

# Rewriting the Overtime Dialogue: Why Misclassified Reality Television Producers are Entitled to Only Half-Time Damages

Danielle C. Newman

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# NOTE

## REWRITING THE OVERTIME DIALOGUE: WHY MISCLASSIFIED REALITY TELEVISION PRODUCERS ARE ENTITLED TO ONLY HALF-TIME DAMAGES

*Danielle C. Newman*<sup>†</sup>

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## INTRODUCTION

*The thing with reality TV is when reality happens,  
you have to go cover it.*<sup>1</sup>

Currently, classifying reality television associate producers as “creative professionals” is a pervasive, industry-wide issue. “Creative professionals” are exempt from the Fair Labor Standard Act’s (FLSA) overtime requirements and thus do not receive a premium for each hour worked above the standard forty-hour workweek.<sup>2</sup> If courts deem reality television producers misclassified, as this Note proposes, a second issue pertaining to damages exists. Federal courts disagree over how to correctly calculate retroactive overtime wages in misclassification cases where a previously exempted worker is found to be nonexempt.<sup>3</sup>

The creative professional exemption states that a worker is exempt when an employee’s primary duty is “the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”<sup>4</sup> This language is the source of confusion for courts looking to determine whether a reality television producer is exempt from overtime. The very nature of *reality* television undercuts the argument that its production requires invention. Arguably, the scenes are not *created* by writers, editors, or producers but are passively filmed, or even witnessed.<sup>5</sup> Furthermore, producers have a wide array of responsibilities, which often differ among individual workers.<sup>6</sup> Some of these responsibilities include planning shoots, scouting locations, handling bookings, obtaining releases from locations and talent, and managing the budget.<sup>7</sup> On the other hand, pro-

<sup>1</sup> Dennis Nishi, *From Film to Reality TV*, WALL ST. J. (Mar. 10, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB123663307657275677> (quoting reality show producer, Sara Mast).

<sup>2</sup> 29 U.S.C. § 213(a)(1) (2006) (“creative professionals” exemption); 29 U.S.C. § 207(a) (2006) (overtime).

<sup>3</sup> See *infra* notes 126–27 and accompanying text.

<sup>4</sup> 29 C.F.R. § 541.302(a) (2014).

<sup>5</sup> See Matthew Watts, *What Does a Reality Producer Do?*, JOHNAUGUST.COM (Feb. 29, 2012), <http://www.johnaugust.com/2012/what-does-a-reality-producer-do>. But see Nishi, *supra* note 1 (noting that “[c]ritics generally fault reality programming for being overscripted and set up”).

<sup>6</sup> Watts, *supra* note 5 (distinguishing between the duties of field producers, post producers, and story producers).

<sup>7</sup> See *id.*; *What Do Associate Producers Do?*, MEDIAMATCH.COM, <http://www.mediamatch.com/usa/jobtypes/associate-producer-jobs-402679.php> (last visited Mar. 21, 2015); WRITERS GUILD OF AM. E., *The Real Cost of Reality TV: How the Nonfiction Television Industry Steals Tens of Millions of Dollars from New York Taxpayers*, 2013 WGA REPORT ON NONFICTION TELEVISION 8–10 (2013), available at <http://www.scribd.com/doc/185243231/Writers-Guild-of-America-East-White-Paper> [hereinafter *The Real Cost of Reality TV*].

ducers may also have “creative” tasks such as choosing footage from archives, revising scripts, and contributing to storyline development.<sup>8</sup>

This issue is timely for three reasons: First, there has been continuous expansion in the reality television industry.<sup>9</sup> Second, the efforts of the Writers Guild of America, East to organize in the reality television field and fight for better wages and working conditions are ongoing and gathering momentum.<sup>10</sup> Third, resolving the classification issue would provide a vehicle for the Supreme Court to address, and perhaps resolve, the split of opinion in federal courts as to how to correctly calculate retroactive overtime wages in misclassification cases.<sup>11</sup>

This Note explores the FLSA’s creative professional exemption as it applies to reality television producers. Part I provides background on the reality television industry, including the job titles that exist in the industry. The fluidity of these titles makes it difficult for employers to correctly classify producers as exempt or nonexempt. Part II illuminates the challenges associated with categorizing reality television producers as exempt “creative professionals” in light of prior court determinations. Part II ultimately concludes that reality television producers fall outside the exemption’s scope because the nature of reality television is inherently different than that of fiction film and television industries whose writers are categorically exempted.<sup>12</sup> Part III examines whether courts should apply the standard time-and-one-half method for all overtime hours worked or the Fluctuating Workweek method (FWW) to discern the amount of retroactive overtime owed to misclassified workers. The FWW is an alternative to the standard time-and-one-half method in which the employee is paid a fixed weekly salary plus a halftime overtime premium for hours worked beyond forty in a week, provided the employee’s hours regularly fluctuate above and below forty hours per week.<sup>13</sup> Part IV proposes that the Supreme Court adopt the FWW as the

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<sup>8</sup> See Watts, *supra* note 5; see also Brett Bartlett & Brandon Spurlock, *A Dose of Reality: How Reality TV Is Testing the Limits of the Creative Professional Exemption*, 15 PUB. EMPLOYER’S GUIDE TO FLSA EMP. CLASSIFICATION NEWSL., 3 Sept. 2009 (“The employees [who filed suit against FreemantleMedia North America] claim to have performed a variety of what they allege to have been nonexempt duties in the production of these reality television shows such as location scouting, conducting rank-and-file interviews, confirming basic information for the series, creating schedules and coordinating activities for their superiors.”).

<sup>9</sup> See *infra* Part I.

<sup>10</sup> See *What We Want*, WGAE NON-FICTION WRITERS & PRODUCERS UNITED, <http://nonfictionunited.org/index.php?id=293> (last visited Mar. 21, 2015).

<sup>11</sup> *Infra* notes 127–34 and accompanying text.

<sup>12</sup> See 29 C.F.R. § 541.302(b) (2014) (“[T]he work performed must be in a recognized field of artistic or creative endeavor . . . [such as] music, writing, acting and the graphic arts.” (internal quotation marks omitted)).

<sup>13</sup> See *infra* notes 145–51.

method for calculating retroactive overtime. This proposal is in line with the overwhelming circuit court support for the FWW.<sup>14</sup>

## I

### BACKGROUND: BEHIND THE SCENES OF THE REALITY TELEVISION INDUSTRY

Expansion in the reality television industry in the past decade has been both rapid and continuous. In the 2013–2014 season, many reality shows such as *American Dream Builders*, *Cold Justice*, *Cosworld*, *MasterChef Junior*, and *The Million Second Quiz* aired in primetime slots.<sup>15</sup> The Bravo network alone introduced seventeen new reality shows in the 2013–2014 season.<sup>16</sup> In recent years, the composition of primetime television programming has shifted significantly.<sup>17</sup> According to historical data from the Nielsen Company, reality television during the 2010–2011 season “was much more popular . . . than it was 10 years ago.”<sup>18</sup> In 2001, reality television viewers “accounted for about 22% of the prime time viewers watching the top [ten] programs.”<sup>19</sup> In 2010, the percentage increased almost 155% to roughly 56% of the audience.<sup>20</sup> This spike in viewership does not even represent the apex of reality television’s popularity because in 2007, reality television “comprised more than three-quarters (77%) of the audience for the top [ten] prime time TV programs.”<sup>21</sup> These statistics evidence the growing popularity of reality television. As viewership increases, production of such shows will likely increase as well to supply the growing demand. Therefore, the need for correctly classifying the workers who help produce reality television shows is apparent.

In addition to the growing popularity of reality television, the unionization efforts to organize the reality television field and fight for better wages and working conditions are ongoing and gathering momentum.<sup>22</sup> In 2013, the Writers Guild of America, East (WGAE) released a research report that highlights working conditions in the

<sup>14</sup> See *infra* notes 131–34 and accompanying text.

<sup>15</sup> *Fall TV Preview: 2013-2014 New Shows*, TV GUIDE, <http://www.tvguide.com/Photo-Gallery/2013-New-Fall-Shows-1065172> (last visited Mar. 21, 2015); *MasterChef Junior*, IMDB, <http://www.imdb.com/title/tt3038248/> (last visited Mar. 21, 2015).

<sup>16</sup> *Bravo Announces 17 New, 18 Returning Series*, BRAVO, <http://www.bravotv.com/blogs/the-dish/bravo-announces-17-new-18-returning-series> (last visited Mar. 21, 2015).

