pursuant to *Skidmore*).

     *Third Circuit:* McLamb v. High 5 Hospitality, 197 F. Supp. 3d 656 (D. Del. 2016) (holding FOH definition of “occasionally” with regard to tips was entitled to deference because there was no evidence of inconsistent application).

     *Fourth Circuit:* Spencer v. Macado’s, Inc., 2018 BL 273846, 2018 WL 3676990, at \*7 (W.D. Va. Aug. 1, 2018) (collecting cases and providing “at least” *Skidmore* deference to FOH 20% rule); Barnhart v. Chesapeake Bay Seafood House Assocs., LLC, 2017 BL 105210, 2017 WL 1196580 (D. Md. Mar. 31, 2017) (affording *Auer* deference to DOL’s guidance contained in the FOH regarding tips); Goodson v. OS Rest. Servs., 2017 BL 158224, 2017 WL 1957079 (M.D. Fla. 2017) (affording *Auer* deference to DOL’s guidance contained in FOH regarding tips); Irvine v. Destination Wild Dunes Mgmt., Inc., 2015 BL 167355, 2015 WL 3441148 (D.S.C. May 26, 2015) (finding FOH §30d00(e) supported facially plausible claim that employer claimed inappropriate tip credit).

     *Sixth Circuit*: Waters v. Pizza to You, LLC, 2021 BL 170867, 2021 WL 1839974, at \*10 (S.D. Ohio May 7, 2021) (giving *Skidmore* deference to FOH’s guidance under 29 C.F.R. §531.35, the “anti-kickback regulation,” that, absent proof of actual expenses, IRS mileage rate should be used for calculating out-of-pocket expenses incurred by delivery drivers using their own vehicles for purposes of determining whether minimum wage requirements were met).

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872, 881 (8th Cir. 2011) (giving *Auer* deference to Section 30d00(e) of the FOH, which provides guidance regarding the DOL’s “Dual Job Regulation,” 29 C.F.R. §531.56(e), because it deemed the regulation ambiguous and the FOH guidance not to be inconsistent with the regulation).

     *Ninth Circuit:* Lillehagen v. Alorica, Inc., 2014 BL 347052, 2014 WL 6989230 (C.D. Cal. Dec. 10, 2014) (affording *Auer* deference to DOL’s subregulatory guidance contained in FOH regarding rest breaks).

     *Tenth Circuit:* Romero v. Top-Tier Colorado LLC, 274 F. Supp. 3d 1200 (D. Colo. 2017) (following *Fast*, 638 F.3d 872).

     *Eleventh Circuit:* Klinedinst v. Swift Invs., Inc., 260 F.3d 1251, 1255 (11th Cir. 2001) (holding FOH not entitled to *Chevron* deference, but still found to be persuasive as to definition of “commission”); Thomas v. Bayou Fox, Inc., 2017 BL 182220, 2017 WL 2374706 (M.D. Ala. May 31, 2017) (holding FOH entitled to deference because it is consistent with the regulation on dual jobs and further defines and clarifies the dual jobs rule without contradicting it; finding the DOL’s “about-face,” while not dispositive, weighs against deference, as did the potential the FOH is inconsistent with the regulation) [↑](#footnote-ref-177)
177. Giguere v. Port Res. Inc., 927 F.3d 43, 48–49 (1st Cir. 2019) (recognizing that WHD promulgated an industry-specific guide in 1999 for the personal care industry, including the Enforcement Policy for Hours Worked in Residential Care Establishments (1988 WL 614199 (June 30, 1988)); finding persuasive DOL’s enforcement memorandum as most comprehensive analysis; declining to address whether *Skidmore* or *Auer* deference applied; quoting *Skidmore,* 323 U.S. at 140, that “[g]ood administration of the [FLSA] and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons”). [↑](#footnote-ref-178)
178. *See, e.g.,*

     *Third Circuit:* Reynolds v. Chesapeake & Del. Brewing Holdings, LLC, 2020 BL 177776, 2020 WL 2404904 (E.D. Pa. May 12, 2020) (applying *Kisor* and declining to grant deference to DOL’s revised guidance, including FOH, field assistance bulletin (FAB), and opinion letter, on dual jobs); Belt v. P.F. Chang’s China Bistro, Inc., 401 F. Supp. 3d 512 (E.D. Pa. 2019) (declining to defer to DOL’s FOH interpretation of dual jobs regulation as articulated in FOH, FAB, and opinion letter, finding internal inconsistency amongst guidance).

     *Fourth Circuit:* Spencer v. Macado’s, Inc., 399 F. Supp. 3d 545, 553 (W.D. Va. 2019) (declining to give DOL’s new interpretation of dual jobs regulation either *Auer* or *Skidmore* deference because of the “abrupt change in a longstanding agency interpretation, the extent to which the new interpretation’s timing suggests political motivations rather than any genuine interpretive change, and the extent to which DOL offered no ‘evidence of any thorough consideration for reversing course’ on the twenty percent rule”); Chavez v. T&B Mgmt., LLC, 2017 BL 175119, 2017 WL 2275013, at \*4 (M.D.N.C. May 24, 2017) (holding FOH tip guidance was not entitled to deference where the DOL explicitly disclaimed such an intent, stating that it was “not used as a device for establishing interpretative policy”).

