

# Pursuing an FLSA claim

*Many employers have figured out how to skirt the requirements of the Fair Labor Standards Act. Here's how to ensure that your client gets a decent day's pay for a decent day's work.*

SCOTT H. PETERS AND R. BRENT WALTON

Charles Dickens's descriptions of England's 19th-century sweatshops in novels like *Hard Times* are chilling. Here in the modern-day United States, we tend to believe that the days of our own robber barons—who built their rail, steel, oil, cotton, tobacco, and manufacturing fortunes on the backs of grossly underpaid and ill-treated laborers—are distasteful memories, not to be compared to today's more enlightened age.

Well, it may be time to wake up and smell the Starbucks. Wage abuses by corporate America occur regularly in other countries—witness Nike's debacle in Southeast Asia—and an alarmingly large number of American workers are being systematically cheated out of wages, breaks, mealtimes, overtime, and other rights guaranteed under state and federal labor laws. And it is happening in both blue- and white-collar jobs. While less obvious than the brutal practices of the robber barons, these abuses are no less un-American, and they call for a response from lawyers committed to justice for all workers.

In 1938, Congress passed the Fair Labor Standards Act (FLSA) to provide a minimum standard for wage payment and a maximum standard for work hours for “the maintenance of the minimum standard of living” and “to protect all covered workers from substandard wages and oppressive working hours.”<sup>1</sup> FLSA establishes the “minimum” level of acceptable employment conditions, not a pervasive scheme of employment standards. Nor does it preclude application of nonconflicting state labor laws that give workers greater benefits or remedies.

The act contains five significant forms of worker protection:

- a minimum wage (currently \$6.55 per hour)
- overtime pay (employers must pay one and a half times the regular hourly rate for any hour that an employee works in excess of the standard 40-hour work week)
- record-keeping by employers to confirm FLSA compliance

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- child labor protection
- equal pay for equal work

For employment lawyers, the first three are of key importance.

American employers frequently violate FLSA, usually cutting corners in order to slash payroll expenses without also cutting back on the hours of work performed. Employers are trying to do the nearly impossible—holding payroll expenses down while increasing labor hours worked. They do so using several different methods: “shaving” employee time off submitted time cards, “moving” hours an employee has worked one week to the next week to avoid overtime, refusing to provide meal or rest breaks, and failing to pay employees for required on-site or off-site work activities.

For example, employers may require that employees arrive at work early to do prep work, start or warm up equipment, or put on protective clothing, but forbid them from clocking in until their shift begins or the business opens. Similarly, they may refuse to pay for off-site activities like making deliveries, running errands, checking competitor prices, doing laundry, fielding work-related telephone calls while off duty, or simply being on call.

## Understanding the law

Understanding the specific terms of FLSA is crucial to investigating a violation. Under the act, an “employer” is any construction, retail, or service business with an annual budget of more than \$500,000, including hospitals, health care facilities, and public agencies. Not-for-profit §501(c)(3) charitable or religious organizations are excluded, as are family businesses where all employees are family members.

By design, §203 of the act broadly defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>2</sup> Thus, any officer with sufficient operational control—or more than one of them—can be deemed the “employer” along with the corporation and be held jointly and severally liable

for any labor violations.

An “employee” is someone whom the employer “suffers or permits” to work,<sup>3</sup> and the employer must designate and record the starting date and hour of the “work week.” Once designated, this definition may not be changed, except under specific circumstances.<sup>4</sup>

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A work week consists of seven 24-hour periods, beginning with the designated start time and start day. The weekly pay, divided by the hours worked, must meet federal and state minimum-wage requirements, and overtime must be paid for any hours worked above 40 for each work week. Two weeks may not be averaged together, and hours cannot be moved into another work week to avoid paying overtime.