<sup>17</sup> See *Prime Time TV Preferences Shift During Decade*, MARKETINGCHARTS, (Sept. 22, 2011), <http://www.marketingcharts.com/television/prime-time-tv-preferences-shift-during-decade-19354/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> WGAE NON-FICTION WRITERS & PRODUCERS UNITED, <http://nonfictionunited.org/> (last visited Mar. 21, 2015); see also Todd Cunningham, *Reality TV: The Invisible Front in Hollywood’s Labor Wars*, WRAP (Sept. 30, 2012, 6:53 PM), <http://www.thewrap.com/tv/arti->

reality television industry.<sup>23</sup> The WGAE conducted an industry-wide survey in the summer of 2013 and found “widespread violations of state wage and hour laws, and a sharp increase in hours worked across the industry.”<sup>24</sup> These violations pertained to various reality television workers including producers, associate producers, and production assistants.<sup>25</sup> The efforts of the WGAE align with prior efforts of the Writers Guild of America, West, which worked to organize reality television editors and writers who were not receiving the same benefits as their scripted television counterparts.<sup>26</sup>

Continuous work without compensation for overtime or breaks deprives the individuals in reality television crews of \$30,000 per year in unpaid wages.<sup>27</sup> Combined, this “adds up to approximately \$40 million a year across the nonfiction [television] industry that employs tens of thousands [of people] in New York City, with producers and writers making \$70,000 a year, on average.”<sup>28</sup> One producer stated, “I’ve known people to work upwards of 100 hours in a given week while shooting . . . . There’s no compensation for that additional work.”<sup>29</sup> The WGAE’s report found that “84% of nonfiction TV producers and writers work more than 40 hours a week almost every week, while 85% never receive overtime pay. More than 50% of the 315 people who responded [to the survey] said they worked 80 hours or more in a week.”<sup>30</sup> The movement to recoup unpaid wages for reality television workers gained momentum with the addition of powerful advocates such as Congressman Jerrold Nadler and New York City Public Advocate Letitia James.<sup>31</sup> The WGAE’s fight for better hours and working conditions for reality television producers should

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cle/reality-tv-invisible-front-hollywoods-labor-wars-58026 (discussing difficulties associated with organizing reality television workers).

<sup>23</sup> “Reality” TV Industry Steals \$40 Mil from Writer/Producers, Study Finds, WGAE NON-FICTION WRITERS & PRODUCERS UNITED (Nov. 18, 2013) <http://nonfictionunited.org/index.php?id=292#sthash.tepF74sh.dpuf>.

<sup>24</sup> *Id.*

<sup>25</sup> See The Real Cost of Reality TV, *supra* note 7 at 10.

<sup>26</sup> Sharon Waxman, *Reality TV Workers Sue Producers and Networks*, N.Y. TIMES (July 11, 2005), <http://www.nytimes.com/2005/07/11/business/media/11union.html>. One worker stated, “It’s a cartoonish system.” Another stated, “it was 12 hours a day, 7 days in a row, and we weren’t paid overtime for that. . . . We were paid, on my paycheck, with a flat salary based on 50 hours for the week.” *Id.*

<sup>27</sup> Daniel Beekman, *Reality TV Producers, Writers Getting Ripped Off on Overtime Pay, Breaks, Writers Guild Survey Finds*, N.Y. DAILY NEWS (Nov. 18, 2013, 2:30 AM), <http://www.nydailynews.com/entertainment/tv-movies/reality-tv-producers-writers-ripped-article-1.1520254>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (“‘Pawn Stars’ boasts 4.6 million viewers, a million more than the traditional sitcom ‘Royal Pains.’ But producers and writers for ‘Pawn Stars’ earn a minimum of just \$2,136 a week, while ‘Royal Pains’ workers pull down \$6,712, the union said.”).

<sup>31</sup> *Id.* James stated, “The networks and production companies that make millions of dollars in profits from reality-television programs must obey the wage-and-hour laws.” *Id.*

serve as the impetus for courts to categorically classify such employees as nonexempt from overtime payments.

## II

### THE CREATIVE PROFESSIONAL EXEMPTION: ARE REALITY TELEVISION PRODUCERS “LEGALLY” CREATIVE?

The Department of Labor (DOL), via interpretive regulations, attempted to provide useful measures of creativity;<sup>32</sup> these measures, however, have proven inadequate as evidenced by the recurrence of cases assessing whether a worker qualifies as an exempt creative professional.<sup>33</sup> 29 C.F.R. § 541.302 attempts to elaborate on the definition of a “creative duty,” namely one involving “invention, imagination, originality, or talent,” by contrasting it with one that “primarily depends on intelligence, diligence, and accuracy.”<sup>34</sup> Lines between creative and not creative duties become harder to draw, however, because of the accessibility of technology and the increasing reliance on marketing and new types of media. Therefore, individuals who might harness traditional “creativity” in their professional lives are, in a legal sense, not creative due to the nontraditional fields in which they operate.

To determine whether reality television producers fit the description of creative professionals or whether they deserve overtime payments as nonexempt employees, courts often employ a dual-pronged test.<sup>35</sup> The first prong is the salary test: the employee must be “[c]ompensated on a salary or fee basis at a rate of not less than \$455 per week, . . . exclusive of board, lodging, or other facilities.”<sup>36</sup> The reality television producers addressed in this Note likely satisfy the salary test, earning more than \$455 per week.<sup>37</sup> Therefore, the next and more difficult inquiry assesses the second prong: the primary duties test.<sup>38</sup> Under the second prong, the employee’s “primary duty [must be] the performance of work . . . [r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”<sup>39</sup> The exemption is not applicable if the primary duty is

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<sup>32</sup> 29 C.F.R. § 541.302(a) (2014) (defining a creative employee’s primary duty as work that is *not* “routine mental, manual, mechanical or physical work . . . [or] work which can be produced by a person with general manual or intellectual ability and training”).

<sup>33</sup> *See, e.g.*, *Reich v. Newspapers of New Eng., Inc.*, 44 F.3d 1060, 1075 (1st Cir. 1995) (certain journalists were nonexempt); *Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1482 (D.D.C. 1994) (a reporter was exempt).

<sup>34</sup> 29 C.F.R. § 541.302(a), (c) (2014).

<sup>35</sup> *See id.* § 541.300.

<sup>36</sup> *Id.* § 541.300(a)(1).

<sup>37</sup> Troy Devolld, *Starting Your Reality TV Career* (Dec. 30, 2009), <https://realitytvtroy.wordpress.com/2009/12/30/starting-your-reality-tv-career/>.

<sup>38</sup> 29 C.F.R. § 541.300(a)(2) (2014).

<sup>39</sup> *Id.* § 541.300(a)(2)(ii).

“routine mental, manual, mechanical or physical work”; “work which can be produced by a person with general manual or intellectual ability and training”; or “work that primarily depends on intelligence, diligence and accuracy.”<sup>40</sup> “[M]usic, writing, acting and the graphic arts” constitute “recognized field[s] of artistic or creative endeavor.”<sup>41</sup> The regulations list:

[A]ctors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers . . . ; and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an “animator” of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.<sup>42</sup>

This range of employees illustrates that the exemption applies only to those whose work product is the result of distinct artistry or creativity.<sup>43</sup> However, these examples also demonstrate that certain positions in seemingly creative industries may fall outside the exemption’s bounds.<sup>44</sup> Therefore, prior court determinations offer useful illustrations of applications of the exemption.

#### A. Treatment of Journalists

Under certain circumstances, courts have classified journalists as exempt creative professionals.<sup>45</sup> In other instances, journalists have been deemed nonexempt and thus deserving of overtime payments.<sup>46</sup> This inquiry is highly factual and courts will consider various factors in making their determinations.<sup>47</sup> The relevant regulation, 29 C.F.R. § 541.302(d), states: “Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.”<sup>48</sup> Reporters are not exempt “if their work product

<sup>40</sup> *Id.* §§ 541.301(b), 541.302(a), (c).

<sup>41</sup> *Id.* § 541.302(b).

<sup>42</sup> *Id.* § 541.302(c).

<sup>43</sup> *See id.* § 541.302(a)–(c).

<sup>44</sup> *See infra* Part II.A–B.

<sup>45</sup> *See, e.g.,* *Freeman v. Nat’l Broad. Co.*, 80 F.3d 78, 82–84 (2d Cir. 1996).

<sup>46</sup> *See, e.g.,* *Reich v. Newspapers of New Eng., Inc.*, 44 F.3d 1060, 1074–75 (1st Cir. 1995).

<sup>47</sup> 29 C.F.R. § 541.302(c) (2014).