     *Sixth Circuit:* Matusky v. Avalon Holdings Corp., 379 F. Supp. 3d 657 (N.D. Ohio 2019) (declining to grant *Auer* deference to DOL’s interpretation of its dual jobs regulation published in the FOH because (1) the Sixth Circuit has not afforded the FOH any type of deference or binding effect in relation to its interpretation of the FLSA; (2) the FOH itself states that it should not be used for interpreting policy; and (3) the FOH’s interpretation was inconsistent with the text of the FLSA and related DOL regulations).

     *Eighth Circuit:* Rorie v. WSP2, LLC, 485 F. Supp. 3d 1037, 1041 (W.D. Ark. 2020) (declining to defer to FOH or Opinion Letter 2018-27 interpreting dual job regulation, 29 C.F.R. §531.56); Esry v. P.F. Chang’s China Bistro, Inc., 373 F. Supp. 3d 1205 (E.D. Ark. 2019) (declining to give *Auer* deference to FOH provision involving dual jobs because (1) the revised FOH contradicted the plain language of the dual jobs regulation that placed a specific temporal limit on the amount of related duties an employee could perform and still be considered to be engaged in tip-producing occupation; and (2) the revised FOH purports to change DOL’s interpretation after years of consistently construing the dual jobs regulation as limited by the 80/20 rule); Helmert v. Butterball, LLC, 805 F. Supp. 2d 655 (E.D. Ark. 2011) (FOH “unpersuasive” because the Administrator had issued an opinion letter in January 2001, taking precedence over FOH statements).

     *Ninth Circuit:* Montijo v. Romulus, Inc., 2015 BL 91281, 2015 WL 1470128 (D. Ariz. Mar. 31, 2015), *vacated in part sub nom*. Marsh v. J. Alexander’s LLC, 869 F.3d 1108 (9th Cir. 2017), *on reh’g en banc*, 905 F.3d 610 (9th Cir. 2018), and *rev’d sub nom*. Marsh v. J. Alexander’s LLC, 905 F.3d 610 (9th Cir. 2018) (finding FOH §30d00(e) not persuasive or entitled to deference because controlling regulation not ambiguous and FOH added additional requirements); Richardson v. Mountain Range Rests., LLC, 2015 BL 77139, 2015 WL 1279237 (D. Ariz. Mar. 20, 2015) (same).

     *Tenth Circuit*: Kennedy v. Mountainside Pizza, Inc., 2020 BL 325077, 2020 WL 5076756, at \*4–5 (D. Colo. Aug. 26, 2020) (declining to defer to FOH standard applying IRS rate for delivery driver reimbursements, finding 29 C.F.R. §531.35, the “anti-kickback” regulation, was not ambiguous, and even if it were, while FOH may be “useful,” it is not “authoritative”). [↑](#footnote-ref-179)
179. 642 F.3d 518 (6th Cir. 2011). [↑](#footnote-ref-180)
180. *See* Employment Relationship Under the FLSA, WH Pub. 1297 (rev. May 1980). [↑](#footnote-ref-181)
181. *Laurelbrook Sanitarium*,642 F.3d at 521. [↑](#footnote-ref-182)
182. *Id*. at 525. [↑](#footnote-ref-183)
183. From December 1, 2005, to March 1, 2006, these FABs were called Wage and Hour Advisory Memoranda (WHAMs). The DOL did not indicate why it changed the name from WHAM to FAB, but there appears to be no substantive difference in content between a WHAM and a FAB. They are functionally equivalent. [↑](#footnote-ref-184)
184. *See Field Assistance Bulletins,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-assistance-bulletins (last visited Sept. 18, 2020). [↑](#footnote-ref-185)
185. *See, e.g.*, Speer v. Cerner Corp., 2016 BL 316471, 2016 WL 5395268 (W.D. Mo. Sept. 26, 2016) (giving deference to FAB regarding late payment of overtime); Salazar-Martinez v. Fowler Bros., Inc., 781 F. Supp. 2d 183, 191–94 (W.D.N.Y. 2011) (granting “substantial”deference to FAB); *In re* Cardinal Health, Inc. ERISA Litig., 424 F. Supp. 2d 1002, 1037–39 (S.D. Ohio 2006) (“*Skidmore* deference” given to FAB regarding ERISA issue); Difelice v. US Airways, Inc., 397 F. Supp. 2d 735, 752 (E.D. Va. 2005) (same). [↑](#footnote-ref-186)
186. Castellanos-Contreras v. Decatur Hotels, Inc., 622 F.3d 393 (5th Cir. 2010). *But see* *Salazar-Martinez*, 781 F. Supp. 2d at 194 (agreeing with dissent in *Castellanos-Contreras*). [↑](#footnote-ref-187)
187. *See Fact Sheet Numeric Index,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/regs/compliance/whdcomp.htm#numeric (last visited Aug. 15, 2020). [↑](#footnote-ref-188)
188. *See, e.g.,*

     *First Circuit:* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 324 n.23 (D.N.J. 2005), *aff’d*, 691 F.3d 527 (2012) (relying on Fact Sheet #48 to conclude that DOL’s position both before and after *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002),is that undocumented workers may pursue FLSA claims for work performed).

