AN EVALUATION OF ALASKA'S STANDARD FOR WAGE AND HOUR EXEMPTIONS

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ABSTRACT

What burden of proof should govern wage and hour exemptions under Alaska law? Under federal law, the majority rule is that wage and hour exemptions are established by a preponderance of the evidence. However, in Fred Meyer of Alaska, Inc. v. Bailey the Alaska Supreme Court adopted a "beyond a reasonable doubt" standard, the most stringent burden that could be imposed. This Article explains why the Fred Meyer standard conflicts with precedent, reason, and policy and proposes an analytical model for either the Alaska Supreme Court or the Alaska Legislature to use in abandoning Fred Meyer and adopting a preponderance of the evidence standard.

INTRODUCTION

In the classic formulation well-known to Alaska lawyers, Alaska courts will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[1] However, is this necessarily correct? In the 1993 opinion *Dayhoff v. Temsco Helicopters, Inc.*,[2] the Alaska Supreme Court quoted, in dicta, a federal lower court opinion for the proposition that wage and hour exemptions should be denied if there was a reasonable doubt as to their applicability.[3] Eleven years later in *Fred Meyer of Alaska, Inc. v. Bailey*,[4] the Alaska Supreme Court applied this dicta to hold that a "beyond a reasonable doubt standard" governed

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1. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979); *see also* United States v. CNA Fin. Corp., 381 F. Supp. 2d 1088, 1097 (D. Alaska 2005).
2. 848 P.2d 1367 (Alaska 1993).
3. *Id.* at 1372.
4. 100 P.3d 881 (Alaska 2004).

analysis of wage and hour exemptions.[5] This is the most stringent standard that could be imposed. The court adopted this standard without explanation or analysis.[6] Instead, it simply cited *Dayhoff*, which itself cited a Court of Claims opinion[7] analyzing a threshold jurisdictional issue and quoting a policy from the Civil Service Commission (an agency that does not even exist anymore, having been replaced by the Office of Personnel Management). In short, traced back to its origins, the "beyond a reasonable doubt" standard is based on an attempt by an official for a now defunct federal agency to articulate the concept that exemptions are narrowly construed. Moreover, in adopting this elevated burden of proof, the court ignored the settled principle that the default burden of proof in civil actions should be the preponderance of the evidence standard. Subsequent statutory amendments to the Alaska Wage and Hour Act cast further doubt on *Fred Meyer*'s result.

This Article briefly reviews wage and hour principles, explains why the *Fred Meyer* standard conflicts with precedent, reason, and policy, and proposes an analytical model for either the Alaska Supreme Court or the Alaska Legislature to use in abandoning *Fred Meyer* and adopting a preponderance of the evidence standard. Part I briefly reviews background principles and developments in the law necessary for an understanding of the *Fred Meyer* standard. Part II analyzes the *Fred Meyer* standard and concludes that it is an unsound rule that should be abandoned. Part III discusses judicial and legislative options that could be applied for purposes of addressing and correcting *Fred Meyer*.[8]

I. THE ROAD TO *FRED MEYER*

A. A Brief Review of State and Federal Wage and Hour Law

This Article is not intended as a comprehensive review of wage and hour principles. However, a brief review of significant concepts is necessary in order to evaluate the *Fred Meyer* standard in context. Wage and hour law establishes rules governing compensation for employees. The Fair Labor Standards Act (FLSA) is the federal scheme enacted during the Great Depression both as a means of improving working

5. *Id.* at 884.
6. Id.
7. *Dayhoff*, 848 P.2d at 1372.
8. The author principally represents employers and businesses and has directly or indirectly litigated the burden of proof issue in two prior cases: Motion for Rule of Law, *Borge v. Getronics USA, Inc.*, No. 3:07-cv-105(TMB) (D. Alaska dismissed May 14, 2009) and Motion for Rule of Law, *Black v. Colaska, Inc.*, No. C07-0823 JLR (W.D. Wash. appeal dismissed Mar. 26, 2009).

standards and as an incentive to encourage employers to hire more workers.[9] Its chief components are establishment of a minimum wage and a premium, or overtime, rate that is calculated based on the minimum wage.[10] Overtime is the pay rate that employers must pay when employees work over a specified number of hours.[11] The overtime rate is one and one half the regular rate of pay.[12] For example, if an employee's regular rate of pay was twelve dollars per hour of work, his or her overtime rate would be eighteen dollars per hour of work (\$12 x 1.5 = \$18). If an employee is entitled to overtime, the overtime rate is paid for all work over forty hours in a given workweek.[13] The Alaska Wage and Hour Act (AWHA) is patterned after the FLSA and incorporates many of the same terms with a few significant variations discussed further below.

Indeed, the FLSA and the AWHA were both enacted for the same general purpose: "to establish minimum wage, maximum workweek, and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers."[14] In a sense, the AWHA supplements the FLSA in that it covers entities not engaged in interstate commerce; otherwise such entities would avoid the requirements of the FLSA.[15] That is, the AWHA functions as a backstop to ensure that employers engaged solely in intrastate commerce are nevertheless covered by wage and hour requirements.

Courts frequently describe wage and hour law as being remedial legislation enacted for the benefit of workers.[16] This accurately reflects public policy findings declared by both the FLSA and the AWHA.[17] However, an often overlooked or underappreciated concept underlying the FLSA was to spur job growth.[18] The nation was mired in the Great

9. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219) (2006). The FLSA's policy goals are set forth in 29 U.S.C. § 202.

10. 29 U.S.C. § 206 (2006) (minimum wage); 29 U.S.C. § 207 (2006) (overtime).

11. *See* 29 U.S.C. § 207(a)(2).

12. *Id.* § 207(a).

13. *Id.* § 207(a)(2)(C).

14. Webster v. Bechtel, 621 P.2d 890, 896 (Alaska 1980).

15. See id.

16. *See*, *e.g.*, Whitesides v. U-Haul Co. of Alaska, 16 P.3d 729, 732 (Alaska 2001).

17. 29 U.S.C. § 202 (2006) (FLSA); ALASKA STAT. § 23.10.050 (2010) (AWHA).

18. *See* JULIET SCHOR, THE OVERWORKED AMERICAN 66–67 (1991); *see also* Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 510 (7th Cir. 2007) ("The purposes [of the FLSA] are to spread work in order to reduce unemployment, to discourage (by increasing the cost to the employer) a degree of overtime that might impair workers' health or safety, and to increase the welfare of low-paid workers."); *cf.* Janes v. Otis Eng'g Corp., 757 P.2d 50, 53 (Alaska 1988) (understanding Alaska's

Depression, and the FLSA was a product of social engineering. Its key components (a forty-hour workweek, the establishment of a minimum wage, and overtime) were designed, in part, to encourage employers to hire more employees.[19] For example, the concept was that if an employer had one employee who usually worked sixty hours in a week, the employer would have an incentive to hire another worker because it would be more cost effective for the employer to hire a part-time employee to work the extra twenty hours rather than pay the full-time employee an overtime rate.