<sup>48</sup> *Id.* § 541.302(d).

is subject to substantial control by the employer.”<sup>49</sup> The regulation provides as examples of exempt journalists who satisfy the primary duty test those whose “primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.”<sup>50</sup>

The courts have recognized the creative professional exemption in cases involving talented journalists, reporters, and producers who hold prestigious positions and whose work product reflects individualized creative input.<sup>51</sup> In *Freeman v. National Broadcasting Company, Inc.*,<sup>52</sup> the Second Circuit held that the plaintiffs (a news writer, producer, and field producer for NBC’s *Nightly News*) satisfied the exemption’s requirements because they had superior ability and occasionally were inventive in producing news stories.<sup>53</sup> The court found that the *Nightly News* writer held “among the most highly coveted jobs in broadcast journalism.”<sup>54</sup> The news writer’s responsibilities included coordinating coverage for nearly all of the United States’ sourced news and writing approximately one-third of each broadcast.<sup>55</sup> The producer was “one of a handful” of individuals tasked with putting together and airing the broadcast.<sup>56</sup> The field producer developed, wrote, shot, and edited the news stories.<sup>57</sup> The Second Circuit concluded that the plaintiffs’ primary duties satisfied the exemption’s requirement because the plaintiffs’ talent was superior to that of many others in their field and their work was occasionally inventive and demonstrative of creativity.<sup>58</sup>

In contrast, courts have not exempted line reporters and newspaper or television journalists who do not utilize the requisite level of talent and inventiveness or imagination.<sup>59</sup> For example, in *Dalheim v.*

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Freeman v. Nat’l Broad. Co.*, 80 F.3d 78, 82–84 (2d Cir. 1996); *Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1473–74 (D.D.C. 1994) (finding newspaper reporter exempt because the reporter “originat[ed] story ideas, . . . cultivat[ed] sources, utilize[d] his imagination and other skills in seeking information” and held a “prestigious, competitive job among journalists”).

<sup>52</sup> 80 F.3d 78, 82–84 (2d Cir. 1996).

<sup>53</sup> *Id.* at 82–83.

<sup>54</sup> *Id.* at 81.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 82–83; *see also Sherwood*, 871 F. Supp. at 1473.

<sup>59</sup> *See e.g., Reich v. Gateway Press*, 13 F.3d 685, 700 (3d Cir. 1994) (“We believe that the Gateway reporters are like the majority of reporters: although their fact gathering duties require intelligence, diligence and accuracy, such duties do not require invention, imagination or talent.”); *Reich v. Newspapers of New Eng. Inc.*, 834 F. Supp. 530, 538 (D.N.H. 1993) (determining that a photojournalist was not exempt because his work was

*KDFW-TV*, the Fifth Circuit held that “general assignment reporters” and news producers at a television station fell outside the scope of the creative professionals exemption.<sup>60</sup> The station claimed that the employees were creative because they “meld[ed] language and visual images into an informative and memorable presentation.”<sup>61</sup> The court disagreed and held that developing presentations reflected the employees’ reliance on “skill, diligence, and intelligence.”<sup>62</sup> Where the employees’ use of graphics was repetitive and consistent, their work reflected diligence and accuracy rather than creativity.<sup>63</sup> Under *Dalheim*, courts consider the nature of the employee’s task, rather than the finished product, when determining whether the employee is creative.<sup>64</sup>

## B. Treatment of Other Types of Employees

### 1. *Graphic Consultants*

In *Kadden v. VisualLex, LLC*, the Southern District of New York found that a litigation graphic consultant fell outside the scope of the creative professional exemption.<sup>65</sup> The court held that the consultant’s primary duties were “to convey information about a case in an informative, easily understandable way, to triers of fact” and not “to originate stories from scratch, or produce complex analyses of or transform the facts she was given.”<sup>66</sup> Therefore, the court concluded that the consultant’s primary duties were not creative.<sup>67</sup> This case exemplifies the difficulty employers face in correctly classifying employees as exempt or nonexempt because the DOL regulation clearly cites “the graphic arts” as a “recognized field of artistic or creative endeavor.”<sup>68</sup> In this instance, however, the graphic consultant was more like the nonexempt journalists who do not contribute creative analysis to the news they write and report.

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not creative since he “tr[ie]d to photograph reality, as it happen[ed], without embellishment, without taking sides” (internal quotation marks omitted), *aff’d*, 44 F.3d 1060, 1075 (1st Cir. 1995).

<sup>60</sup> 918 F.2d 1220, 1220, 1224, 1233 (5th Cir. 1990).

<sup>61</sup> *Id.* at 1228–29.

<sup>62</sup> *Id.* at 1229.

<sup>63</sup> *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 502–03 (N.D. Tex. 1988) (“Graphics are . . . used . . . where . . . there are several points or statements which the viewer needs to keep in mind simultaneously.”), *aff’d*, 918 F.2d 1220 (5th Cir. 1990).

<sup>64</sup> See *Shaw v. Prentice Hall, Inc.*, 977 F. Supp. 909, 915–16 (S.D. Ind. 1997) (“We must look to the nature of the work, not its ultimate consequence, in determining whether [an employee’s] work is of substantial importance to [the employer].” (quoting *Dalheim*, 706 F. Supp. at 493)), *aff’d*, *Shaw v. Prentice Hall Computer Publ’g, Inc.*, 151 F.3d 640 (7th Cir. 1998).

<sup>65</sup> 910 F. Supp. 2d 523, 539 (S.D.N.Y. 2012).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 29 CFR § 541.302(b) (2014).

## 2. *Chefs*

In addition to graphic consultants, chefs are another category of employees that create confusion among employers attempting to classify such workers. The DOL's regulation, issued on April 23, 2004, to resolve confusion, stated that a chef might qualify as exempt from overtime under the creative professional exemption or the learned professional exemption in the event the chef has a higher educational degree.<sup>69</sup> The DOL noted that certain chefs may qualify as creative professionals stating, "certain forms of culinary arts have risen to a recognized field of artistic or creative endeavor requiring 'invention, imagination, originality or talent.'"<sup>70</sup> Furthermore, as Shlomo D. Katz notes:

DOL's own *Occupational Outlook Handbook for 2002-2003* . . . stated[,] . . . "Due to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame." Accordingly, DOL stated: "[A]fter careful consideration of this issue, the department concludes that to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional."<sup>71</sup>

The DOL noted that chefs' duties differ widely and thus application of the exemption must vary on a case-by-case basis.<sup>72</sup>

Although the classification of chefs is highly fact specific, and in this respect similar to that related to reality television producers, there are certain qualities that will make it more likely for a chef to constitute an exempt creative professional. For example, a chef at a gourmet establishment as opposed to a chain is more likely to be classified as creative.<sup>73</sup> American chef Thomas Keller and Spanish chef Andoni Luis Aduriz, both chefs at top restaurants, have stated that they believe "their responsibility as chefs is primarily to *create* breathtakingly

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<sup>69</sup> Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,154 (Dep't of Labor Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

<sup>70</sup> *Id.*

<sup>71</sup> Shlomo D. Katz, *Chefs Present a Smorgasbord of FLSA Classification Issues*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 16, 2010), <http://www.shrm.org/LegalIssues/FederalResources/Pages/Chefs.aspx> (alteration in original) (citing U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK FOR 2002-2003 (2002)). A chef may also be classified as exempt from overtime under the learned professional exemption if the chef "attained a four-year specialized academic degree in a culinary arts program." *Id.*

<sup>72</sup> 69 Fed. Reg. at 22,154.

<sup>73</sup> *Id.* ("The Department intends that the creative professional exemption extend only to truly 'original' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires 'invention, imagination, originality, or talent.'"); Katz, *supra* note 71.

delicious and beautiful food.”<sup>74</sup> Aduriz’s food has been compared to the paintings of Picasso and has been deemed “radical art.”<sup>75</sup> Aduriz, therefore, would likely be subject to the creative professionals exemption because of the inventive manner in which he prepares food.

Furthermore, if the specific chef has published cookbooks or has by some other means indicated a level of imagination associated with food, that chef might be an exempt creative professional.<sup>76</sup> Published chefs are more likely to have influence over the food industry. For example, *The Restaurant Magazine’s* 2010 “Chef of the Decade” Ferran Adrià, an executive chef, was recently featured in a museum exhibition.<sup>77</sup> The exhibition focused on “the role of drawing in [his] quest to understand creativity.”<sup>78</sup> A representative from the Drawing Center, the museum featuring Adrià’s work, stated: “As one of the most important avant-garde chefs of the twenty-first century, Adrià pushes culinary boundaries with knowledge and wit, transforming the art of food into an art form all its own.”<sup>79</sup> Adrià, therefore, would likely be considered a creative professional because his food is art requiring imagination and invention.

Thus while all chefs, by the DOL’s definition, prepare food, determine portions, plan menus, and order food supplies, certain chefs—such as executive chefs—are more likely to exhibit creativity at work.<sup>80</sup> On the other hand, a sous chef, or “second-in-command” likely follows the orders of the head chef and is thus less likely to be classified as creative.<sup>81</sup> A sous chef closely parallels an associate producer on a reality television show who follows the orders of higher-level producers without making the creative decisions necessary to qualify as an exempt employee.

### 3. *Dancers*

Dancers are yet another category of creative-type professionals that pose confusion for employers seeking to classify workers.

<sup>74</sup> Julia Moskin, *For Them, a Great Meal Tops Good Intentions*, N.Y. TIMES (May 15, 2012), <http://mobile.nytimes.com/2012/05/16/dining/for-them-a-great-meal-tops-good-intentions.html> (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> See 69 Fed. Reg. at 22,154.