     *Third Circuit:* Kuznyetsov v. West Penn Allegheny Health Sys., Inc., 2009 BL 125388, 2009 WL 1515175, at \*5 (W.D. Pa. June 1, 2009) (relying on Fact Sheet #53—which requires employers who use automatic deductions for meal breaks to ensure that employees are receiving full meal breaks—to find that defendants’ policy that shifted responsibility to employees to ensure compensation for time worked during meal breaks was unlawful practice for purposes of collective action certification); Camesi v. University of Pittsburgh Med. Ctr., 2009 BL 105420, 2009 WL 1361265, at \*4 n.3 (W.D. Pa. May 14, 2009) (noting that Fact Sheet #53 “may be an accurate statement of the law,” but not addressing its contents in granting conditional certification).

     *Eleventh Circuit:* Ramos v. Lee Cnty. Sch. Bd., 2005 BL 40689, 2005 WL 2405832, at \*4 n.12 (M.D. Fla. Sept. 29, 2005) (holding that Fact Sheet #17D was “entitled to some respect”). [↑](#footnote-ref-189)
189. *See, e.g.*, Chavez v. T&B Mgmt., LLC, 2017 BL 175119, 2017 WL 2275013 (M.D.N.C. May 24, 2017) (fact sheets regarding tip credit not entitled to deference; pointing to inconsistencies between fact sheets, FOH, and DOL letters). [↑](#footnote-ref-190)
190. 811 F.3d 528 (2d Cir. 2016). [↑](#footnote-ref-191)
191. *Id.* at 535–36. [↑](#footnote-ref-192)
192. Walling v. Portland Terminal Co., 330 U.S. 148 (1947). [↑](#footnote-ref-193)
193. *Glatt*, 811 F.3d at 536 (quoting New York v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)). [↑](#footnote-ref-194)
194. 858 F. Supp. 2d 1181 (D. Colo. 2012). [↑](#footnote-ref-195)
195. *Id.* at 1191. [↑](#footnote-ref-196)
196. *Id.* [↑](#footnote-ref-197)
197. *See FLSA Compliance Assistance Library,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/paid/flsa-compliance-assistance-library (last visited Sept. 10, 2023). [↑](#footnote-ref-198)
198. *See* *Compliance Assistance Toolkits,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/compliance-assistance/toolkits (last visited Sept. 10, 2023). [↑](#footnote-ref-199)
199. *Id.*  [↑](#footnote-ref-200)
200. U.S. Dep’t of Labor, Employment Law Guide (Dec. 2016),https://webapps.dol.gov/elaws/elg. [↑](#footnote-ref-201)
201. *See Fair Labor Standards Act (FLSA) Minimum Wage Poster,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/posters/flsa (last visited Sept. 10, 2023). [↑](#footnote-ref-202)
202. *See, e.g.*, Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 562–65 (2d Cir. 2012) (deferring to statements made by the DOL in the preamble to the 2004 final rule, noting that although the regulatory preamble is not binding, it is “persuasive”). [↑](#footnote-ref-203)
203. *See Elaws Advisors,* U.S. Dep’t of Labor, https://webapps.dol.gov/elaws/ (last visited Sept. 10, 2023). [↑](#footnote-ref-204)
204. *See Questions and Answers About the Fair Labor Standards Act (FLSA),* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/flsa/faq.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-205)
205. U.S. Dep’t of Labor, http://www.dol.gov (last visited Sept. 10, 2023). [↑](#footnote-ref-206)
206. U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd (last visited July 12, 2020). [↑](#footnote-ref-207)
207. *See, e.g.*, *Notice of Proposed Rulemaking (NPRM): Tip Regulations under the Fair Labor Standards Act (FLSA),* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/WHD/flsa/tipcreditnprm.htm (last visited Sept. 10, 2023); *Notice of Proposed Rulemaking on Joint Employer Status under the FLSA,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/joint-employment\_factsheet.pdf (last visited Sept. 10, 2023); *Notice of Proposed Rulemaking (NPRM): Overtime*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/overtime/FAQ2019.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-208)