It is the employer’s—not the employee’s—duty to monitor the workplace, so it is no defense to an FLSA claim if a manager says, “I didn’t instruct her to do that.” Federal regulations clearly caution that “work not requested but suffered or permitted is work time” that must be paid.<sup>5</sup> The reason an employee works beyond his or her scheduled shift is immaterial; if the employer knows or has reason to believe that any worker is doing so, the additional hours must be counted. According to the regulations:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.<sup>6</sup>

At the same time, the employer may ignore “de minimus” amounts (seconds

or a few minutes, provided the time is not easily recordable).<sup>7</sup>

Accordingly, if an employee notifies the supervisor that he or she worked more than the schedule indicates, or if a supervisor instructs the employee not to record time or that a company does not pay overtime, the employer is

deemed to have actual knowledge of the employee’s working off the clock. If the employer tries to squelch truthful reporting of hours, or “encourage artificially low reporting,” the employer cannot disclaim knowledge that the employee was working off the clock.<sup>8</sup>

Under FLSA, employers must keep accurate records of each employee’s work week for a minimum of three years. If these records are incomplete or inadequate, the employee need only give a reasonable estimate of the hours he or she worked, in a declaration or in deposition testimony, to state an FLSA claim. An employer who has not kept records as required “cannot be heard to complain that there is no evidence of the precise amount of time worked.”<sup>9</sup> The employer can overcome such testimony only with reliable evidence of the “precise” number of hours worked.<sup>10</sup>

Section 251 defines a workday and the activities that constitute work. Generally, the test is whether the activity is for the employers’ benefit, integral to the job, and not undertaken for the employee’s convenience.

The Supreme Court recently denied an appeal from the Third Circuit in a

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case where the employer argued that putting on and taking off protective clothing is not compensable time because doing so does not entail any physical “exertion.”<sup>11</sup> The case concerns a rule at Tyson Foods, Inc., requiring employees to sanitize and put on hair nets, earplugs, and safety goggles before each shift and break, and to remove them after each shift and break. The Third Circuit held that the time they took to do this was compensable.

The Supreme Court has previously held that time spent walking to and from

ee must remain available, stay close to the work site, and not use the time for personal activities—for instance, going to the movies, vacationing, or going to church—the time is compensable.

If the employee can be called away every few hours while he or she is off duty yet still on call, that time is also compensable. (Obviously, no camping, vacations, or sporting activities are possible on weekends for on-call workers, even on what is technically a “day off.”) When on call, the employee must be compensated for the entire time un-

typically seek conditional certification of the case to authorize notice to all similarly situated employees. Perhaps it is an oversight, but the act does not define “similarly situated.” The standard of proof at this stage is lenient; courts do not require the factual situations of prospective class members to be identical but use a two-step approach to decide whether a case may proceed as a representative or collective action under FLSA.<sup>21</sup>

The court first examines the pleadings and affidavits of the proposed class action and determines whether there is a colorable basis to find that the named claimants are “similarly situated” to the prospective class members.<sup>22</sup> If the court finds that there is, it “conditionally certifies” the class; notice is issued and may go to employees in different job positions and at different locations. Putative class members are then given the opportunity to opt in, and the action proceeds as a representative action throughout discovery.

The second phase of inquiry, which occurs after discovery is largely complete, is typically precipitated by the defendant’s motion for decertification. At this stage, the court decides whether the class is similarly situated based on the record, employing a summary judgment standard that accepts all inferences in favor of the plaintiffs.

The plaintiff’s burden is not heavy. “Section 216(b)’s ‘similarly situated’ requirement is less stringent than that for joinder under Rule 20(a) or for separate trials under Rule 42(b).”<sup>23</sup> For the action to continue, a plaintiff must demonstrate a “reasonable basis” for the claim of a classwide violation, such as by providing “detailed allegations supported by evidence which successfully engage[s]” the defendant’s proffer of evidence to the contrary.<sup>24</sup>

Usually, some discovery will have been conducted on a representative or statistical basis. The defendant is not entitled to depose all plaintiffs or putative class members, and the plaintiffs are not required to produce evidence as to each plaintiff’s unpaid wages.

To show that employees are similarly situated, the plaintiffs may either pre-

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a workstation after donning safety gear is compensable.<sup>12</sup> Other decisions have found that time spent warming up a pizza oven, preparing a cash register, assembling tools, and cleaning or breaking down equipment at the end of a shift are compensable activities.<sup>13</sup> Even waiting time is compensable if it primarily benefits the employer.<sup>14</sup>

Required meetings or training sessions that take place outside of normal work hours, especially if related to the employee’s job, are compensable.<sup>15</sup> Breaks or rest periods between 5 and 20 minutes are compensable.<sup>16</sup> But meal periods of 30 minutes or longer are not compensable, provided the employee is completely relieved from work during that time.<sup>17</sup>

On-call time is compensable if being on call is to the employer’s benefit, the on-call employee’s activities are seriously restricted while he or she is on call, and the employee regularly receives calls or job assignments—especially if he or she must report to the job site or another work-related location.