1. Key elements of wage and hour law

Under the FLSA, the key time period is forty hours in a given workweek.[20] A workweek is any period of seven consecutive twenty-four hour days.[21] The employer defines the workweek but may not do so in a manner designed to evade overtime requirements.[22] An employee eligible for overtime is paid overtime for all work over forty hours in that workweek.[23] In the prior example, if the employee worked forty-seven hours in one workweek, his or her wages for that week would be $606 ($12/hour X 40 = $480 + $18/hour X 7 = $126). The AWHA incorporates the same forty-hour workweek standard but also includes a daily time period of eight hours a day.[24]

The concept of being employed is broadly defined under both the FLSA and the AWHA. To employ means "to suffer or permit to work."[25] All employees are eligible for the minimum wage and overtime unless they are exempt. Accordingly, a critical concept in wage and hour law concerns the classification of employees as exempt or non-exempt.[26] Exemptions are established by law. The exemptions often overlap; that is, an employee classified as exempt under one exemption may also be classified as exempt under another exemption as well.

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version of the fair labor act similarly).

19. *Cf.* SCHOR, *supra* note 18, at 66–67.

20. 29 U.S.C. § 207(a) (2006).

21. 29 C.F.R. § 778.105 (2010).

22. Id.

23. 29 U.S.C. § 207(a); 29 C.F.R. §§ 778.100–778.101 (2010).

24. ALASKA STAT. § 23.10.060(a) (2010).

25. 29 U.S.C. § 203(g) (2006). Alaska law incorporates federal definitions except where Alaska expressly defines a concept differently. ALASKA STAT. § 23.10.145 (2010).

26. Another important concept involves the classification of workers as employees or independent contractors, the latter not being subject to wage and hour principles. *See* Jeffcoat v. State, Dep't of Labor, 732 P.2d 1073, 1075 (Alaska 1987). This sub-issue is beyond the scope of this Article.

The AWHA includes seventeen exemptions that apply to both state minimum wage and overtime requirements,[27] nineteen exemptions that apply to state overtime requirements,[28] and three exemptions that apply to minimum wage.[29] The FLSA includes eleven exemptions that apply to federal minimum wage and overtime requirements[30] and twenty-one that apply to federal overtime.[31]

Some of these exemptions are "industry" exemptions that exclude coverage for employees in an entire industry. For example, under the AWHA, agricultural workers are exempt from the Act.[32] Others are "business-related" exemptions that exclude coverage for businesses of a certain size. For example, under the AWHA, employers that employ less than four employees in the regular course of business are exempt from the Act's overtime requirements,[33] as are lumber operations employing fewer than twelve employees.[34] "Worker-related" exemptions exclude certain specific workers from coverage, such as executives, administrative employees, professionals, outside sales personnel, and computer analysts (if they satisfy prescribed regulatory standards).[35] These are merely illustrative examples.

Of these three general exemption categories, the industry and business-related exemptions usually pose little or no difficulty in interpreting and applying the relevant standards because the exemptions are generally straightforward. Employers will usually know whether or not they fit the defined concepts. However, the worker-related exemptions often pose more significant challenges because they depend upon analysis of each worker's actual job duties in connection with the relevant legal standards governing the exemption in question.

2. Interpreting and applying "white collar" exemptions

The worker-related exemptions that pose the most significant analytical and practical problems are the so-called Section 13(a)(1), or "white collar," exemptions.[36] Three of the more difficult "white collar" exemptions are the exemptions for executive, administrative, and

27. ALASKA STAT. § 23.10.055(a) (2010).
28. ALASKA STAT. § 23.10.060(d).
29. ALASKA STAT. § 23.10.070.
30. 29 U.S.C. § 213(a)(1)–(17) (2006). Six of these subdivisions have been repealed. *See, e.g.*, *id.* § 213(a)(2) (repealed 1989).
31. 29 U.S.C. § 213(b). Note that nine of the subsections of this statute have been repealed. *See, e.g.*, *id.* § 213(b)(4) (repealed 1974).
32. ALASKA STAT. § 23.10.055(a)(1), (10).
33. ALASKA STAT. § 23.10.060(d).
34. ALASKA STAT. § 23.10.060(d)(9).
35. ALASKA STAT. § 23.10.055(a)(9).
36. 29 U.S.C. § 213(a)(1).

professional employees. These exemptions depend upon application of the salary basis test. In order to qualify for an exemption: (1) the employee must be paid a salary;[37] (2) the salary amount must meet minimum threshold levels; and (3) the employee may perform only certain duties that are described in the regulation.[38] The federal salary threshold for most of the white collar exemptions is $455 per week.[39] The Alaska standard is $620 per week.[40]

The "white collar" exemptions are defined by dense regulatory language that frequently embraces deceptively misleading concepts. For example, in order to qualify for an administrative employee exemption, an employee's "primary duty" must be performing office or non-manual work that is "directly related to the management or general business operations" of the employer, and the employee's primary duty must include exercising "discretion and independent judgment with respect to matters of significance."[41] An executive employee must have the "primary duty" of "management" of the enterprise, must "customarily and regularly" direct the work of two or more employees, and must have authority to make significant decisions or recommendations that are accorded weight.[42]

All of these concepts are terms of art, and there is an "Alice in Wonderland"-like quality to wage and hour regulations. By way of illustration, "primary duty" means the main or important duty, but the term is not defined by relation to the amount of time spent on exempt work.[43] Instead, "the character of the employee's job as a whole" is the relevant benchmark for evaluating a primary duty.[44] Time spent performing exempt work may be relevant, but an employee need not spend most of his or her time performing exempt work in order to be classified as exempt.[45] Consequently, an employee's primary duty can be, in theory, a duty that is performed less than a majority of the total time spent working.[46]

37. Payment on a salary basis requires that the employee be paid a fixed, recurring amount each workweek without consideration for the hours worked and without reduction for the quality or quantity of work. 29 C.F.R. § 541.602 (2010).

38. 29 C.F.R. §§ 541.600–541.601.

39. 29 C.F.R. § 541.600(a).

40. ALASKA STAT. § 23.10.055(b). This amounts to twice the minimum wage, $7.75 per hour, for 40 hours worked in a week. *Id.*

41. 29 C.F.R. § 541.200(a).

42. 29 C.F.R. § 541.100(a).

43. 29 C.F.R. § 541.700(a)–(b).

44. 29 C.F.R. § 541.700(a).

45. 29 C.F.R. § 541.700(b).

46. Id.

"Customarily and regularly" is defined as "a frequency that must be greater than occasional but which, of course, may be less than constant."[47] This leaves employers and their counsel on an uncertain regulatory continuum. "Directly and closely related" tasks are defined as "tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work."[48] However, such work "may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly."[49]

Exercising "discretion and independent judgment . . . involves the comparison and the evaluation of possible courses of conduct[] and acting or making a decision after the various possibilities have been considered."[50] The relevant factors emphasize an employee's authority to independently function in a variety of managerial-related tasks.[51] "However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level."[52] Indeed, the regulations emphasize the fact that an employee's decisions or recommendations "are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment."[53]

Even a concept as seemingly straightforward as "management" can present interpretative obstacles. The definition includes classic managerial duties such as:

> [I]nterviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; [and] appraising work performance; handling employee complaints and grievances; disciplining employees; planning the work; determining the

47. 29 C.F.R. § 541.701.
48. 29 C.F.R. § 541.703(a).
49. Id.
50. 29 C.F.R. § 541.202(a).
51. 29 C.F.R. § 541.202(b). These include, among others, the "authority to formulate . . . policies; . . . authority to commit the employer in matters that have significant financial impact; . . . authority to waive or deviate from established policies and procedures without prior approval; . . . authority to negotiate and bind the company on significant matters; . . . [and] represent[ing] the company in handling [disciplinary matters and proceedings]." *Id.*
52. 29 C.F.R. § 541.202(c).
53. Id.