208. *See Overtime Pay: General Guidance,* U.S. Dep’t of Labor, Wage & Hour Div., http://www.dol.gov/whd/overtime/general\_guidance.htm (last visited Sept. 10, 2023). [↑](#footnote-ref-209)
209. *See Code of Federal Regulations,* U.S. Dep’t of Labor, https://www.dol.gov/general/cfr (last visited Sept. 10, 2023). [↑](#footnote-ref-210)
210. *See Contact Us,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/contact (last visited Sept. 10, 2023); *Local Offices,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/contact/local-offices (last visited Sept. 10, 2023). [↑](#footnote-ref-211)
211. *See Handy Reference Guide to the Fair Labor Standards Act*, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa (last visited Sept. 10, 2023). [↑](#footnote-ref-212)
212. *See Field Operations Handbook,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Sept. 10, 2023). [↑](#footnote-ref-213)
213. See §III.E.6 above. [↑](#footnote-ref-214)
214. *See Final Rulings & Opinion Letters,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (last visited Sept. 10, 2023). See §III.E.2 above. [↑](#footnote-ref-215)
215. *See Regulatory Agenda,* U.S. Dep’t of Labor, Employee Benefits Sec. Admin., https://www.dol.gov/agencies/ebsa/laws-and-regulations/regulatory-agenda (last visited Sept. 10, 2023). [↑](#footnote-ref-216)
216. U.S. Dep’t of Labor, Office of Admin. Law Judges, http://www.oalj.dol.gov (last visited Sept. 10, 2023). [↑](#footnote-ref-217)
217. 29 U.S.C. §211(d). [↑](#footnote-ref-218)
218. 29 C.F.R. §530.1(d). The definition of industrial homework applies. *Id.* [↑](#footnote-ref-219)
219. *See id.* §530.1(e) for a definition of the “women’s apparel industry.” [↑](#footnote-ref-220)
220. *See* *id.* §530.1(f) for a definition of the jewelry manufacturing industry. [↑](#footnote-ref-221)
221. *Id.* [↑](#footnote-ref-222)
222. *See* *id.* §530.1(g) for a definition of the knitted outerwear industry. [↑](#footnote-ref-223)
223. *See* *id.* §530.1(h) for a definition of the gloves and mittens industry. [↑](#footnote-ref-224)
224. *See* 29 C.F.R. §530.1(i) for a definition of the button and buckle manufacturing industry. [↑](#footnote-ref-225)
225. *See* *id.* §530.1(j) for a definition of the handkerchief manufacturing industry. [↑](#footnote-ref-226)
226. *See* *id.* §530.1(k) for a definition of the embroidery industry. [↑](#footnote-ref-227)
227. *See* *id.* §530.102. [↑](#footnote-ref-228)
228. *See* *id.* §530.101(b). [↑](#footnote-ref-229)
229. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #24: Homeworkers Under the Fair Labor Standards Act (July 2008), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs24.pdf. [↑](#footnote-ref-230)
230. *See* 29 C.F.R. Subpart B. [↑](#footnote-ref-231)
231. *Id.* [↑](#footnote-ref-232)
232. *See* *id.* §§530.103, .104. [↑](#footnote-ref-233)
233. *See* *id.* §530.105. [↑](#footnote-ref-234)
234. *See* *id.* Subpart C. [↑](#footnote-ref-235)
235. N.J. Stat. Ann. §34, ch. 6, §§34:6-136.3 to -150. [↑](#footnote-ref-236)
236. 29 U.S.C. §214(a)–(c). As will be discussed below, subsection (d) of §214 does not require a certificate for subminimum wages. [↑](#footnote-ref-237)
237. *Id*. [↑](#footnote-ref-238)
238. 62 Fed. Reg. 7094 (Feb. 14, 1997). [↑](#footnote-ref-239)
239. For reasons discussed below, there are no regulations for employment under 29 U.S.C. §214(d). [↑](#footnote-ref-240)
240. *See, e.g.*, 29 U.S.C. §214(a) (wages lower than the minimum wage, subject to limitations prescribed by the Secretary); 29 U.S.C. §214(b) (at a wage rate not less than 85 per centum of the otherwise applicable wage rate under section 206); 29 U.S.C. §214(c) (wages lower than the minimum wage applicable under section 206, commensurate with those paid to nonhandicapped workers and related to the individual’s productivity). [↑](#footnote-ref-241)