<sup>77</sup> Press Release, the Drawing Center, Ferran Adrià: Notes on Creativity (Jan. 24, 2014), available at <http://www.drawingcenter.org/en/drawingcenter/5/exhibitions/9/upcoming/502/ferran-adria/>; Paula Forbes, *Ferran Adrià Exhibit Coming to NYC & Cleveland in 2014*, EATER (Dec. 2, 2013, 12:00 PM), <http://www.eater.com/2013/12/2/6321015/ferran-adria-exhibit-coming-to-nyc-cleveland-in-2014>.

<sup>78</sup> The Drawing Center, *supra* note 77.

<sup>79</sup> *Id.*

<sup>80</sup> See *Cobb v. Finest Foods, Inc.*, 755 F.2d 1148, 1150 (5th Cir. 1985); 69 Fed. Reg. at 22,154; Katz, *supra* note 71.

<sup>81</sup> See sources cited *supra* note 80.

Although most dancers' primary duties are to perform in a manner requiring "invention, imagination, originality or talent,"<sup>82</sup> not all dancers perform equally. For example, in *Harrell v. Diamond A Entertainment, Inc.*, the court determined that the exotic dancer in the case did not meet such requirements.<sup>83</sup> In *Harrell*, the exotic dancing at issue did not involve specific steps, moves, or choreography.<sup>84</sup> Instead, according to the plaintiff, when the club owner hired dancers he focused more on the dancer's "enticing" qualities rather than "artistic" ones.<sup>85</sup> The plaintiff stated:

[T]he work product being purchased . . . by the employer is not dancing skill at all. It is the ability of the dancers to titillate male customers. If a fully clothed modern dancer auditioned to modern, atonal music, she might be a former member of the Martha Graham or Twyla Tharp dance groups, but she would not stand a chance of being hired at Babe's or Foxy Lady [exotic dance clubs] . . . . [T]hey are not looking for dance talent, they are looking for attractive young women . . . .<sup>86</sup>

The modern dancers described above, however, would likely qualify as exempt creative professionals. The court in *Harrell* found the analogy between dancing and acting persuasive for allowing dancers to fulfill the requirement of "invention, imagination, originality or talent" for exempt creative professionals.<sup>87</sup> Dancers, like actors who are typically covered by the exemption, are "trained, possess specialized skills, and undergo competitive auditions for jobs."<sup>88</sup> These qualifications distinguish between professional dancers and exotic dancers since exotic dancers gain merit based mainly on attractiveness rather than dancing ability.<sup>89</sup> As some have noted, "dancers also can be analogized to cartoonists because they rely on their own creative ability to express the concept choreographers attempt to convey."<sup>90</sup> Dancers use their bodies the way cartoonists use their pencils, to concretize a verbal

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<sup>82</sup> 29 C.F.R. § 541.300(a)(2)(ii) (2014).

<sup>83</sup> 992 F. Supp. 1343, 1357 (M.D. Fla. 1997) ("At bottom, the Court is left with Plaintiff's bare assertion that she felt a need not to copy other dancers and to invent her own dance steps. This is not sufficient." (footnote omitted)).

<sup>84</sup> *Id.* at 1351.

<sup>85</sup> *Id.* at 1356.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1354, 1355 & n.14.

<sup>88</sup> Michelle Van Oppen, *Establishing Respect For Music Video Dancers: Flash Mobs, Litigation, and Collective Bargaining*, 22 S. CAL. REV. L. & SOC. JUST. 133, 151-54 (2012) (arguing that music video dancers likely fall within the creative professional exemption because dance has artistic merit "at least equivalent to that of acting and music"); see also Sara Wolf, *Landing a Gig in L.A.*, DANCE MAG., Feb. 2005, at 84 (advising dancers to bring a resume listing their professional experience and background training to auditions).

<sup>89</sup> Van Oppen, *supra* note 88, at 153.

<sup>90</sup> *Id.*

idea.<sup>91</sup> Consequently, “dancers likely fall within the [creative] professional exemption because they meet the minimum payment requirement and the artistic merit of dance is at least equivalent to that of acting, music, and drawing.”<sup>92</sup>

#### 4. *Floral Designers*

Floral designers may satisfy exemption requirements if they create floral designs based on vacuous instructions such as “subject matter, theme or occasion . . . and create[ ] the floral design or floral means of communicating an idea for the occasion.”<sup>93</sup> The lack of concrete directions, unlike those given to reality TV associate producers by supervising producers, is what allows certain floral designers to satisfy the primary duties test and conduct work that is inventive, imaginative, and based on the employee’s talents.<sup>94</sup>

### C. Applying These Principles to Reality Television Producers

The classification of an employee as an exempt creative professional is a highly factual inquiry and one that must be determined on a case-by-case basis.<sup>95</sup> However, a strong argument can be made that the work of reality television producers, as a class, is not substantially creative enough to qualify for the exemption. For example, production companies, rather than the producers themselves, generally establish a framework or format for each reality show.<sup>96</sup> While the producers are granted autonomy in determining where and when to “cut,” they are usually under strict instructions from their superiors.<sup>97</sup> Throughout the course of production, the producers’ work gets reviewed numerous times by their superiors and by the network executives.<sup>98</sup> For this reason, their writing differs from the “creative” writing of essayists, novelists, and screenplay writers “who choose their own subjects and hand in a finished piece of work to their employers.”<sup>99</sup>

<sup>91</sup> See 29 C.F.R. § 541.302(c) (2014) (“[C]artoonists . . . are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept.”).

<sup>92</sup> Van Oppen, *supra* note 88, at 153.

<sup>93</sup> See Wage & Hour Division Opinion Letter, 1970 WL 2644269 (Dep’t of Labor Sept. 4, 1970) (citing 69 Fed. Reg. 22,122, 22,154 (Dep’t of Labor Apr. 23, 2004)).

<sup>94</sup> See *id.*

<sup>95</sup> 29 C.F.R. § 541.302(c).

<sup>96</sup> See David Rupel, *How Reality TV Works*, WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org/organizesub.aspx?id=1091> (last visited Mar. 18, 2015) (noting that one of the types of reality TV is the “followed story” in which the show has “very little structure, where everyday events become the stories”).

<sup>97</sup> See *Credit Guidelines for Non-fiction Television*, PRODUCERS GUILD AM., [http://www.producersguild.org/?page=coc\\_ts\\_3](http://www.producersguild.org/?page=coc_ts_3) (The Associate Producer “[r]eports directly to the Producer”) (last visited Mar. 19, 2015).

<sup>98</sup> See *id.*

<sup>99</sup> 29 C.F.R. § 541.302(c).

Middle- and low-level producers' duties often revolve around logistical work: booking locations, making travel arrangements, and providing meal service for the cast and crew.<sup>100</sup> In congruence with the notion that exemptions should be interpreted narrowly, the primary duty threshold is a difficult one to overcome.<sup>101</sup> Therefore, most producers in the reality television industry do not primarily complete work of a creative nature. The work of reality television associate producers is more similar to the work of journalists, reporters, and news producers than it is to the work of novelists and writers of fiction.

Under prior regulations in which the exemption was called the "artistic professional exemption," fiction writers were classified as artistic professionals, but nonfiction newspaper writers were considered artistic professionals only if their writing was analytical and interpretive.<sup>102</sup> Reality television associate producers do not complete highly individualized, analytical work like that of editorial writers, critics, and columnists.<sup>103</sup> Rather, they complete assignments that are substantially controlled and overseen by producers.<sup>104</sup> Perhaps the key difference between journalists and most reality television associate producers is that journalists find, analyze, or interpret events, and their work product is reflective of their effort, while associate producers take footage and cut it down to fit requirements.<sup>105</sup> Thus their effort reflects the guidelines they were given rather than their own creative input.

### III

#### THE SPLIT: HOW COURTS CALCULATE OVERTIME IN MISCLASSIFICATION CASES

The settlement of a 2013 case in the Southern District of New York prevented, or at the very least postponed, the New York court from clarifying the ongoing confusion surrounding the calculation of retroactive overtime. A personal assistant, Jennifer O'Neill, filed suit alleging that her former employer, the musician Stefani Joanne Germanotta, better known as Lady Gaga, failed to pay her \$380,000 in requisite overtime wages, thus violating the FLSA and New York Labor

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100 See Bartlett & Spurlock, *supra* note 8.

101 *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 520 (S.D.N.Y. 2013).

102 29 C.F.R. § 541.302(f)(1).