According to the Supreme Court, whether this time is compensable depends on whether the worker has been “engaged to wait” or is “waiting to be engaged.”<sup>18</sup> In other words, if the employ-

der the “continuous workday rule.”<sup>19</sup> If the worker is on call for an entire weekend, that is an additional 48 hours in wages.

### **Filing a claim**

An FLSA claim can be filed in federal or state court and may include plaintiffs from multiple states or judicial districts. FLSA actions can be brought as “collective actions,” a mechanism that Congress allows for a group of employees to pool claims and resources in one action and for which Congress requires each employee to affirmatively opt in to the case by signing a separate consent form to assert his or her federal rights.

Employees may also file claims under state labor laws, sometimes even for the overtime and minimum wages allegedly owed under the federal FLSA. These state law claims may be asserted in the FLSA case or filed separately. And even though a certified Rule 23(b)(3) class action requires employees to opt out if they do not wish to participate, courts have generally approved the filing of hybrid cases containing both FLSA’s opt-in and Rule 23’s opt-out procedures because they address different independent claims and rights.<sup>20</sup>

After an FLSA case is filed, plaintiffs

sent allegations and evidence to illustrate that the defendant engaged in an unlawful policy, plan, or scheme, or show that their actual employment positions are “similar, not identical, to the positions held” by other class members, or both.<sup>25</sup>

In making an assessment, courts consider at least three factors: the disparate factual and employment settings or similar history of denied wages, potential of individualized defenses, and fairness and procedural considerations.<sup>26</sup>

The latter directs the court to consider the relative efficiency and fairness of handling the case in a single action: “The court should consider that the primary objectives of a §216(b) collective action are: (1) to lower costs to the plaintiffs through the pooling of resources; and (2) to limit the controversy to one proceeding which efficiently resolves common issues of law and fact that arose from the same al-

leged activity.”<sup>27</sup>

If the court finds sufficient evidence for a reasonable jury to conclude that the claimants are similarly situated, the representative or collective action proceeds to trial.

If the court finds that the claimants are not similarly situated, it decertifies the class and the opt-in plaintiffs are dismissed without prejudice; they may refile their claims immediately and seek to join the action as individual plaintiffs. The action then proceeds to trial. Under this scenario, each opt-in plaintiff would have to try his or her case separately—not an outcome that defendants are likely to want, despite the seeming regularity with which defendants pursue decertification motions.

The FLSA specifically prevents employers from retaliating against any employee who has joined a collective action, testified in one, or otherwise aided the plaintiffs in such a case. Retaliation claims are analyzed using the *McDonnell*

*Douglas* framework<sup>28</sup> and the same three-part test as Title VII retaliation claims.<sup>29</sup>

## Damages and limitations

Plaintiffs who prevail in FLSA cases are entitled to damages going back two years; if the employer’s actions were willful, this is extended to three years. The Supreme Court has explained that an FLSA violation is willful if “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.”<sup>30</sup>

Whether the employer’s actions were willful is typically a matter for the jury to decide. And although individuals may not enforce FLSA’s record-keeping requirements, “an employer’s record-keeping practices may . . . corroborate an employee’s claims that the employer acted willfully in failing to compensate for overtime.”<sup>31</sup>

## Section members tap into ‘nationwide law firm’ of employment lawyers

The Employment Rights Section helps plaintiff attorneys prepare for the legal and emotional complexities of employment litigation. Members have access to a community of practitioners from across the country who can share their collective knowledge and advice.

“My practice section membership affords me the opportunity to brainstorm with what is essentially a nationwide law firm of attorneys who, like me, are dedicated to protecting the rights of individuals,” said section chair Victoria Herring. “I have developed relationships and friendships with many other section members, which have strengthened over time.”

Section resources include a list server—where members discuss current trial strategies, potential experts, and recent court rulings—and a newsletter featuring timely, practical articles written by members, for members. Recent

articles have discussed threshold issues in assessing sexual harassment cases, as well as the Lily Ledbetter Fair Pay Act, which has been passed by the U.S. House of Representatives. That legislation, if signed into law, would overturn the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which made it much more difficult for workers to sue for pay discrimination. (127 S. Ct. 2162 (2007).)