241. 62 Fed. Reg. 7094, 7097 (Feb. 14, 1997). [↑](#footnote-ref-242)
242. *Id.* [↑](#footnote-ref-243)
243. 62 Fed. Reg. 64,956 (Dec. 9, 1997). [↑](#footnote-ref-244)
244. 29 C.F.R. Part 519 (full-time student regulations); 29 C.F.R. Part 520 (student-learner regulations). [↑](#footnote-ref-245)
245. See Chapter 14, Recordkeeping, §II.B.5 [Recordkeeping Requirements for Employees Subject to the Minimum Wage and/or Overtime Pay Provisions of the FLSA; Special Recordkeeping Requirements or Exceptions for Certain Employees Subject to the Minimum Wage and/or Overtime Pay Provisions of the FLSA; Learners, Apprentices, Messengers, Students, or Disabled Workers Employed Under Special Certificates as Provided in Section 214. [↑](#footnote-ref-246)
246. 29 U.S.C. §214(b)(1). [↑](#footnote-ref-247)
247. *Id*. §214(b)(2). [↑](#footnote-ref-248)
248. *Id.* §214(b)(3). *See* 29 C.F.R. §§519.1 and 519.11. [↑](#footnote-ref-249)
249. 29 C.F.R.§519.2(a). [↑](#footnote-ref-250)
250. *Id* §519.12(a). [↑](#footnote-ref-251)
251. *Id*. §§519.3(c), 519.13(a). [↑](#footnote-ref-252)
252. *Id*. §519.13(c). [↑](#footnote-ref-253)
253. *See*, *e.g*., *id*. §§519.4(a)(2) (conditions for employment include “forwarding a properly completed application … not later than the start of such employment”), 519.6(a) (full-time student certificates will not be issued retroactively). [↑](#footnote-ref-254)
254. *Id.* §519.4(a). [↑](#footnote-ref-255)
255. *See* 29 C.F.R. §§519.6(a) (establishment or farm), 519.16(a) (institution of higher learning). [↑](#footnote-ref-256)
256. *Id*. §§519.5(c), 519.15(c). [↑](#footnote-ref-257)
257. *Id.* Part 519, Subpart A. [↑](#footnote-ref-258)
258. *Id*. Part 519, Subpart B. [↑](#footnote-ref-259)
259. *Id*. §§519.3, 519.13. [↑](#footnote-ref-260)
260. *Id.* §§519.4, 519.14. [↑](#footnote-ref-261)
261. 29 C.F.R. §§519.5, 519.15. [↑](#footnote-ref-262)
262. *Id.* §§519.6, 519.16. [↑](#footnote-ref-263)
263. *Id.* §§519.7, 519.17. [↑](#footnote-ref-264)
264. *Id.* §§519.8, 519.18. [↑](#footnote-ref-265)
265. *Id.* §§519.9, 519.19. [↑](#footnote-ref-266)
266. *Id*. [↑](#footnote-ref-267)
267. 29 C.F.R. §§519.9, 519.19 [↑](#footnote-ref-268)
268. *Id*. (request for review must take place within 15 days of the determination on reconsideration). [↑](#footnote-ref-269)
269. *Id*. §519.6(c). [↑](#footnote-ref-270)
270. *Compare* *id*. §519.6(d) (explaining employment of not more than six students requires only attestation that no more than six shall be employed), *with* §519.6(f), (h) (explaining various required documentation). [↑](#footnote-ref-271)
271. Hodgson v. Eunice Superette, 368 F. Supp. 639 (W.D. La. 1973). [↑](#footnote-ref-272)
272. 29 C.F.R. §519.4(b). [↑](#footnote-ref-273)
273. *Id*. [↑](#footnote-ref-274)
274. *Id*. §§519.5(g), 519.6(b). [↑](#footnote-ref-275)
275. *Id*. §519.6(j). [↑](#footnote-ref-276)
276. *Id*. [↑](#footnote-ref-277)
277. *Id.* §516.30. [↑](#footnote-ref-278)
278. 29 C.F.R. §519.7(b)(2). [↑](#footnote-ref-279)
279. *Id*. [↑](#footnote-ref-280)
280. *Id*. §519.7(b)(3). [↑](#footnote-ref-281)
281. *Id*. §§519.7(a), 516.5. [↑](#footnote-ref-282)
282. *Id.* §516.5. [↑](#footnote-ref-283)
283. *Id*. Part 519, subpt. A (Retail or Service Establishments, Agriculture, §§519.1–519.10). [↑](#footnote-ref-284)
284. 29 C.F.R. §519.7(b)(3). [↑](#footnote-ref-285)
285. *Id.* §214(b)(3); *see also* *id.* §519.15(b). [↑](#footnote-ref-286)
286. *Id.* §519.15(g). [↑](#footnote-ref-287)
287. *Id*. §519.17. [↑](#footnote-ref-288)
288. *Id.* §519.16(a). [↑](#footnote-ref-289)
289. *Id*. §519.14(a). [↑](#footnote-ref-290)
290. 29 C.F.R. §520.200. [↑](#footnote-ref-291)
291. 62 Fed Reg. 64,956 (Dec. 9, 1997). Because the prior regulations governing messengers, apprentices, and learners have been withdrawn by the DOL’s final rule, we shall only refer to 29 C.F.R. Part 520 in addressing certificate requirements for these categories of workers. [↑](#footnote-ref-292)