103 See *supra* note 98 and accompanying text.

104 See *supra* note 98 and accompanying text.

105 See *supra* notes 98–99 and accompanying text.

Law (NYLL).<sup>106</sup> Although trial was scheduled to commence on November 4, 2013,<sup>107</sup> Gaga and O’Neill settled the lawsuit.<sup>108</sup>

In *O’Neill v. Mermaid Touring Inc.*, O’Neill stated that she frequently worked unconventional hours due to the nature of her employment.<sup>109</sup> O’Neill knew when she accepted this position that “she would be paid \$1,000 per week to work ‘24/7.’”<sup>110</sup> O’Neill resigned after a few weeks, but was reinstated and told that she would be paid \$75,000 annually.<sup>111</sup> “O’Neill understood that her . . . salary would be her total compensation for all the work she performed,” but no discussion occurred regarding potential overtime payments.<sup>112</sup> O’Neill explained her duties as involving the following:

[A]nything and everything that [Stefani Germanotta] needed, from cleaning the hotel room and cleaning up after her to helping her put her makeup out, have her makeup done, making sure her hair looked right before she went on stage, making sure she drank water, making sure she had tea, making sure that she ate, making sure she was hopefully on time to places. And just being there for her.<sup>113</sup>

Regarding O’Neill’s employment, Germanotta stated: “You don’t get a schedule that is like you punch in and you can play [ ] Tetris at your desk for four hours and then you punch out at the end of the day. This is when I need you, you’re available.”<sup>114</sup> When the court ruled on a summary judgment motion, the defendants conceded that “[O’Neill] was misclassified as an exempt employee and that she [did] not meet the administrative exemption set forth in 29 U.S.C. § 213(a)(1).”<sup>115</sup> When employers concede the issue of misclassification and admit that the employee is covered by FLSA, the pertinent issue is how to calculate that retroactive overtime.<sup>116</sup>

In the event that associate producers on reality television shows are deemed nonexempt from overtime pay, either on a class-wide or individual basis, employers will need to determine which method of calculating back pay is appropriate for the retroactive hours worked. The issue of misclassifying employees as exempt from overtime has yet to be quashed. This widespread problem still persists years after the DOL launched its “Misclassification Initiative” as part of Vice

<sup>106</sup> *O’Neill v. Mermaid Touring, Inc.*, 968 F. Supp. 2d. 572, 574–75 (S.D.N.Y. 2013).

<sup>107</sup> *Id.* at 587.

<sup>108</sup> *Lady Gaga Settles Overtime Lawsuit With Ex-Assistant*, PEOPLE MAG. (Oct. 22, 2013, 12:50 PM), <http://www.people.com/people/article/0,,20748027,00.html>.

<sup>109</sup> *O’Neill*, 968 F. Supp. 2d at 575–76.

<sup>110</sup> *Id.* at 575.

<sup>111</sup> *Id.* at 575–76.

<sup>112</sup> *Id.* at 576.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 583.

<sup>116</sup> *Id.*; see also *infra* Part III.

President Biden's Middle Class Task Force in 2011.<sup>117</sup> As of November 19, 2013, New York became the latest state to sign an agreement with the DOL to increase enforcement efforts against employers suspected of such behavior.<sup>118</sup> Currently, twenty other states have signed similar memoranda.<sup>119</sup> The Misclassification Initiative and these recently signed agreements to work towards reducing misclassification serve two purposes: First, they would provide benefits such as overtime, minimum wage, and unemployment insurance to deserving workers. Second, they aim to help "level the playing field" for employers who abide by these laws and thus face higher labor costs than their law-breaking competitors.<sup>120</sup> New York State Labor Commissioner Peter Rivera stated: "When employers misclassify employees . . . for their own gain, they hurt . . . the law-abiding employers who don't steal from their employees."<sup>121</sup> These good employers face intense economic pressures as they are disadvantaged compared to those intentionally violating the law by misclassifying employees.<sup>122</sup> Since 2011, the Initiative has helped collect in excess of \$18 million in back wages for over 19,000 workers who had been classified as exempt from overtime and minimum wage.<sup>123</sup> In states such as New York in which the DOL has signed agreements with state DOLs and Attorneys General, employers should expect increased scrutiny into their employment practices surrounding the issue of classifying workers as exempt.<sup>124</sup> The difference between an exempt and nonexempt employee is not always clear, especially in the emerging field of reality television. Widespread, categorical misclassification of this nature could constitute very costly mistakes for reality television production companies who would owe potentially millions of dollars in overtime damages.<sup>125</sup> Therefore, the need for clarification on whether reality television producers are nonexempt employees is evident.

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<sup>117</sup> Carlos Lopez, *New York Teams Up with Feds to Go After Worker Misclassification*, WAGE & HOUR LITIG. BLOG (Nov. 19, 2013), <http://www.wagehourlitigation.com/state-claims/new-york-teams-up-with-feds-to-go-after-worker-misclassification/>.

<sup>118</sup> *Id.* ("[O]fficials from the U.S. DOL, the New York DOL, and the New York Attorney General's Office signed memoranda of understanding that will enable the agencies to share information and coordinate enforcement efforts.").

<sup>119</sup> *Employee Misclassification as Independent Contractors*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/workers/misclassification/> (last visited May 14, 2015).

<sup>120</sup> *Id.*

<sup>121</sup> Press Release, U.S. Dep't of Labor, US Labor Department Signs Agreements with NY Labor Department and NY Attorney General's Office to Reduce Misclassification of Employees (Nov. 18, 2013), <http://www.dol.gov/opa/media/press/whd/WHD20132180.htm> (internal quotation marks omitted).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> The Real Cost of Reality TV, *supra* note 7.

The method of overtime calculation is often as important as the underlying misclassification itself. The first issue in relation to calculating retroactive overtime is whether courts should apply the standard time-and-one-half method or the fluctuating workweek method when discerning the amount of overtime owed.<sup>126</sup> The federal courts are divided as to whether to rely on 29 C.F.R. § 778.114 (114 bulletin) and the fluctuating workweek in cases where the employer has incorrectly categorized the employee as exempt from FLSA's overtime mandate.<sup>127</sup> The 114 bulletin is an interpretive ruling issued by the DOL that lacks the binding effect of law, thus leading the courts into a state of disarray.<sup>128</sup> Certain courts of appeals have applied the 114 bulletin to misclassification cases,<sup>129</sup> while other courts find it inappropriate to apply the fluctuating workweek method to a misclassification case.<sup>130</sup> The First, Fourth, Fifth, Seventh, and Tenth Circuits have endorsed the FWW as the applicable method to calculate overtime back pay in a misclassification case.<sup>131</sup> In the Second Circuit, several district courts have rejected the FWW.<sup>132</sup> The Third Circuit has not yet decided whether the FWW applies retroactively to a

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<sup>126</sup> One method of calculating overtime is based on a fixed salary for fluctuating hours. 29 C.F.R. § 778.114(a) (2014). Another is the standard time-and-one-half method. 29 U.S.C. § 207(a)(1) (2006).

<sup>127</sup> See *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 681 (7th Cir. 2010); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1013 (N.D. Cal. 2009) (“The FWW method cannot be used to calculate overtime pay retroactively in a misclassification case.”); *Desmond v. PNGI Charles Town Gaming, LLC*, 661 F. Supp. 2d 573, 585 (N.D.W. Va. 2009) (adopting the FWW method in a case where the employer misclassified its employees as exempt), *aff’d in part, vacated in part sub nom.*, 630 F.3d 351 (4th Cir. 2011).

<sup>128</sup> Compare Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1711 (2007) (“Virtually all agree that policy statements announce a policy or agency intention but do not bind the agency or the public. But at least one pocket of scholarship suggests that while policy statements are not binding, valid interpretive rules are binding to the extent that they ‘merely interpret’ already existing legal duties.” (footnote omitted)) and Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992) (claiming that interpretive rules are binding as a practical matter), *with Freeman v. Nat’l Broad. Co., Inc.*, 80 F.3d 78, 83 (2d Cir. 1996) (finding the DOL’s interpretation of the FLSA “non-binding, outdated, and inapplicable”).

<sup>129</sup> See *Black v. SettlePou, P.C.*, 732 F.3d 492, 498 (5th Cir. 2013) (citing *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir. 1988)); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230–31 (10th Cir. 2008); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999).

<sup>130</sup> See *Urnikis-Negro*, 616 F.3d at 677–79; *Hasan v. GPM Invs., LLC*, 896 F. Supp. 2d 145, 149 (D. Conn. 2012) (“When an employer misclassifies an employee, the resultant employment contract will never fulfill any of the requirements of section 778.114.”); *Perkins v. S. New Eng. Tel. Co.*, 2011 WL 4460248, at \*3 (D. Conn. Sept. 27, 2011); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1013 (N.D. Cal. 2009); *Rainey v. Am. Forest & Paper Assoc.*, 26 F. Supp. 2d 82, 100–02 (D.D.C. 1998).

<sup>131</sup> See *Black v. SettlePou, P.C.*, 732 F.3d 492, 498 (5th Cir. 2013) (citing *Blackmon*, 835 F.2d at 1138); *Urnikis-Negro*, 616 F.3d at 681; *Clements*, 530 F.3d at 1230–31; *Valerio*, 173 F.3d at 40; *Bailey v. Cnty. of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996).