> techniques to be used; [and] apportioning the work among the employees.[54]

However, "management" also includes duties that a filing clerk or receptionist could perform, such as:

> [D]etermining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.[55]

These are merely representative examples to illustrate some of the definitions that employers and their counsel must wrestle with when evaluating whether employees should be classified as exempt or non-exempt. As can be seen from these examples, there is considerable "play" with respect to the regulatory concepts that govern wage and hour law. Oftentimes, interpretation is subject to conflicting case law or agency decisions and opinions that are not always consistent with one another.[56] The point in briefly highlighting these regulatory definitions is to place the burden of proof issue into an understandable context. Wage and hour law is not as simple as merely marshalling the proverbial "mountain of evidence." Instead, it is fair to comment that it is not always immediately clear what specific evidence is necessary or useful with respect to specific exemptions.

54. 29 C.F.R. § 541.102 (2010).

55. Id.

56. For example, for several years the United States Department of Labor classified mortgage loan officers as exempt administrative employees. However, on March 24, 2010, Deputy Administrator Leppink issued new guidance concluding that mortgage loan officers were non-exempt. *See* U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2010-1 (2010). Another example is seen in how employees working as computer professionals are classified. Courts have issued a wide range of conflicting opinions that are not always easily reconcilable. *Compare* Koppinger v. Am. Interiors, Inc., 295 F. Supp. 2d 797, 802 (N.D. Ohio 2003) (computer professional exempt because the troubleshooting being performed involved investigating problems, considering possible solutions, and implementing the solution deemed best for the situation, all indicia of discretion and independent judgment), *with* Turner v. Human Genome Sci., Inc., 292 F. Supp. 2d 738, 742, 747 (D. Md. 2003) (computer professionals non-exempt because the troubleshooting that they performed did not involve exercise of discretion and independent judgment).

B. Standards and Burden of Proof for Analyzing Exemptions

Certain principles govern analysis of wage and hour exemptions. Under the FLSA, exemptions are affirmative defenses for which the employer carries the burden of proof.[57] The United States Supreme Court has held that they are to be narrowly construed[58] and must be plainly and unmistakably established.[59] Some circuit courts have added an additional interpretative guideline by instructing that exemptions must be proved by "clear and affirmative" evidence.[60]

Alaska courts apply comparable principles for analyzing exemptions under the AWHA.[61] Exemptions are "narrowly construed and limited to those 'plainly and unmistakably within their terms and spirit.'"[62]

Although these principles alert an employer to the importance of meeting its burden, the overwhelming majority rule is that the actual burden of proof for establishing an exemption remains the preponderance of the evidence standard. Four United States Circuit Courts of Appeal studying this issue (the Sixth,[63] Seventh,[64] Ninth, [65] and Eleventh[66] Circuits) have held that the burden remains a preponderance of the evidence standard. Additionally, federal district courts in six circuits (the First,[67] Second,[68] Third,[69] Fifth,[70] Eighth,[71] and Eleventh[72])

57. Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).
58. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).
59. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).
60. Donovan v. United Video, Inc., 725 F.2d 577, 581 (10th Cir. 1984).
61. *See* Whitesides v. U-Haul Co. of Alaska, 16 P.3d 729, 732 (Alaska 2001).
62. *Id.* (quoting *Arnold*, 361 U.S. at 392).
63. Thomas v. Speedway Superamerica LLC, 506 F.3d 496, 501–02 (6th Cir. 2007); Renfro v. Ind. Mich. Power Co., 497 F.3d 573, 576 (6th Cir. 2007).
64. Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 506–09 (7th Cir. 2007).
65. Dickenson v. United States, 353 F.2d 389, 392 (9th Cir. 1966); Coast Van Lines v. Armstrong, 167 F.2d 705, 707 (9th Cir. 1948).
66. Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1566 n.5 (11th Cir. 1991).
67. Reeves v. Alliant Techsystems, Inc., 77 F. Supp. 2d 242, 250 (D.R.I. 1999).
68. Golden v. Merrill Lynch & Co., No. 06 Civ. 2970(RWS), 2007 WL 4299443 at *17 (S.D.N.Y. Dec. 6, 2007); Moran v. GTL Constr., LLC, No. 06 Civ. 168(SCR), 2007 WL 2142343 at *2 (S.D.N.Y. July 24, 2007); Khan v. IBI Armored Servs., Inc., 474 F. Supp. 2d 448, 456 (E.D.N.Y. 2007); Marshall v. Burger King Corp., 504 F. Supp. 404, 406–07 (E.D.N.Y. 1980), *aff'd*, 675 F.2d 516 (2d Cir. 1980).
69. Caminiti v. Cnty. of Essex, Civ. No. 04-4276 (WHW), 2007 WL 2226005 at *8 (D.N.J. July 31, 2007).
70. Cash v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 892 (E.D. Tex. 1997); Dahlheim v. KDFW-TV, 706 F. Supp. 493, 503–04 (N.D. Tex. 1988), *aff'd*, 918 F.2d 1220 (5th Cir. 1990).
71. Goldman v. RadioShack Corp., No. Civ.A. 03-0032, 2006 WL 336020 at *7 (E.D. Pa. Jan. 23, 2006); Shaw v. Prentice Hall, Inc., 977 F. Supp. 909, 913 (S.D. Ind. 1997); Kowalski v. Kowalski Heat Treating Co., 920 F. Supp. 799, 806 (N.D.

have applied the preponderance of the evidence standard or stated that this was the rule that governed in their respective circuits. One state court that has squarely confronted the issue also concluded that the burden should be by a preponderance of the evidence.[73] Consistent with the majority rule, Federal Civil Pattern Jury Instructions provide for a preponderance of the evidence standard.[74]

In *Renfro v. Indiana Michigan Power Co.*, the Sixth Circuit declined to apply a heightened standard of proof for the establishment of an exemption.[75] The court observed that the Tenth Circuit had used the phrase "clear and affirmative" in regard to the employer's burden in *Donovan v. United Video, Inc.*,[76] without explanation, by citing to a prior United States Supreme Court opinion.[77] However, the Sixth Circuit noted that the Supreme Court opinion cited in *Donovan* did "not raise the evidentiary burden; [but instead] it merely clarified that the applicability of an FLSA exemption is an *affirmative* defense."[78] The panel explained, "[w]e clarify here that the phrase 'clear and affirmative evidence' does *not* heighten [an employer's] evidentiary burden when moving for summary judgment."[79] The court instructed:

> The word "clear," as used in this phrase, traces to the "clearly erroneous" Rule 52(a) standard, but that standard is inapposite to our current review of a motion for summary judgment. And because establishing the applicability of an FLSA exemption is an affirmative defense, [employers have] the burden to establish [exemptions] by a prepondrance of the evidence[.][80]

The case of *Yi v. Sterling Collision Centers, Inc.* provides another example of an application of the preponderance standard.[81] There, the Seventh Circuit rejected arguments that a heightened burden of proof should be used to evaluate wage and hour exemptions.[82] The court

Ohio 1996); Fight v. Armour & Co., 533 F. Supp. 998, 1004 (W.D. Ark. 1982).