292. 29 C.F.R. §520.201. [↑](#footnote-ref-293)
293. *Id*. §520.202. [↑](#footnote-ref-294)
294. *Id*. §520.203. [↑](#footnote-ref-295)
295. *Id.* §520.204. [↑](#footnote-ref-296)
296. *Id.* §520.205. [↑](#footnote-ref-297)
297. *Id*. §520.401. [↑](#footnote-ref-298)
298. 29 C.F.R. §520.300. [↑](#footnote-ref-299)
299. *Id*. §520.402. [↑](#footnote-ref-300)
300. *Id*. §520.403. [↑](#footnote-ref-301)
301. *Id*. §520.402(b). [↑](#footnote-ref-302)
302. *Id*. §520.404. [↑](#footnote-ref-303)
303. *Id*. §520.412(a), (c). [↑](#footnote-ref-304)
304. 29 C.F.R. §520.407(a)(1). Prior to the final rule, this rate was 75% of the applicable minimum wage. [↑](#footnote-ref-305)
305. *Id*. §520.401(d). [↑](#footnote-ref-306)
306. *Id.* §520.403(b). [↑](#footnote-ref-307)
307. *Id*. §520.404(g). [↑](#footnote-ref-308)
308. *Id.* §520.300. [↑](#footnote-ref-309)
309. *Id.* §520.406(c). [↑](#footnote-ref-310)
310. 29 C.F.R. §520.406(c). [↑](#footnote-ref-311)
311. *Id.* §520.409(a). [↑](#footnote-ref-312)
312. *Id.* [↑](#footnote-ref-313)
313. *Id.* §520.409(b). [↑](#footnote-ref-314)
314. *Id*. §520.410(b). [↑](#footnote-ref-315)
315. *Id*. §520.412(d). [↑](#footnote-ref-316)
316. *See* 29 C.F.R. §520.412(e). [↑](#footnote-ref-317)
317. 29 U.S.C. §214(a); *see also* 29 C.F.R. §520.200. [↑](#footnote-ref-318)
318. 29 C.F.R. §520.300. [↑](#footnote-ref-319)
319. *Id.* [↑](#footnote-ref-320)
320. *Id*. §520.300. [↑](#footnote-ref-321)
321. *Id*. §520.402(a). [↑](#footnote-ref-322)
322. *Id.* §520.405. [↑](#footnote-ref-323)
323. *Id*. §520.508(d). [↑](#footnote-ref-324)
324. 29 C.F.R.§520.403(a)(1). [↑](#footnote-ref-325)
325. *Id*. §520.404(b). [↑](#footnote-ref-326)
326. *Id*. §520.404(f). [↑](#footnote-ref-327)
327. *Id*. §520.404(d). [↑](#footnote-ref-328)
328. *Id*. §520.410(a). [↑](#footnote-ref-329)
329. *Id.* §520.411(b). [↑](#footnote-ref-330)
330. 29 C.F.R. §520.401(b). [↑](#footnote-ref-331)
331. *Id*. §520.401(c). [↑](#footnote-ref-332)
332. *See id.* §520.201(b). [↑](#footnote-ref-333)
333. *Id.* §520.412(a). [↑](#footnote-ref-334)
334. *Id*. §520.412(b). [↑](#footnote-ref-335)
335. *Id*. [↑](#footnote-ref-336)
336. 29 C.F.R. §520.412(c). [↑](#footnote-ref-337)
337. *Id*. §520.408(a)(1). [↑](#footnote-ref-338)
338. *Id.* §520.300. [↑](#footnote-ref-339)
339. *Id*. [↑](#footnote-ref-340)
340. *Id.* [↑](#footnote-ref-341)
341. *Id*. [↑](#footnote-ref-342)
342. 29 C.F.R. §520.300. [↑](#footnote-ref-343)
343. *Id*. [↑](#footnote-ref-344)
344. *Id*. §520.501(a). [↑](#footnote-ref-345)
345. *Id.* §520.501(b). [↑](#footnote-ref-346)
346. *Id*. §520.501(a). [↑](#footnote-ref-347)
347. *Id*. §520.502. [↑](#footnote-ref-348)
348. 29 C.F.R. §520.504. [↑](#footnote-ref-349)
349. *Id*. [↑](#footnote-ref-350)
350. *Id.* §520.505. [↑](#footnote-ref-351)
351. *Id*. §520.503(e). [↑](#footnote-ref-352)
352. *Id*. §520.503(f). [↑](#footnote-ref-353)
353. *Id*. §520.503(g)–(h). [↑](#footnote-ref-354)
354. 29 C.F.R. §520.503(k). [↑](#footnote-ref-355)
355. *Id.* §520.503(i). [↑](#footnote-ref-356)
356. *Id*. §520.507. [↑](#footnote-ref-357)
357. *Id*. §520.506(a). [↑](#footnote-ref-358)
358. *Id.* §520.506(c)(1). [↑](#footnote-ref-359)
359. *Id*. §520.506(c)(2)(i), (c)(3)(i). [↑](#footnote-ref-360)
360. 29 C.F.R. §520.506(c)(2)(ii), (c)(3)(ii). [↑](#footnote-ref-361)
361. *Id*. §520.6(c)(3). [↑](#footnote-ref-362)
362. *Id*. [↑](#footnote-ref-363)
363. *Id.* §520.506(d). [↑](#footnote-ref-364)
364. *Id*. §520.10. [↑](#footnote-ref-365)
365. 29 C.F.R. §520.508. [↑](#footnote-ref-366)
366. The statute uses the words “handicapped workers,” but DOL regulations use the words “disabled workers” or “workers with disabilities” and this treatise shall do the same. [↑](#footnote-ref-367)