<sup>132</sup> See, e.g., *Perkins*, 2011 WL 4460248, at \*3 (D. Conn. Sept. 27, 2011).

misclassified worker. Neither the Sixth nor Eighth Circuits have spoken on this precise issue, and in each circuit, only one district court has dealt with the issue explicitly.<sup>133</sup> While the Ninth Circuit has not addressed the issue, district courts within the circuit have renounced the FWW method in the case of a misclassified worker.<sup>134</sup>

Courts are split on whether the fluctuating workweek method should be applied retroactively to employees who have been misclassified as exempt from overtime. In the cases where the court applies the FWW retroactively, there is confusion over which requirements of the 114 bulletin apply to a misclassification case. For example, one such discrepancy is whether the employer's intent that weekly pay compensate actual hours worked can be inferred merely from the fact that the employee worked variable hours for a fixed weekly salary.<sup>135</sup>

The Supreme Court has yet to determine which method of calculating overtime damages should be used in misclassification cases. There is one Supreme Court case that lower courts reference and struggle to apply in such situations: *Overnight Motor Transportation Co., Inc. v. Missel*.<sup>136</sup> In *Missel*, the Court sanctioned the use of the DOL's fluctuating workweek provision under FLSA, allowing for the use of a fixed salary to compensate for an employee's fluctuating work hours.<sup>137</sup> Therefore, this case overrode the presumption of a standard forty-hour workweek.<sup>138</sup> The *Missel* Court calculated the regular rate of pay by dividing the weekly wage by the employee's actual hours

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<sup>133</sup> See *Frisby v. Keith D. Weiner & Assocs. Co.*, No. 1:09-CV-2027, 2010 WL 1630107, \*9–10 (N.D. Ohio Apr. 21, 2010) (denying summary judgment on the issue of whether a “clear mutual understanding” existed between the employer and the employee regarding overtime compensation and thus neglecting to apply half-time damages); *Cowan v. Treetop Enters., Inc.*, 163 F. Supp. 2d 930, 938–43 (M.D. Tenn. 2001) (holding that the FWW method cannot be applied retroactively to calculate damages in a misclassification case); see also *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 918 (D. Minn. 2010) (following the *Urnikis-Negro* line of decisions and applying the FWW method of calculating damages despite acknowledging the inapplicability of section 778.114(a) in misclassification cases).

<sup>134</sup> See *e.g.*, *McCoy v. N. Slope Borough*, No. 3:13-CV-00064-SLG, 2013 WL 4510780, at \*19 (D. Alaska Aug. 26, 2013) (adopting the *Russell v. Wells Fargo & Co.* decision stating that in a misclassification case “an effective clear mutual understanding is absent and overtime compensation was not provided contemporaneously” (internal quotations omitted)).

<sup>135</sup> See *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 59 (D.D.C. 2006) (comparing cases that require contemporaneous payment of overtime with cases allowing the retroactive payment of overtime to qualify for the FWW method of calculating overtime).

<sup>136</sup> 316 U.S. 572 (1942).

<sup>137</sup> *Id.* at 573–74, 578, 581.

<sup>138</sup> See *id.* at 581 (“But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage . . . and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage.”).

worked in a given week.<sup>139</sup> The application of the FWW in *Missel* was not used to calculate owed overtime damages.<sup>140</sup> Therefore, the case does little to solve the dispute in the arena of retroactive overtime.

Many employers argue in favor of the FWW method in situations where, as with reality television employees, the employer intends the salary to compensate for actual hours worked, and thus the overtime calculation does not change.<sup>141</sup> Under the FWW an employee receives a fixed weekly salary regardless of a fluctuation in actual hours worked during a workweek.<sup>142</sup> Applying the FWW method, the regular rate of pay varies weekly: the employee is paid for actual hours worked at the regular rate plus fifty percent as an overtime premium for overtime hours worked.<sup>143</sup> This equals the same amount under the section 778.113(a) formula where the salary intends to compensate for actual hours worked.<sup>144</sup> If the calculation is the same then why choose a method at all? The calculation only comes out the same way if the intention was to compensate for all hours worked. Where that intention is not present, there is a need for clear determination as to whether the FWW or the standard method should be used to calculate retroactive overtime.

#### A. The Fluctuating Workweek Approach

The Fluctuating Workweek (FWW) method stands in opposition to the traditional time-and-one-half rate of overtime payment. The method, as laid out in the 114 bulletin, states that an employer can pay employees just half-time without violating the law if five conditions are satisfied.<sup>145</sup> First, the employee's hours must regularly fluctuate above and below forty hours from week to week.<sup>146</sup> Second, the

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<sup>139</sup> See *id.* at 580 & n.16 (“Wage divided by hours equals regular rate.”); see also *Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F. Supp. 2d 372, 394-95 (E.D.N.Y. 2012) (noting the possible direct application of the *Missel* formula without referencing the FWW regulations).

<sup>140</sup> See *Missel*, 316 U.S. at 581.

<sup>141</sup> See, e.g., *Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199, 204 (D. Conn. 2013) (holding that where an “employee is to be paid a fixed salary as straight time pay for whatever hours [the employee] is called upon to work in a workweek . . . . [E]ach hour worked over the agreed to hours [ ] earns only an additional fifty percent premium over the regular wage rate.” (first alteration in original) (internal quotation marks omitted)).

<sup>142</sup> See *id.*; see also 29 C.F.R. § 778.114(a) (2014) (“An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek . . . .”).

<sup>143</sup> See 29 C.F.R. § 778.114(a) (2014) (“Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate . . . .”).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* § 778.114(a).

<sup>146</sup> See *id.*

employee must receive the same fixed weekly salary regardless of the number of hours actually worked in a given week.<sup>147</sup> Thus an employer would pay, for example, a \$1,000 weekly wage whether the employee works 40, 30, or 80 hours in one week. Third, the fixed weekly wage must not result in a regular rate of pay below the minimum wage when divided by the actual hours worked.<sup>148</sup> For example, if an employee is paid \$1,000 per week and worked 65 hours, the regular rate of pay equals \$15.38. This rate is greater than the \$7.25 minimum wage and satisfies the third condition. However, if the weekly salary is \$455, as required for the creative professional exemption,<sup>149</sup> and the employee works 65 hours, the regular rate of pay equals \$7.00 and is below the current minimum wage. This would not satisfy the third condition. Fourth, the employer must pay a 50% overtime premium (the “half-time”) in addition to the fixed salary for each hour over 40 hours in any given week.<sup>150</sup> If the weekly salary is \$1,000 and the employee worked a 65-hour workweek, the regular rate of pay is \$15.38. The half-time rate is then  $\$15.38 \div 2 = \$7.69$ . The employee worked 25 hours of overtime that week and  $25 \text{ hours} \times \$7.69 \text{ per hour} = \$192.25$  in overtime pay. Therefore, using the FWW the employee is owed \$1,000 weekly wage plus \$192.25 in overtime for a total weekly salary of \$1,192.25.

The fifth and final condition is that the employer and employee must have a “clear mutual understanding” that the fixed salary compensates for fluctuating hours each week rather than for working forty hours or some other fixed amount.<sup>151</sup> This condition has influenced the circuit split of opinion as to whether the FWW can apply retroactively; it is difficult to argue that an employee who believed that he or she was exempt from overtime payments had an “understanding” that his or her fixed salary included an overtime premium.

When an employer misclassifies an employee as exempt from overtime payments, the issue becomes whether the employer should retroactively enjoy the benefits of the relatively cheaper FWW method of overtime calculation even though the parties never made an explicit agreement regarding overtime. Some federal circuits, including

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<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See 29 C.F.R. § 541.300(a)(1) (2014).

<sup>150</sup> See *id.* § 778.114(a).