72. Rossi v. Associated Limousine Servs., Inc., 438 F. Supp. 2d 1354, 1359 (S.D. Fla. 2006).

73. *See* Mitchell v. Pemco Mut. Ins. Co., 142 P.3d 623, 626 (Wash. Ct. App. 2006).

74. *See* 3C Kevin F. O'Malley, Jay E. Grenig & William C. Lee, Federal Jury Practice and Instructions §§ 175.40, 175.50, 175.71 (5th ed. 2000).

75. Renfro v. Ind. Mich. Power Co., 497 F.3d 573, 576 (6th Cir. 2007).

76. 725 F.2d 577 (10th Cir. 1984).

77. *Renfro*, 497 F.3d at 576; *see also Donovan*, 725 F.2d at 581.

78. *Renfro,* 497 F.3d at 576.

79. *Id.*

80. *Id.*

81. Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 505 (7th Cir. 2007).

82. *Id.* at 507–08.

observed that considerable confusion had arisen from the use of phrases such as "clearly" and "affirmatively" or "plainly" and "unmistakablely."[83] Properly construed, these phrases did not affect the burden of proof but instead appeared to be "merely a clumsy invocation of the familiar principle of statutory interpretation that exemptions . . . should be construed narrowly."[84] This principle, however, could not and did not displace "the presumption that the burden of proof in federal civil cases is proof by a preponderance of the evidence."[85]

The overwhelming majority of courts that have addressed the burden of proof for establishing wage and hour exemptions have applied similar reasoning and have reached the same conclusion that was reached by the Sixth and Seventh Circuits.[86] Courts applying the preponderance of the evidence standard have expressly or impliedly relied on a range of settled presumptions. First, in the absence of an express burden of proof, the burden that applies in civil cases is the preponderance of the evidence standard.[87] Alaska applies the same principle.[88] Second, legislative silence regarding the burden of proof will result in the preponderance of the evidence standard being applied.[89] Finally, exemptions are in the nature of affirmative defenses, and affirmative defenses are ordinarily established by a preponderance of the evidence.[90]

However, there is some contrary authority. The Fourth Circuit applies a clear and convincing evidence standard as its burden of proof.[91] This standard was imposed in *Shockley v. City of Newport News*.[92] The *Shockley* court never explained its reasoning or its analysis. Two other courts have cited and relied on *Shockley* without comment or

83. *Id*. at 507.
84. *Id*. at 508.
85. *Id*. at 507.
86. *See* cases cited *supra* notes 63–64.
87. *See* States Marine Corp. of Del. v. Producers Coop. Packing Co., 310 F.2d 206, 212 (9th Cir. 1962); *see also Yi*, 480 F.3d at 507–08.
88. *See* DeNuptiis v. Unocal Corp., 63 P.3d 272, 277–78 (Alaska 2003); Fernandes v. Portwine, 56 P.3d 1, 5 n.13 (Alaska 2002) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)).
89. *See* Grogan v. Garner, 498 U.S. 279, 286 (1991); United States v. Motamedi, 767 F.2d 1403, 1407 (9th Cir. 1985).
90. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 856–57 (9th Cir. 2002) (en banc) (in context of Title VII), *aff'd*, 539 U.S. 90 (2003).
91. *See* Shockley v. City of Newport News, 997 F.2d 18, 21 (4th Cir. 1993).
92. *Id.*; *see also* Clark v. J.M. Benson Co., 789 F.2d 282, 286 (4th Cir. 1986) (citing Donovan v. United Video, Inc., 725 F.2d 577, 581 (10th Cir. 1984)). But note that *Clark* and *Donovan* both spoke in terms of "clear and *affirmative* evidence." *Clark*, 789 F.2d at 286; *Donovan*, 725 F.2d at 581 (emphasis added).

analysis.[93] In addition, an unpublished 1991 decision from the District of Oregon also applied a clear and convincing standard.[94] However, the court failed to consider existing Ninth Circuit precedent that applies a preponderance of the evidence standard[95] and instead misunderstood a reference to "clear and affirmative" evidence in *Donovan* as establishing a higher burden of proof.[96] *Donovan* did not apply a clear and convincing burden of proof standard, and other courts studying *Donovan* have noted that its reference to "clear and affirmative" evidence did not establish a heightened burden of proof.[97] Indeed, the "clear and affirmative" language in *Donovan* came from a 1962 decision by the Tenth Circuit, which stated that "[o]ne asserting that an employee is exempt from the wage and hour provisions of the Act has the burden of establishing the exemption *affirmatively and clearly*."[98] And this language itself came from *McComb v. Farmers Reservoir & Irrigation Co.*: "And one asserting that its employees are exempt from the wage and hour provisions of the Act has the burden of showing *affirmatively* that they come *clearly* within an exemption provision." [99] Such language suggests that the "clear and affirmative" requirement does not raise the standard of proof so much as describe how that standard must be met. And indeed, the Tenth Circuit itself has confirmed that the "clear and affirmative" standard is "merely a different articulation of . . . the preponderance of the evidence standard."[100]

C. *Fred Meyer v. Bailey*

However, when the Alaska Supreme Court was faced in *Fred Meyer of Alaska, Inc. v. Bailey* with the question of which burden of proof to apply when considering wage and hour exemptions, the court reached a

93. *See* Astor v. United States, 79 Fed. Cl. 303, 308 (Fed. Ct. Cl. 2007); Wright v. Monroe Cnty., No. 05-CV-6268T, 2007 WL 1434793, at *2 (W.D.N.Y. May 14, 2007).

94. *See* Hall v. Porter Yett Co., Inc., CIV. No. 90-424-FR, 1991 WL 66830, at *3 (D. Or. Apr. 19, 1991).

95. *See* Dickenson v. United States, 353 F.2d 389, 392 (9th Cir. 1966); Coast Van Lines v. Armstrong, 167 F.2d 705, 707 (9th Cir. 1948).

96. *Hall*, 1991 WL 66830, at *3.

97. *See* Renfro v. Ind. Mich. Power Co., 497 F.3d 573, 576 (6th Cir. 2007); Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 506–08 (7th Cir. 2007).

98. *See* Legg v. Rock Prods. Mfg. Corp., 309 F.2d 172, 174 (10th Cir. 1962) (emphasis added).

99. McComb v. Farmers Reservoir & Irrigation Co., 167 F.2d 911, 915 (10th Cir. 1948), *modified on other grounds*, 337 U.S. 755 (1949) (emphasis added).