Each year during AAJ’s Annual Convention, the section holds an education program that focuses on current important topics, legal developments, and practical litigation and trial techniques in employment rights cases. The section’s most recent program addressed jury selection, opening statements, direct examination, cross-examination, and closing arguments in the employment context.

Employment Rights Section leaders

work with other AAJ sections and litigation groups to provide members with a comprehensive understanding of emerging issues in employment law. For example, during the association’s Winter Convention in San Juan, the section hosted a joint panel discussion with members of the Business Torts Section to discuss e-discovery and a range of related topics.

In addition to Herring, the section’s officers are Chair-Elect David Fish of New York City; Secretary K. Glenda Cameron of Saint Croix, Virgin Islands; Treasurer Edward Still of Birmingham, Alabama; and Immediate Past Chair Adele Rapport of Washington, D.C.

Annual membership dues are \$45. To join or for more information, contact AAJ Sections at [sections@justice.org](mailto:sections@justice.org) or visit the Employment Rights home page at [www.justice.org/sections/employmentrights](http://www.justice.org/sections/employmentrights). ■

Plaintiffs are also entitled to an equal amount in liquidated damages. Such damages are mandatory, unless the employer proves that, after undertaking a reasonable investigation into its practices and potential liability, it acted in good faith and reasonably believed that its conduct complied with the labor laws.

Liquidated damages under FLSA “are compensation, not a penalty or punishment.”<sup>32</sup> As the Supreme Court held in a 1945 case, the provision for liquidated damages

an FLSA claim alleging that they are not exempt. The employer then has the burden of proving that the exemption is justified by showing that the worker’s job duties are primarily managerial and not production, labor, or customer service.<sup>36</sup>

Many major U.S. employers have been sued under FLSA, including Dow Chemical, Sears, and Wal-Mart, to name just a few. A federal judge in California recently affirmed a jury verdict on behalf of 200 employees of the *Chinese Daily News*,<sup>37</sup> and Starbucks has been ordered to stop requiring its baristas to

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constitutes a congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.<sup>33</sup>

Management, executive, or administrative-level employees are generally exempt from FLSA’s minimum wage and overtime provisions. Knowing this, employers routinely misclassify their hourly-wage worker bees by changing their titles, in an attempt to skirt overtime requirements and reduce payroll costs.

Recently, Caribou Coffee settled a case that alleged the company glorified its baristas by making them “store managers” and putting them on a salary rather than paying them an hourly wage. This way, it could claim the workers were exempt from FLSA while working them 50 to 70 hours a week without overtime pay.<sup>34</sup> Starbucks settled a similar case involving assistant managers and is vigorously litigating a store manager lawsuit.<sup>35</sup>

In cases like these, employees can file

split their tips with supervisors.<sup>38</sup>

Today, with ever-increasing frequency, employers are wrongfully withholding the wages their workers earn by convincing them that to be good team players, they should accept the employer’s terms—especially if they want to keep their jobs or advance in the company—and “volunteer” their time.

This corporate thievery puts enormous pressure on millions of working Americans, especially in a tight economy; enables employers to unduly benefit from huge amounts of “free” labor; and diverts a family’s wages into corporate coffers.

Workers like these need your help, and your success in representing them will not only bring them relief, it will also bring you enormous personal satisfaction. As with any case or cause you take on, all it takes to succeed is a thorough knowledge of the law—and a little hard work. ■

Notes

1. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).
2. 29 U.S.C. §203(d) (2000).
3. 29 U.S.C. §203 (g); see *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