<sup>151</sup> See *id.*

the Fourth<sup>152</sup> and the First,<sup>153</sup> use the FWW method to measure damages in misclassification cases where the employee received a fixed weekly salary. These courts conclude that acceptance of the fixed salary over a period of time represented an implied agreement to be paid on a fixed salary basis and thus satisfies the conditions of the FWW.<sup>154</sup>

The Seventh Circuit in *Urnakis-Negro v. American Family Property Services* found that an employee understood at the time of hiring that her fixed salary intended to compensate her actual hours worked regardless of whether they exceeded forty hours.<sup>155</sup> Thus the court applied the FWW method under the authority of *Missel*.<sup>156</sup> The court treated the fixed salary as “straight time” pay for the actual number of hours worked in a given week.<sup>157</sup> The regular rate varied from week to week and the hours worked over forty was calculated at half-time.<sup>158</sup> The court rejected the argument that the payment of overtime could not be “contemporaneous” due to the misclassification and instead found clear mutual understanding to be sufficient.<sup>159</sup> The court relied on proof of clear mutual understanding and analyzed the requirement of intent rather than contemporaneous payment.<sup>160</sup>

In *Ransom v. M. Patel Enterprises*, the Fifth Circuit reversed a lower court decision, which had held that when there was no persuasive evidence showing the intentions of the parties to compensate for a fixed number of hours per week, the court should assume the salary compensated forty hours of work.<sup>161</sup> The Fifth Circuit held that the lower court erred in finding that the employer and employee shared a mu-

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<sup>152</sup> See *Desmond v. PNGI Charles Town Gaming, LLC*, 661 F. Supp. 2d 573, 583–84 (N.D.W. Va. 2009), *aff'd in part, vacated in part sub nom.*, 630 F.3d 351 (4th Cir. 2011). In *Desmond*, the court applied *Missel* to a misclassification case and held that employees and employers can agree to a fixed weekly salary that covers all hours worked as long as it meets the minimum wage requirements. See *id.*

<sup>153</sup> *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999). The court found that the parties had reached a clear mutual understanding that the employee’s salary was fixed despite the variance in her hours actually worked. See *id.* Valerio clearly understood that her fixed weekly salary compensated her for fluctuating hours. See *id.* at 37 (“[Valerio’s employer] told her at the time she was hired that the position was considered ‘exempt’ under the FLSA and she therefore would not be entitled to overtime pay . . .”). As Valerio was originally classified as exempt, she accepted that Putnam did not intend to pay overtime if she worked more than forty hours. See *id.*

<sup>154</sup> See, e.g., *id.* at 39–40 (noting that Valerio, the plaintiff-employee, understood that she would receive a fixed weekly salary and never demanded overtime pay precomplaint).

<sup>155</sup> 616 F.3d 665, 680–81 (7th Cir. 2010).

<sup>156</sup> *Id.*

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> *Ransom v. M. Patel Enters.*, No. A-10-CA-857 (AWA), 2012 WL 242788, at \* 2 (W.D. Tex. Jan. 25, 2012), *rev'd*, 734 F.3d 377, 384 (5th Cir. 2013).

tual understanding that the salary intended to compensate for fifty-five hours.<sup>162</sup> The lower court stated that intent is difficult to determine in a misclassification case as it is unlikely the employer and employee discussed overtime.<sup>163</sup> The lower court found that the weekly salary intended to compensate for fifty-five hours of work and thus used that figure in determining the regular rate.<sup>164</sup> The Fifth Circuit found this decision erroneous and reversed the judgment, holding instead that the record showed that the plaintiffs were paid a fixed weekly salary under the expectation that they would work fluctuating weekly hours and therefore the FWW was the applicable method of calculation.<sup>165</sup> The Fifth Circuit held that the applicable divisor was equal to the number of hours actually worked in a workweek rather than the fifty-five hour divisor.<sup>166</sup> The Fifth Circuit thus followed its earlier decision in *Blackmon v. Brookshire Grocery Co.*, finding that the FWW was the correct method of calculating unpaid overtime and that to compute the regular rate, a court must “divid[e] the actual hours worked each workweek into the fixed salary . . . [then] multiply[ ] all hours over 40 in the workweek by 1/2 the regular rate for that workweek.”<sup>167</sup>

The Tenth Circuit in *Clements v. Serco, Inc.* held that despite the fact that the employees were misclassified as exempt under the “outside salesmen” exemption, the court could apply the FWW method of overtime calculation.<sup>168</sup> The court held that the parties had a clear mutual understanding that the employees were hired on a salaried basis and that they would routinely work more than forty hours per week.<sup>169</sup> Because the employees were not docked for working fewer than forty hours and were not paid more when they worked more, the court inferred the overtime premium from the parties’ conduct.<sup>170</sup>

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<sup>162</sup> *Ransom v. M. Patel Enters.*, 734 F.3d 377, 384, 388 (5th Cir. 2013).

<sup>163</sup> *Ransom*, 2012 WL 242788, at \* 2 (W.D. Tex. Jan. 25, 2012). Some courts have held that in a misclassification case the employer intended to compensate the worker through a salary, but under the assumption that the worker was exempt from receiving any overtime. *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See Ransom*, 734 F.3d at 384, 388. *But cf. Black*, 732 F.3d at 498–500, 503 (finding no explicit (or implicit) agreement between the employee and employer that the employee would receive a fixed weekly salary to work fluctuating hours; thus the FWW cannot apply). The Fifth Circuit interpreted *Missel* and *Blackmon* to require the application of the FWW when a mutual agreement (even an implicit one) is discernible. *See Ransom*, 734 F.3d at 385.

<sup>166</sup> *See Ransom*, 734 F.3d at 384–85.

<sup>167</sup> *See id.* (quoting *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138–39 (5th Cir. 1988)) (emphasis omitted).

<sup>168</sup> *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227–30 (10th Cir. 2008).

<sup>169</sup> *Id.* at 1230–31.

<sup>170</sup> *Id.*

## B. The Traditional Method

Applying the traditional method of calculating overtime, an employer would pay an employee time-and-one-half for all hours worked over forty in a given week.<sup>171</sup> This would cost the employer considerably more than if the FWW's half-time figure was used. Using the above example, where the employer pays a \$1,000 weekly wage and the employee works 65 hours, the overtime calculation for the traditional method of overtime is  $1000 \div 40 \times 1.5$ , which equals an overtime rate of \$37.50 per hour. Where the employee worked 65 hours (25 hours of overtime), the total payment would be  $\$37.50 \times 25$  for a total of \$937.50. Therefore, using the traditional method, the employee is due \$1,937.50 in total as compared to \$1,192.25 using the FWW. It is clear that the traditional method results in much costlier damages when factoring in the sheer number of employees owed overtime damages at any one company.

Courts have found different reasons for rejecting the less expensive FWW method of calculation, however. For example, in *Perkins v. Southern New England Telephone Co.*, the court rejected the FWW as a method of overtime calculation because, in the *Perkins* court's view, an employer in a misclassification case cannot meet the requirements of clear mutual understanding and contemporaneous payment.<sup>172</sup> The court also discussed policy implications of applying the FWW such as the perverse incentive to misclassify workers as exempt.<sup>173</sup> Furthermore, the court reasoned that the FWW method allows employers to escape the time-and-one-half payment figure and instead pay only half-time.<sup>174</sup>

A district court in *Costello v. Home Depot USA, Inc.* did not apply the FWW in the misclassification case based on a lack of clear mutual understanding between the employee and employer.<sup>175</sup> The court applied the default forty-hour week with time-and-one-half overtime.<sup>176</sup> The court then noted that an employer in a misclassification case cannot infer an employee's intention to cover all hours worked when the employment agreement disregarded overtime payment.<sup>177</sup> The failure to contemplate overtime, according to the *Costello* court, is a reason for rejecting a contract. Thus the DOL's 114 bulletin reflects the

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<sup>171</sup> See, e.g., 5 C.F.R. § 551.501(a) (2011) (requiring federal agencies to pay nonexempt employees at a rate equal to one and one-half times the employee's hourly regular rate for hours worked in excess of forty hours per week).

<sup>172</sup> *Perkins v. S. New Eng. Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 4460248, at \*3 (D. Conn. Sept. 27, 2011).

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> 944 F. Supp. 2d 199, 203–08 (D. Conn. 2013).

<sup>176</sup> *Id.* at 208.

<sup>177</sup> *Id.* at 207.

holding of *Missel* and should lead other courts to apply the standard forty-hour workweek.<sup>178</sup> According to the *Costello* court, an employee cannot achieve a clear mutual understanding as to how many hours the salary compensates if there is no inclusion of overtime in the contract.<sup>179</sup>

The *Costello* court also noted the perverse policy implications of allowing for the FWW method of calculation.<sup>180</sup> The court stated that assessing retroactive damages using the FWW method provides employers an incentive to misclassify workers as exempt in order to receive a “windfall in damages” in the event the employer is found liable for misclassification.<sup>181</sup> Furthermore, the court stated that Home Depot’s FWW arrangement did not clearly fit within the “general spirit of what a FWW alternative method attempted to achieve.”<sup>182</sup> The FWW attempts to offset an employee’s relative loss from workweeks above forty hours with the benefit of stable pay for weeks in which an employee works less than forty hours.<sup>183</sup>

The issue in *Martinez v. Hilton Hotels Corp.* was whether the parties had such a “clear mutual understanding” that the employees’ salaries were intended to compensate them for hours in excess of forty hours per week, which would allow the half-time method of overtime calculation.<sup>184</sup> The court found that the clear mutual understanding requirement was not satisfied but that a question of fact existed as to whether the FWW applied.<sup>185</sup>

The court in *Hasan v. GPM Investments, LLC* did not apply the FWW to the misclassification case and instead applied the *Missel* reasoning.<sup>186</sup> The court reasoned that a contract does not comply with the FLSA where it does not include a provision for overtime.<sup>187</sup> The court looked to the requirements of the 114 bulletin and found that in a misclassification case the employer will meet neither the requirement of contemporaneous payment nor of clear mutual understanding.<sup>188</sup> The court stated that in this case, the variance between weeks with a moderate amount of overtime and weeks where the majority of

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178 *Id.*

179 *Id.*

180 *Id.* at 208.