100. Neville v. U.S. Fid. & Gaur. Co., No. 95-6128, 1996 U.S. App. LEXIS 8739, at *7–8 (10th Cir. Apr. 22, 1996) (quoting Reich v. Chicago Title Ins. Co., 853 F. Supp. 1325, 1329 n.2 (D. Kan. 1994).

very different conclusion than did the courts in any of the previously discussed cases. Ron Bailey was a manager working for the chain retailer Fred Meyer, which classified him as an exempt executive employee.[101] Other employees filed a class action challenging Fred Meyer's wage and hour practices.[102] Bailey opted out of the class after he was threatened by his store manager, who purportedly advised all managers that they would not be promoted if they joined the class action.[103] Later, however, another store manager clarified that Bailey would not lose his job if he filed a claim for overtime compensation, and Bailey filed suit.[104]

The exemption at issue in Bailey's case was the old form of the executive employee exemption under Alaska law.[105] Eligibility for this exemption required six elements: (1) the employee's primary duty was management; (2) the employee customarily and regularly directed the work of two or more employees; (3) the employee had the authority to hire or fire or could make recommendations that were accorded weight; (4) the employee customarily and regularly exercised discretionary authority; (5) the employee did not work more than a set prescribed percentage of time in non-exempt duties (forty percent for employees such as Bailey who worked in a retail business); and (6) the employee was paid on a salary basis.[106]

Bailey's case turned on whether or not more than forty percent of his time at work was spent performing non-exempt activities. The superior court conducted a bench trial and held that Bailey was non-exempt.[107] The court based this result on two findings in particular: that Bailey's work included sales, restocking, and customer service tasks that were not directly or closely related to management and that he spent up to sixty percent of his time on these non-exempt tasks.[108] It necessarily followed that he was non-exempt regardless of his managerial title. The superior court also concluded that Fred Meyer was not able to rely upon the good faith defense to limit liquidated damages and fees and awarded Bailey $254,056.34 in damages[109] and $70,087.50 in attorney's fees.[110]

101. *See* Fred Meyer v. Bailey, 100 P.3d 881, 882–83 (Alaska 2004).
102. *Id.* at 883.
103. Id.
104. Id.
105. *Id.* at 884 (citing ALASKA ADMIN. CODE tit. 8 § 15.910(a)(7) (2006)).
106. ALASKA ADMIN. CODE tit. 8 § 15.910(a)(7).
107. See Fred Meyer, 100 P.3d at 883.
108. *Id.* at 885.
109. *Id.* at 883. Half of this damage award was liquidated damages. *Id.*
110. Id.

Fred Meyer appealed, arguing primarily that Bailey was, in fact, exempt.[111] The Alaska Supreme Court rejected Fred Meyer's arguments and affirmed. Of relevance here, the court instructed that exemptions are narrowly construed and that "[t]he burden is on the employer to prove beyond a reasonable doubt that the employee is exempt."[112] The court provided no analysis or discussion regarding this point. Instead, it simply cited *Dayhoff v. Temsco Helicopters, Inc.*[113] in a footnote and observed that "[c]ontrary to the explicit language in *Dayhoff*, Fred Meyer argues that the AWHA requires proof only by a preponderance of the evidence."[114]

The burden of proof argument was not addressed in Fred Meyer's opening brief.[115] It was not a principal issue on appeal. Bailey included one sentence in his answering brief in which he simply cited *Dayhoff* and stated that "Fred Meyer . . . bears the burden of proving Bailey's overtime exemption beyond a reasonable doubt."[116] In response, Fred Meyer made brief reference to the burden of proof in its reply brief, which cited one case and a commercial jury instruction guide on the point, but did not otherwise analyze or explain its argument.[117] Oral argument was never held. Instead, the appeal was submitted on the briefs.[118]

The court's citation to *Dayhoff* shed no light because the *Dayhoff* court never analyzed the issue either. Instead, in *Dayhoff*, the court noted that "AWHA is based upon the Fair Labor Standards Act (FLSA) and federal interpretations of FLSA are relevant in interpreting AWHA."[119] The court further stated that "[u]nder federal law, the employer has the burden to prove the exemption is applicable."[120] The court then emphasized that exemptions are narrowly construed, and to drive the point home it quoted a United States Claims Court opinion for the proposition that "[i]f there is a reasonable doubt as to whether an

111. *Id.* at 884.
112. Id.
113. 848 P.2d 1367, 1371–72 (Alaska 1993).
114. *Fred Meyer*, 100 P.3d at 884 n.11.
115. *See* Brief of Appellant, Fred Meyer of Alaska, Inc. v. Bailey, 100 P.3d 881 (Alaska 2004) (No. S-10968), 2003 WL 24048627.
116. *See* Brief for Appellee at 8, Fred Meyer of Alaska, Inc. v. Bailey, 100 P.3d 881 (Alaska 2004) (No. S-10958), 2003 WL 24048628.
117. *See* Reply Brief of Appellant, at 4, Fred Meyer of Alaska, Inc. v. Bailey, 100 P.3d 881 (Alaska 2004) (No. S-10958).
118. The Alaska Supreme Court's case management system reflects that the case was submitted on the briefs on February 19, 2004. *See* http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S10968 (click "Oral Argument") (last visited Mar. 2, 2011).
119. Dayhoff v. Temsco Helicopters, Inc., 848 P.2d 1367, 1371 (Alaska 1993).
120. *Id.* at 1371–72.

employee meets the criteria for exemption, the employee should be ruled non-exempt."[121]

The Claims Court decision in question was *Adam v. United States*.[122] However, the *Adam* case never analyzed the issue either. Instead, the court was addressing a threshold issue concerning whether or not jurisdiction existed; specifically, the court examined whether or not sovereign immunity had been waived under the circumstances of the case.[123] In the course of resolving this issue, the court quoted a policy from the Civil Service Commission (an agency that has been replaced by the Office of Personnel Management) in which the Commission's policy declared: "if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be ruled nonexempt."[124] The issue itself, however, was not being argued in the case and was not actually addressed or analyzed by the court.

D. 2005 Amendments to the Alaska Wage and Hour Act

Before turning to an analysis of the *Fred Meyer* standard, there is one additional legal development that needs to be addressed. In 2004 the United States Department of Labor promulgated new regulations covering exemptions under the FLSA.[125] The purpose was to clarify and streamline certain exemptions, especially the "white collar" exemptions, so that the legal standards would be easier to interpret and apply. The Alaska Legislature followed suit and amended the AWHA in 2005. House Bill 182 (HB 182) took effect on November 7, 2005, almost one year to the day after the Alaska Supreme Court issued its opinion in *Fred Meyer v. Bailey*.[126]

Under HB 182, the Alaska Legislature adopted the new federal regulations used for the section 13 "white collar" exemptions (professional, executive, administrative, and computer professionals) and made other revisions to bring Alaska law into conformity with the FLSA.[127] The purpose for the amendments was to bring Alaska law into

121. *Id.* at 1372 (quoting Adam v. United States, 26 Cl. Ct. 782, 786 (1992) (internal quotation marks omitted)).
122. 26 Cl. Ct. 782 (1992).
123. *Id.* at 785–86.
124. *Id.* at 786.
125. For a discussion see *Labor Department Overhauled Overtime Regulations*, JABURG WILK, http://www.jaburgwilk.com/articles/overtime-regulations.aspx (last visited Apr. 7, 2011).
126. 100 P.3d 881 (Alaska 2004).
127. *See* 2005 Alaska Sess. Laws *1–2; ALASKA H. JOURNAL, 24th Leg., 1st Sess. 2198–99 (2005).

closer alignment with federal exemption standards.[128] HB 182's sponsor noted, "[t]he goal of the bill . . . is to bring Alaska code into greater conformance with the federal law so that employers wouldn't have such difficulty when looking at two sets of laws."[129] The Alaska Legislature did not want different standards governing the same legal rights and obligations.