367. Samuel R. Bagenstos, *The Case Against Section 14(c) Subminimum Wage Program*, retrieved from https://portal.ct.gov/-/media/DDS/employment/TheCaseAgainst14cSubMinumumWageProgram.pdf?la=en. See also Chapter 1, A Brief History of the Fair Labor Standards Act, §III.A [The Fair Labor Standards Act of 1938; Enactment] for a discussion of the various bills that were put before Congress prior to the enactment of the FLSA. [↑](#footnote-ref-368)
368. Pub. L. No. 75-718, §14, 52 Stat. 1060 (June 25, 1938). [↑](#footnote-ref-369)
369. *See* Congressional Research Service, Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act 6-28 (2007 ed.). [↑](#footnote-ref-370)
370. Pub. L. No. 99-486, 100 Stat. 1229 (Oct. 16, 1986). [↑](#footnote-ref-371)
371. 29 U.S.C. §214(c)(1). [↑](#footnote-ref-372)
372. The legislative history underlying Section 214(c) of the FLSA speaks of disabled individuals in terms of “speeding their movement into fully productive private employment,” yet calls for “flexibility which permits the employment of seriously handicapped workers at wage rates in proportion to their productivity.” S. Rep. No. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3003. The legislative history underlying the Americans with Disabilities Act stresses mainstreaming, H. Rep. No. 101-485 (I), at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 268, but is clear that rates of pay may not be discriminatory on the basis of disability. H. Rep. No. 101-485 (II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 337. [↑](#footnote-ref-373)
373. 29 U.S.C. §214(c)(1)(B). [↑](#footnote-ref-374)
374. 42 U.S.C. §12101(a). [↑](#footnote-ref-375)
375. “[N]o provision of these regulations … shall excuse noncompliance with any other Federal or State law.” 29 C.F.R. §525.20. [↑](#footnote-ref-376)
376. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2022-4: Enforcement of the Rehabilitation Act Section 511 Requirements for Workers with Disabilities in the Section 14(c) Program (June 16, 2022), https://www.dol.gov/sites/dolgov/files/WHD/fab/2022-4.pdf (last visited Sept. 10, 2023). This bulletin supplements enforcement guidance set forth in Field Assistance Bulletin Nos. 2016-2 and 2019-1 and Fact Sheet 39H. [↑](#footnote-ref-377)
377. 29 C.F.R.§525.8. [↑](#footnote-ref-378)
378. *Id*. [↑](#footnote-ref-379)
379. *Id.* [↑](#footnote-ref-380)
380. Samuel R. Bagenstos, *The Case Against Section 14(c) Subminimum Wage Program*, at 4, retrieved from https://portal.ct.gov/-/media/DDS/employment/TheCaseAgainst14cSubMinumumWageProgram.pdf?la=en. [↑](#footnote-ref-381)
381. U.S. Gen. Accounting Off., Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, But Labor Should Improve Oversight 9 (Sept. 4, 2001), https://www.gao.gov/new.items/d01886.pdf. [↑](#footnote-ref-382)
382. Bagenstos, *The Case Against Section 14(c) Subminimum Wage Program*, at 5. [↑](#footnote-ref-383)
383. WH Admin. Interpretations No. 2016-2 (Nov. 17, 2016). [↑](#footnote-ref-384)
384. *Id.* [↑](#footnote-ref-385)
385. 29 C.F.R. Part 525. [↑](#footnote-ref-386)
386. WH Admin. Interpretations No. 2016-2 (Nov. 17, 2016). [↑](#footnote-ref-387)
387. 29 C.F.R. §525(c). [↑](#footnote-ref-388)
388. *Id*. §525.3(d). [↑](#footnote-ref-389)
389. *Id.*  [↑](#footnote-ref-390)
390. In *Souder v. Brennan*, 367 F. Supp. 808, 21 WH Cases 398 (D.D.C. 1973), the court held that patient-workers in nonfederal psychiatric institutions were subject to the FLSA and required the DOL (notwithstanding a contrary nonenforcement policy) to enforce either the FLSA’s minimum wage laws or subminimum wages as permitted by Section 214(c). [↑](#footnote-ref-391)
391. Williams v. Strickland, 87 F.3d 1064 (9th Cir. 1996). [↑](#footnote-ref-392)
392. *Id*. at 1067. [↑](#footnote-ref-393)
393. 29 U.S.C. §214(c)(1)(C); 29 C.F.R. §525.9(a)(1). [↑](#footnote-ref-394)