4. 29 C.F.R. §§788.301-302.
5. 29 C.F.R. §785.11.
6. 29 C.F.R. §785.13.
7. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946); 29 C.F.R. §785.47. As the federal court in the Northern District of Iowa explained, cases uniformly observe that the *de minimus* “rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.” *Saunders v. John Morrell & Co.*, 1992 WL 531674 at \*1 (N.D. Iowa Oct. 14, 1992).
8. *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 828 (5th Cir. 1973); *Allen v. Bd. of Pub. Educ. for Bibb Co.*, 495 F.3d 1306 (11th Cir. 2007); *Reich v. Dept. Conservation & Nat. Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994) (holding that a court need only inquire whether, under the circumstances, the employer either had knowledge of overtime hours being worked or had the opportunity through reasonable diligence to acquire knowledge).
9. *Wirtz v. First St. Abstract & Ins. Co.*, 362 F.2d 83, 88 (8th Cir. 1966).
10. *Anderson*, 328 U.S. at 687-88; *Allen*, 495 F.3d at 1316.
11. *DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007), cert. denied, 2008 WL 336308 (U.S. June 9, 2008).
12. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 36-37 (2005); see also *Preston v. Settle Down Enters., Inc.*, 90 F. Supp. 2d 1267, 1281 (N.D. Ga. 2000).
13. See e.g. *Mitchell v. King Packing*, 350 U.S. 260, 261-63 (1956) (preparatory time spent by butchers sharpening knives outside of normal work hours was compensable under FLSA because it was integral to their butchering work); *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 717 (2d Cir. 2001) (time spent by radiology technologists turning on equipment and readying paperwork before arrival of first patients was compensable); *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 399-401 (5th Cir. 1976) (electricians’ time spent engaging in pre-shift work, filling out paperwork, and fueling, loading, and unloading trucks used for transport to work sites was compensable).
14. See e.g. *Wertz v. Sullivan*, 326 F.2d 946, 949 (5th Cir. 1964) (time spent waiting to be called back on the job during temporary sawmill shutdown was compensable); *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1411-13 (5th Cir. 1990).
15. 29 C.F.R. §§785.27-785.28.
16. 29 C.F.R. §785.18.
17. 29 C.F.R. §785.19(a).
18. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).
19. See 29 C.F.R. §790.6(b); *Alvarez*, 546 U.S. at 29.
20. See e.g. *Lindsay v. Govt. Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006); *Osby v. Citigroup, Inc.*, 2008 WL 2074102 (W.D. Mo. May 14, 2008); *Salazar v. AgriProcessors, Inc.*, 2008 WL 782803 (N.D. Iowa Mar. 17, 2008); *Bartleson v. Winnebago Inds., Inc.*, 219 F.R.D. 629 (N.D. Iowa 2003).
21. *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d

1208, 1219 (11th Cir. 2001) (per curiam); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995); *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J. 1988).

22. *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

23. *Id.*

24. *Hill v. Muscogee Co. Sch. Dist.*, 2005 WL 3526669 at \*2 (M.D. Ga. Dec. 20, 2005). When deciding a motion for class certification under the dictates of *Eisen*, a court may not determine the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); see also *Miller v. Mackey Intl.*, 452 F.2d 424, 427 (5th Cir. 1971); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) (court's inquiry limited to "whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23"); Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §1759, 99 (2d ed., West 1986) ("an inquiry into the merits of the claims of the representative or the class is inappropriate when making the decision whether the action should be certified under Rule 23").

25. *Hill*, 2005 WL 3526669 at \*2 (quoting *Grayson*, 79 F.3d at 1096).

26. *Thiessen v. Gen. Electric Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001).

27. *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000) (citing *Hoffmann La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)).

28. 29 U.S.C. §215(a)(3); *Kanida v. Gulf Coast Med. Personnel LP*, 363 F.3d 568, 577 (5th Cir. 2004); *Southard v. Texas Bd. Crim. Justice*, 114 F.3d 539, 554 (5th Cir. 1997); see also *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

29. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

30. *Id.*

31. *Etwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 844 (6th Cir. 2002); see also *Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294, 301 (N.D.N.Y. 1978) ("The defendants' practice of knowingly maintaining inaccurate time records which greatly understated the number of hours worked by their sales personnel permits only one conclusion; i.e., the violations of the act were willful.").

32. *Overnight Transp. Motor Co. v. Missel*, 316 U.S. 572, 583 (1942).

33. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (quoting 29 U.S.C. §202(a)).

34. *Nerland v. Caribou Coffee*, No. 05-1847-PJS-JJG (D. Minn. settled Feb. 5, 2008).

35. *Pendlebury v. Starbucks Coffee Co.*, No. 9:04-80521 (S.D. Fla. filed June 3, 2004).

36. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1124-29 (9th Cir. 2002).

37. *Wang v. Chinese Daily News, Inc.*, No. 04-CV-1498 (C.D. Cal. filed Mar. 5, 2004).

38. Roger Vincent & Andrea Chang, *Starbucks Tips Ruling Is Made to Order for Baristas*, L.A. Times (Mar. 21, 2008), [www.latimes.com/business/la-fi-starbucks21mar21,0,50639.story](http://www.latimes.com/business/la-fi-starbucks21mar21,0,50639.story).