As amended by HB 182, the AWHA specifically provides that the "white collar" exemptions should be interpreted in accordance with the FLSA.[130] Instead of adopting the federal regulations and allowing Alaska courts and the Alaska Department of Labor and Workforce Development to interpret those definitions under the AWHA, the legislature emphasized that the exemptions have "the meaning and shall be interpreted in accordance with [federal law]."[131] Moreover, the Alaska Legislature did not anchor its amendment in time. Instead, as the FLSA or its regulations are amended or revised in the future, the AWHA will automatically track those amendments. As amended, the AWHA also retained regulations and interpretative guidance instructing that the FLSA's regulations and interpretations should govern analysis of the AWHA's exemptions.[132]

II. THE *FRED MEYER* STANDARD SHOULD BE ABANDONED

Traced back to its origins, the beyond a reasonable doubt standard expressed as dicta in *Dayhoff*, and then applied as a holding in *Fred Meyer*, finds no logical or legal support. It is based on an attempt by an official of a now-defunct federal agency to articulate the concept that exemptions should be narrowly construed.[133] No other court or jurisdiction is known to apply a beyond a reasonable doubt standard for determining whether or not wage and hour exemptions have been established. It does not comport with precedent, reason, or policy and should be abandoned.

128. *See* Alaska H. Labor & Commerce Comm. Minutes, 24th Leg., at 18 (2005).
129. *See id.* at 8–10, 15–16; ALASKA H. FIN. COMM. MINUTES, 24th Leg., at 4–5 (2005).
130. ALASKA STAT. § 23.10.055(c)(1)–(2) (2010).
131. ALASKA STAT. § 23.10.055(c)(1).
132. ALASKA STAT. § 23.10.055(c)(1)–(2).
133. *See supra* text accompanying note 124.

A. *Fred Meyer* Stands Against Overwhelming Precedent

The *Fred Meyer* standard is at odds with the overwhelming majority of state and federal courts that have addressed the issue.[134] Indeed, no other court is known to have actually adopted and applied a beyond a reasonable doubt standard in a case. Even those few courts that have adopted a heightened burden of proof have stopped at the clear and convincing evidence standard.[135] No court is known to have ventured further than that except for the Alaska Supreme Court.

Numbers alone should never dictate a result. Just because the overwhelming majority of courts have concluded that wage and hour exemptions should be analyzed under a preponderance of the evidence standard is not, on its own, a sufficient basis for abandoning *Fred Meyer*. Indeed, there are circumstances where the Alaska Supreme Court has staked out positions dramatically at odds with most other courts and has done so for principled reasons that best comport with how Alaskans view life, law, and their relationship to society.[136] However, where the clear weight of reasoned authority points in one direction, the court should at least acknowledge this fact and explain any contrary position. This is particularly true where, as here, the competing legal principles are supposed to be interpreted and applied in a consistent manner.

In this respect, the AWHA is patterned after the FLSA.[137] Alaska courts will look to the FLSA and federal case law interpreting and applying the FLSA for guidance.[138] As noted, for FLSA claims, the overwhelming majority of courts that have addressed this issue have concluded that the burden of proof for establishing wage and hour exemptions should be by a preponderance of the evidence.[139] Indeed, this principle has taken firm root in civil pattern jury instruction

134. *See supra* notes 63–74 and accompanying text.

135. *See supra* notes 91–94 and accompanying text.

136. For example, in *Ravin v. State*, the Alaska Supreme Court recognized a right to possession of a limited amount of marijuana for personal use in one's house based on Alaska's constitutional right to privacy. 537 P.2d 494 (Alaska 1975). The court based its reasoning on the unique nature of privacy considerations in Alaska. *Id.* at 503–04. In *Anchorage Police Dep't Emp.'s Ass'n v. Municipality of Anchorage*, the court struck down a random drug testing policy for public safety personnel on privacy grounds, notwithstanding the fact that the vast majority of federal and state courts analyzing similar policies have upheld such testing. 24 P.3d 547 (Alaska 2001). These are merely two examples for illustrative purposes. In each case, the court took pains to articulate its reasoning.

137. *See* Dayhoff v. Temsco Helicopters, Inc., 848 P.2d 1367, 1371 (Alaska 1993).

138. *Id.*; *see also* ALASKA STAT. § 23.10.145.

139. *See supra* notes 63–74 and accompanying text.

guides.[140] Given that the AWHA is largely based on the FLSA and that Alaska courts look to the FLSA and its case law for interpretative guidance, it only makes sense for the AWHA to apply the same burden of proof that has been adopted and applied by the overwhelming majority of courts.

In this sense precedent is not simply a numbers game. Instead, it truly reflects the better weight of reasoned authority, and that authority is based on an analysis of legal principles that are substantially similar if not identical to principles recognized in Alaska. Consequently, evaluated against existing precedent, *Fred Meyer* falls short.

B. The *Fred Meyer* Standard Is Not Supported by Principled Reason

The *Fred Meyer* standard conflicts with the underlying spirit of the 2005 amendments to the AWHA. The Alaska Legislature adopted federal standards for several of the same exemptions that are most frequently litigated.[141] The legislature did not want employers to face the same litigation with different standards governing the outcome.[142] Yet that is precisely what would happen presently. If an employer was attempting to establish an administrative employee exemption for claims filed under the FLSA and the AWHA, the burden of proof under the FLSA claim would be by a preponderance of the evidence while the burden of proof under the AWHA claim would be beyond a reasonable doubt. This is not an academic concern; the same exemption defined and governed by the same regulatory standards would be analyzed under differing burdens of proof that could easily lead to conflicting results. The same law and the same facts should be governed by the same burden of proof—especially when state law commands that Alaska courts should look to and apply federal law.

The *Fred Meyer* standard also undermines settled principles that generally apply to all cases. Civil cases are governed by a preponderance of the evidence standard.[143] That is the default standard that applies in Alaska as well.[144] As a general matter, the Alaska Legislature is presumed to be familiar with such principles.[145] And

140. *See* 3C O'MALLEY ET AL., *supra* note 74, at §§ 175.40, 175.50, 175.71.
141. *See* ALASKA H. JOURNAL, *supra* note 127.
142. *See supra* note 129 and accompanying text.
143. *See* States Marine Corp. of Del. v. Producers Coop. Packing Co., 310 F.2d 206, 212 (9th Cir. 1962).
144. *See* DeNuptiis v. Unocal Corp., 63 P.3d 272, 277–78 (Alaska 2003); Fernandes v. Portwine, 56 P.3d 1, 5 n.13 (Alaska 2002) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)).
145. *See, e.g.*, Purdy v. United States, 146 F. Supp. 762, 764 (D. Alaska 1956)

indeed, the legislature established a "clear and convincing" burden of proof for establishing a good faith defense.[146] Thus, its silence in addressing any burden of proof for exemptions should be interpreted as accepting the preponderance of the evidence standard.[147]

The process by which *Fred Meyer* reached its result is also problematic. The burden of proof was not actually at issue in the case. The subject was never identified as an issue on appeal and was never addressed in the opening brief.[148] It was only cursorily referenced in the opposition brief in a boilerplate paragraph.[149] The employer then made brief reference to the burden of proof in its reply brief but did not analyze or explain its argument.[150] Oral argument was never held. Instead, the appeal was submitted on the briefs.[151] The Alaska Supreme Court ordinarily never considers arguments that are raised for the first time in a reply brief.[152] It is not clear why the court elected to do so here and why it adopted such a sweeping rule that runs counter to all existing precedent without the benefit of oral argument and a more developed briefing record. With due respect for the court, the issue deserves more than a dismissive footnote.