181 *Id.* (quoting *Perkins v. S. New Eng. Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 4460248, at \*4 n.5 (D. Conn. Sept. 27, 2011)).

182 *Id.*

183 *Id.* (quoting *Hasan v. GPM Invs., LLC*, 896 F. Supp. 2d 145, 150 (D. Conn. 2012)).

184 *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 529–30 (S.D.N.Y. 2013).

185 *Id.* at 530.

186 896 F. Supp. 2d at 150–51.

187 *Id.* at 149–50.

188 *Id.*; *see, e.g.*, *Perkins v. S. New Eng. Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 4460248, at \*3 (D. Conn. Sept. 27, 2011); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1013–14 (N.D. Cal. 2009); *Rainey v. Am. Forest & Paper Assoc.*, 26 F. Supp. 2d 82, 100–02 (D.D.C. 1998).

hours worked constituted overtime was not the same as “fluctuation” above and below the forty-hour threshold.<sup>189</sup>

In *In re Texas EZPawn*, a district court in the Fifth Circuit rejected the *Blackmon* decision to use the FWW method on the basis that it is difficult to infer a clear mutual understanding that the salary would include an overtime premium between an employer and a misclassified employee.<sup>190</sup> The court based its decision on policy.<sup>191</sup> The court stated that retroactively applying the half-time method of calculation would effectively mean “an employer could claim exempt status for an employee, withhold overtime, then after being held liable for failing to pay overtime, escape the time and one-half requirement of the FLSA.”<sup>192</sup> The court stated that the policies behind overtime would not be supported by the FWW method in a misclassification case.<sup>193</sup> The court also noted that the 114 bulletin “is not entitled to a high level of deference” as it is an interpretive bulletin rather than law.<sup>194</sup> In this case, the court did not follow the Fifth Circuit precedent set forth in *Blackmon* but rather determined that the FWW could not be applied to misclassification cases.<sup>195</sup>

#### IV

#### THE PROPOSAL: CLASSIFYING ASSOCIATE PRODUCERS AS NONEXEMPT AND ADOPTING THE FLUCTUATING WORKWEEK METHOD

This Note establishes that reality television associate producers should be entitled to half-time pay for all overtime hours because their work is not adequately creative in nature to satisfy the creative professional exemption. Reality television associate producers categorically fall outside the scope of the FLSA creative professional exemption because the nature of reality television is inherently different than fiction film and television industries whose writers are categorically exempted.<sup>196</sup> Furthermore, the tasks of most associate producers do not reflect the requisite levels of imagination or innovation to be exempted.<sup>197</sup> Although determinations regarding exempt status are made on a case-by-case basis, the “real” aspect of reality television should serve as a red flag to employers attempting to classify workers

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<sup>189</sup> *Hasan*, 896 F. Supp. 2d at 150.

<sup>190</sup> *In re Texas EZPawn Fair Labor Standards Act Litig.*, 633 F. Supp. 2d 395, 402, 405-06 (W.D. Tex. 2008).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 405.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 405-06.

<sup>196</sup> *See supra* Part II.C.

<sup>197</sup> *See supra* Part II.C.

as exempt.<sup>198</sup> Therefore, reality television middle- and lower-level producers should be classified as nonexempt from overtime as a default rule.<sup>199</sup> This does not, however, eliminate the possibility that an individual associate producer may qualify as exempt if they meet the necessary requirements.

In situations where an employer has misclassified an employee as exempt and later determines that the employee is not exempt, the regular rate of pay should be calculated by dividing the weekly salary by the number of hours actually worked. Many, if not all, reality television associate producers are paid a weekly salary regardless of the number of hours they work in excess of forty hours per week.<sup>200</sup> Although it is often difficult to determine an exact number of hours that a weekly salary is intended to compensate, certain practices in the reality television industry show that employers do not pay any overtime even though they intend that employees work overtime.<sup>201</sup> This shows that employers intended that the weekly salary compensate all hours that an employee actually worked. Therefore, the regular rate of pay should be computed by “dividing the salary by the number of hours which the salary is *intended* to compensate,” which is equivalent to hours actually worked.<sup>202</sup>

Turning to the second issue, whether courts should employ the FWW or the standard time-and-one-half method of calculating overtime damages in a misclassification case, the Supreme Court should adopt the FWW method in all cases in which a “clear mutual understanding” between the employer and the employee can be discerned. An employee who is not receiving hourly overtime pay, in the strict sense, would not likely be party to a clear and mutual agreement that a weekly salary intended to compensate for fluctuating hours.<sup>203</sup> Standard practices in the reality television industry, however, indicate that such an understanding could exist.<sup>204</sup>

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<sup>198</sup> See *supra* Part II.C.

<sup>199</sup> See *supra* Part II.C.

<sup>200</sup> See *The Real Cost of Reality TV*, *supra* note 7 (summarizing survey of working conditions for nonfiction writers and producers). Therefore, this proposal strictly applies to workers paid a salary on a weekly basis.

<sup>201</sup> See *supra* notes 29–30 and accompanying text (noting the widespread lack of overtime payments for reality TV producers); see *generally* *The Real Cost of Reality TV*, *supra* note 7 (summarizing survey of working conditions for nonfiction writers and producers).

<sup>202</sup> 29 C.F.R. § 778.113(a) (2014) (emphasis added).

<sup>203</sup> See *Ransom v. M. Patel Enters. Inc.*, 734 F.3d 377, 381–83 (5th Cir. 2013) (“None of these statements establish that the [employees]’ salary was intended to compensate for a set . . . workweek. They simply suggest that employees understood they would work ‘roughly’ or ‘around’ or a ‘minimum’ of 55 hours, not that their salary was meant to compensate for that ‘estimate’ of only 55 hours.”).

<sup>204</sup> See *supra* notes 29–30 and accompanying text (noting the widespread lack of overtime payments for reality TV producers).

While this Note's proposal seems modest in urging the Court to allow the application of the FWW method *only* if all of its requirements are met and not calling for an across-the-board use of the FWW, the proposal will have positive impacts on both employees and employers. Furthermore, Supreme Court review of this dichotomy will effectively normalize the method of damages calculation used across the country. If the Court allows for the application of the FWW, employers across the nation would owe half-time overtime damages *only* in situations in which a clear mutual understanding that the fixed salary was to compensate for weeks in which the employee worked above and below forty hours. Employers would not, however, receive the "benefit" of the FWW half-time figure if there had been no such understanding. In those cases, courts should apply the standard time-and-one-half figure.

Supreme Court clarification is necessary to standardize payment methods in the reality television industry, a national industry in which state lines are often blurred for the sake of the shot and the viewers' enjoyment. An associate producer in one state should not receive overtime damages at a rate higher than that of a producer in another state. Unstandardized overtime damages may have broader consequences such as a chilling effect on reality television production.

Varying damages calculation rates among different states may chill artistic expression in states that employ a less employer-favorable overtime method. The chilling-effect doctrine is a constitutional doctrine frequently employed in First Amendment cases<sup>205</sup> but that can also apply more generally to the production and creation of art. A chilling effect on art occurs when "individuals seeking to engage in activity . . . are deterred from so doing by governmental regulation not specifically directed at that protected activity."<sup>206</sup> States that award higher damages to misclassified workers may chill production companies from filming or producing reality television. Perceptively punitive damages calculation in one state should not chill the creation of art by production companies.

#### CONCLUSION

Resolving the "fluctuation" over the method of calculating damages in misclassification cases by adopting the FWW as the

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<sup>205</sup> See Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969) ("The chilling effect doctrine has been most frequently employed and refined in first amendment cases."). See *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) for the case in which the Supreme Court first used the language "tendency to chill."

<sup>206</sup> See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978) (defining the "chilling effect" generally) (italics omitted).

nationally-applicable method may seem to benefit only employers who retain significant amounts of money by paying damages equal to half the hourly wage for all overtime hours instead of the standard time-and-one-half. Although this decision is clearly an employer-friendly one in that it will permit employers to pay workers less in retroactive overtime, it may actually serve to benefit employees as well. Imposing the FWW as the national calculation method in misclassification cases may induce employers to correctly classify their workers as nonexempt because employers will arguably pay less in overtime than they would under the standard method.<sup>207</sup>

Reality programming may be a year-round constant in many American homes, playing on the television all day and every day. The producers' actual hours worked per week or even per month are not nearly as constant.<sup>208</sup> Thus producers would benefit from the FWW method, which provides a predictable, stable salary that would compensate them equally for the busiest and the slowest work months. Although damages in misclassification cases naturally look to remedy what happened in the past, employees should remain hopeful for the future.

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<sup>207</sup> See *supra* Part III.B.

<sup>208</sup> See *The Real Cost of Reality TV*, *supra* note 7 (summarizing survey of working conditions for nonfiction writers and producers).