394. 29 U.S.C. §214(c)(1); 29 C.F.R. §525.1(a). [↑](#footnote-ref-395)
395. 29 U.S.C. §214(c)(2); 29 C.F.R. §§525.1(b), 525.9(b). [↑](#footnote-ref-396)
396. 29 C.F.R. §525.10(a). [↑](#footnote-ref-397)
397. *Id.* §525.10(c). [↑](#footnote-ref-398)
398. *Id*. [↑](#footnote-ref-399)
399. *Id*. [↑](#footnote-ref-400)
400. *Id*. [↑](#footnote-ref-401)
401. *Id.* §525.10(e). [↑](#footnote-ref-402)
402. 29 C.F.R. §525.12(f). [↑](#footnote-ref-403)
403. *Id*. §525.12(h)–(j). [↑](#footnote-ref-404)
404. *Id*. §525.22. [↑](#footnote-ref-405)
405. *Id*. §525.22(f). [↑](#footnote-ref-406)
406. *Id*. §525.16. [↑](#footnote-ref-407)
407. *Id*. §525.16(a). [↑](#footnote-ref-408)
408. 29 C.F.R. §525.16(b). [↑](#footnote-ref-409)
409. *Id.* §525.16(c). [↑](#footnote-ref-410)
410. *Id*. §525.16(d). [↑](#footnote-ref-411)
411. *Id*. §525.17. [↑](#footnote-ref-412)
412. *Id*. §525.18. [↑](#footnote-ref-413)
413. *Id*. §525.23. [↑](#footnote-ref-414)
414. 29 C.F.R. §525.23. [↑](#footnote-ref-415)
415. *Id*. §525.24. [↑](#footnote-ref-416)
416. 29 U.S.C.§214(d). [↑](#footnote-ref-417)
417. FOH §10b28 ct. 291993. [↑](#footnote-ref-418)
418. Reich v. Shiloh True Light Church of Christ, 85 F.3d 616, 1996 WL 228802 (4th Cir. 1996) (unpub.). [↑](#footnote-ref-419)
419. *Id.* [↑](#footnote-ref-420)
420. *Id.* [↑](#footnote-ref-421)
421. *Id.* [↑](#footnote-ref-422)
422. *Id.* [↑](#footnote-ref-423)
423. *Id.,* 1996 WL 228802, at \*3­–4. [↑](#footnote-ref-424)
424. *See* 62 Fed. Reg. 7094 (Feb. 14, 1997). [↑](#footnote-ref-425)
425. *Id.* at 7097. [↑](#footnote-ref-426)
426. *Id*. [↑](#footnote-ref-427)
427. 29 C.F.R. §528 *et seq*. [↑](#footnote-ref-428)
428. *Id*. §528.3(a). [↑](#footnote-ref-429)
429. *Id*. §528.3(b). [↑](#footnote-ref-430)
430. *Id*. [↑](#footnote-ref-431)
431. *Id*. §528.3(c). [↑](#footnote-ref-432)
432. *Id.* §528.4. [↑](#footnote-ref-433)
433. 29 C.F.R. §§528.5–528.6. [↑](#footnote-ref-434)
434. *Id*. §528.7. [↑](#footnote-ref-435)
435. *See, e.g.*, *Current Studies,* U.S. Dep’t of Labor, Office of the Assistant Sec. for Policy, https://www.dol.gov/agencies/oasp/evaluation/currentstudies (last visited Sept. 10, 2023); Completed Reports, U.S. Dep’t of Labor, Office of the Assistant Sec. for Policy, https://www.dol.gov/agencies/oasp/evaluation/completedstudies (last visited Sept. 10, 2023); U.S. Dep’t of Labor, Employment & Training Admin., https://www.dol.gov/agencies/eta (last visited Sept. 10, 2023). [↑](#footnote-ref-436)
436. 29 U.S.C. §204(d)(2). Based on these studies, certain exemptions have been eliminated over the years. [↑](#footnote-ref-437)
437. *Id*. §204(d)(3). [↑](#footnote-ref-438)
438. *Id*. §204(d)(1). [↑](#footnote-ref-439)
439. *Id.* §204(d)(3). See also §VI.A above. [↑](#footnote-ref-440)
440. *See, e.g.*, *Completed Reports,* U.S. Dep’t of Labor, Chief Evaluation Office, https://www.dol.gov/agencies/oasp/evaluation/completedstudies (last visited Sept. 10, 2023). [↑](#footnote-ref-441)
441. *See* U.S. Dep’t of Labor FY 2018–2022 Strategic Plan, https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf (last visited Sept. 10, 2023). [↑](#footnote-ref-442)
442. *See Agency Priority Goals,* U.S. Dep’t of Labor, https://www.performance.gov/agencies/dol/ (last visited Sept. 10, 2023). [↑](#footnote-ref-443)
443. *See About Us,* U.S. Dep’t of Labor, https://www.dol.gov/general/aboutdol (last visited Sept. 10, 2023). [↑](#footnote-ref-444)
444. *See*, *e.g.*, *Department of Labor Conference Report Fiscal Year 2022,* U.S. Dep’t of Labor, Office of the Chief Fin. Officer, https://www.dol.gov/agencies/ocfo/2022-DOL-Conference-Report (last visited Sept. 10, 2023). [↑](#footnote-ref-445)
445. *See Regulatory Agenda,* U.S. Dep’t of Labor, Employee Benefits Sec. Admin., https://www.dol.gov/agencies/ebsa/laws-and-regulations/regulatory-agenda (last visited Sept. 10, 2023). [↑](#footnote-ref-446)