The *Fred Meyer* standard also suffers in that it is seemingly inconsistent with the AWHA's statutory scheme. As previously noted, under the AWHA an employer must establish its good faith by clear and convincing evidence in order to avoid imposition of liquidated damages.[153] It makes little sense to apply a higher burden of proof to establish an exemption and then a lower burden of proof to avoid penalties for a wage and hour violation. This renders the good faith exception somewhat academic since if an employer can establish an exemption under the beyond a reasonable doubt standard, it would never have a reason to prove good faith. What would make sense, however, is to apply a preponderance of the evidence standard to determine whether or not an exemption exists. If the employer cannot establish the existence of an exemption under this basic standard then it

("The Legislature is presumed to know the existing law.").

146. *See* ALASKA STAT. § 23.10.110(d)–(e) (2010).

147. *See supra* note 89 and accompanying text.

148. *See* Brief of Appellant, *supra* note 115.

149. *See* Brief of Appellee, *supra* note 116, at *8 ("Fred Meyer, which bears the burden of proving Bailey's overtime exemption beyond a reasonable doubt must prove that Bailey met each of six tests found at [title eight, section 15.910(a)(7) of the Alaska Administrative Code] to qualify Bailey as an 'executive.'" (internal citation omitted)).

150. *See* Reply Brief for Appellant, *supra* note 117, at 3.

151. *See supra* note 118 and accompanying text.

152. *See* Willoya v. State, 53 P.3d 1115, 1125–26 (Alaska 2002).

153. ALASKA STAT. § 23.10.110(d)–(e) (2010).

makes sense to require a greater showing in order for the employer to avoid imposition of penalties.

C. Policy Does Not Commend the *Fred Meyer* Standard

The AWHA protects remedial rights and interests, and an argument can be made that applying a heightened burden of proof for exemptions is in keeping with this protective function. Yet the preponderance of the evidence standard is commonly applied in situations where significant rights and interests are implicated. For instance, perhaps the most important federal remedial statutory right is Title VII, which is designed to eradicate unlawful employment discrimination.[154] In Title VII cases, employers may rebut an employee's prima facie case during application of the *McDonnell Douglas* burden shifting test on less than a preponderance of the evidence.[155] Similarly, Title VII affirmative defenses are established by a preponderance of the evidence.[156] The Alaska Supreme Court has held that preponderance of the evidence is the appropriate standard to use for evaluating just cause to terminate public employees—a situation where individuals are threatened with loss of their livelihood.[157] The United States Supreme Court has held that creditors need only prove entitlement to an exception to a debtor's right to discharge by a preponderance of the evidence.[158] One would think that these cases implicate rights and interests of greater significance than an individual's right to overtime, yet a lesser burden of proof has been deemed adequate in all of these other contexts. Even if one placed an individual's right to overtime on equal footing with these other remedial rights, there would not seem to be any reason to adopt a different (and heightened) burden of proof.

Moreover, there is no support for the conclusion that applying a preponderance of the evidence standard will erode employees' rights and interests protected by wage and hour law. The states and federal circuits applying the preponderance of the evidence standard have not evidenced an erosion of rights. Indeed, as noted, the Sixth Circuit applies a preponderance of the evidence standard to analyze

154. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

155. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259–60 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–05 (1973).

156. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (explaining that in the context of a hostile work environment claim under Title VII, "a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence").

157. *See* Jurgens v. City of North Pole, 153 P.3d 321, 331 (Alaska 2007).

158. *See* Grogan v. Garner, 498 U.S. 279, 286 (1991).

exemptions,[159] yet employees' claims for overtime have prevailed nonetheless.[160]

In addition, there would not seem to be any reason to adopt a heightened burden of proof to protect overtime since overtime is now being applied in a manner that actually undermines its initial declared purposes. As previously discussed, the central purposes underlying overtime were to create jobs and to protect workers from onerous working conditions.[161] At present, however, employers are finding it more economical to compel workers to work overtime rather than hiring new employees because it is less expensive to pay employees overtime than to hire new workers for whom additional fringe benefits costs would have to be incurred.[162]

From a policy perspective, the beyond a reasonable doubt standard carries risks of unintended consequences—particularly with respect to its impact on the workplace. Unlike government agencies, private employers do not have unlimited resources to investigate and prosecute cases. By virtue of its size and its industries, Alaska has many remote sites or on-call employees.[163] It is reasonable to posit that employers, knowing that they would need to establish any exemption beyond a reasonable doubt, would be more likely to adopt burdensome or intrusive monitoring and recordkeeping policies.

The *Fred Meyer* standard places an undue burden on Alaska businesses. Small businesses with a flexible workforce are common in Alaska.[164] In order to be productive, competitive, and cost-efficient,

159. *See* Renfro v. Ind. Mich. Power Co., 497 F.3d 573, 576 (6th Cir. 2007).

160. *See* Martin v. Ind. Mich. Power Co., 381 F.3d 574, 576 (6th Cir. 2004).

161. *See* SCHOR, *supra* note 18.

162. *See* Sherry Slater, *Overtime Trumps Hiring,* FORT WAYNE J. GAZETTE, Aug. 15, 2010, *available at* http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20100815/BIZ/308159953; Megan Woolhouse, *For Small Businesses, a Hesitancy To Hire*, BOS. GLOBE, Feb. 14, 2011, *available at* http://www.boston.com/news/local/massachusetts/articles/2011/02/14/for_small_businesses__a_hesitancy_to_hire;.

163. Many of Alaska's wage and hour cases involve employees working at remote locations or working in on-call situations. *See*, *e.g.*, Geneva Woods v. Thygeson, 181 P.3d 1106, 1108 (Alaska 2008) (home visit nurse); Air Logistics of Alaska, Inc. v. Throop, 181 P.3d 1084, 1088 (Alaska 2008) (helicopter mechanics working at remote site).

164. Summaries published by the Small Business Administration reflect that small businesses dominate the Alaskan economic landscape in terms of number of employers if not revenue. *See* SMALL BUS. ADMIN., SMALL BUSINESS PROFILE (2009), *available at* http://archive.sba.gov/advo/research/profiles/09ak.pdf. The Alaska Department of Labor and Workforce Development's most recent survey of private employers in Alaska was published in July 2010. *See* ALASKA DEP'T OF LABOR & WORKFORCE DEV., ALASKA ECONOMIC TRENDS (2010), *available at* http://labor.state.ak.us/trends/jul10.pdf.

employers may need their employees to wear more than one hat. For example, a manager may have as his or her primary duty management of the enterprise but may also be expected to tackle non-managerial duties from time to time as the need arises. Employers shouldering a beyond a reasonable doubt burden of proof to establish an exemption will face problems efficiently allocating tasks and resources.

Finally, *Fred Meyer* has the perverse effect of undermining workers' rights and interests. It encourages employers and businesses to outsource labor or to use independent contractors instead of employees, particularly in the more skilled trades or professions. For example, most businesses need computer professionals to develop and maintain necessary hardware, software, and servers. Computer professionals often work long, irregular hours because no one can predict when viruses will hit or when equipment will fail. Businesses obviously prefer to classify these employees as exempt and to pay them on a salary basis. However, if there is doubt concerning whether or not the employees should be classified as exempt or nonexempt, prudent businesses will simply outsource the labor for risk management purposes to minimize exposure to overtime liability. The *Fred Meyer* standard is custom-built to engender such doubt. The impact on workers is obvious to anyone who has actually owned or managed a business or advised business clients. Most employers offer their employees some level of fringe benefits (health insurance, retirement or 401K plans, vacation or sick leave or paid time off) that are not available to independent contractors. Consequently, the *Fred Meyer* standard encourages businesses to outsource labor in skilled trades or professions, which in turn erodes those workers' rights and interests. The result is fundamentally at odds with the declared goals of the FLSA and the AWHA—to improve the quality of life and living standards for American workers.[165]

D. *Fred Meyer* Can and Should Be Abandoned

Viewed from any angle, the *Fred Meyer* standard falls short when analyzed against social, legal, political, or economical concerns. It stands alone against the greater weight of reasoned authority. Not only does it stand alone, but it stands mute. We are supplied with no apparent justification for such a stark rule. The standard frustrates underlying policy goals and finds no support in precedent or reason. *Fred Meyer* can and should be abandoned.

165. *See* 29 U.S.C. § 202 (2006); ALASKA STAT. § 23.10.050 (2010).

III. AVAILABLE OPTIONS TO ADDRESS AND CORRECT *FRED MEYER*

If this Article's analysis is correct, then the *Fred Meyer* standard should be discarded in favor of a preponderance of the evidence standard. However, even if one disagreed with this Article's analysis, the subject deserves more study than a cursory footnote. The following paragraphs address judicial and legislative options for studying and remedying *Fred Meyer*. A court challenge would be slower and somewhat less predictable but would hopefully provide for a full, measured consideration of the underlying principles. In contrast, legislative options most likely would be more time and cost efficient but perhaps offer less deliberative insight.

A. Judicial

An employer seeking to challenge the *Fred Meyer* standard could attempt to litigate the issue through the courts. The Alaska Supreme Court accords due regard for precedent in light of principles governing stare decisis and will not readily overrule precedent.[166] The basic test for overruling an opinion is that the court will do so "only if . . . clearly convinced that the precedent is erroneous or no longer sound because of changed conditions, and that more good than harm would result from overturning the case."[167] It is probable that the court would not even consider the issue unless it was dispositive with respect to the case on appeal. This means that there would probably have to be an extremely close case with perhaps a ruling from a superior court judge that the result was affected by the burden of proof.

Although the Alaska Supreme Court has seldom overruled precedent, it has happened on a few occasions. One recent case arose in *Kinegak v. State, Department of Corrections*, in which the court examined whether or not a person who was imprisoned longer than he should have been due to an inadvertent clerical error should be able to allege a civil claim for negligent supervision or negligent recordkeeping.[168] Kinegak was convicted of misdemeanor charges and served seven extra days when a clerical error caused a miscalculation of the time he was supposed to serve.[169] He filed suit and alleged negligence.[170] The State

166. *See* Kinegak v. State, Dep't of Corr., 129 P.3d 887, 889–90 (Alaska 2006).
167. See id.
168. *Id.* at 888–89.
169. *Id.* at 888.
170. Id.

moved to dismiss noting that under Alaska's sovereign immunity statute—section 09.50.250(3) of the Alaska Statutes—sovereign immunity was not waived for false imprisonment claims.[171] Kinegak argued that properly construed, his claim was more in the nature of a negligent supervision or negligent recordkeeping claim and accordingly should be viable under *Zerbe v. State*.[172] In *Zerbe*, the court allowed a claim after a bench warrant was issued by mistake.[173] The *Zerbe* court relied on federal authorities that interpreted the Federal Tort Claims Act (FTCA) as allowing claims for negligent recordkeeping to proceed.[174] Federal authorities provided persuasive guidance because Alaska's statute was patterned after the FTCA.

The State conceded that if *Zerbe* was still good law, Kinegak's complaint should be reinstated.[175] However, the State argued that *Zerbe* had either been overruled by subsequent Alaska precedent or that more recent federal case law interpreting and applying the FTCA cast doubt on the case law and premises upon which the *Zerbe* court relied.[176]

In a sharply divided 3-2 opinion, the court agreed with the State that subsequent federal case law had significantly changed the analytical foundation underlying *Zerbe*.[177] In particular, it was now clear that a claim could not arise from negligent supervision, training, or hiring of government employees.[178] The factual circumstances of Kinegaks's negligent recordkeeping claim were dependent on a false imprisonment theory.[179] This being so, the majority concluded that Kinegak's claim was barred by Alaska's sovereign immunity statute, which preserved sovereign immunity for such claims.[180]

If the right AWHA case came along, *Kinegak* provides an analytical foundation for overruling *Fred Meyer*. Traced back to its source, the *Fred Meyer* court relied on uncertain federal precedent that has been rejected by the overwhelming majority of federal courts. The decision was originally erroneous or is no longer sound. Moreover, persisting in applying *Fred Meyer* would do more harm than good because it would create the risk of logically inconsistent decisions being reached.

171. Id.
172. *Id*. at 889.
173. Zerbe v. State, 578 P.2d 597, 601 (Alaska 1978).
174. *Id*. at 600–01.
175. *Kinegak*, 129 P.3d at 889.
176. Id.
177. *Id*. at 890–92.
178. *Id*. at 892.
179. Id.
180. *Id*. at 893.

However, under any circumstances, it is difficult to persuade the Alaska Supreme Court (or any court) to overrule existing precedent. For example, in *Kinegak*, the State based part of its argument on the fact that two prior Alaska Supreme Court decisions had held that *Zerbe* was overruled to the extent that it conflicted with their results.[181] The majority, however, was unwilling to adopt this argument because the cases in question addressed a separate issue concerning whether or not the State had a duty to exercise due care when initiating civil or criminal proceedings.[182] Moreover, notwithstanding the sound basis for concluding that subsequent federal case law had materially changed the analytical foundation underlying *Zerbe*, the majority garnered only three of five votes.

Another approach that an employer seeking to challenge the *Fred Meyer* standard in court could take is to argue that HB 182 superseded *Fred Meyer*. The Alaska Supreme Court has accepted the premise that legislative action may abrogate or supersede a prior holding.[183] In *Sowinski v. Walker*, the court held that the Alaska Legislature's enactment of pure several liability superseded prior precedent and affected application of Alaska's dram shop statute.[184] The court explained that "a prior decision may be abandoned because of 'changed conditions' if 'related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application.'"[185]

HB 182 fits this standard. The Alaska Legislature specifically adopted federal "white collar" exemptions.[186] The Alaska Legislature also retained specific guidance directing courts to interpret and apply the AWHA by reference to federal law.[187] The Alaska Legislature made it clear that it intended to amend the AWHA to bring Alaska law into closer alignment with federal law and standards.[188] The Alaska Legislature went further than simply adopting federal regulations. The Alaska Legislature could have adopted the federal definitions and left it to Alaska courts and the Alaska Department of Labor and Workforce

181. *Id.* at 889.
182. *Id.* at 889 n.12.
183. *See* Sowinski v. Walker, 198 P.3d 1134, 1148 n.45 (Alaska 2008); Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1176 (Alaska 1993).
184. *Sowinski*, 198 P.3d at 1148–49.
185. *Id.* at 1149 n.45 (quoting *Pratt & Whitney Canada*, 852 P.2d at 1176).
186. ALASKA STAT. § 23.10.055(c)(1)–(2) (2010).
187. ALASKA STAT. § 23.10.145 (2010).
188. *See* ALASKA H. LABOR & COMMERCE COMM. MINUTES, *supra* note 128, at 8–10, 15–16, 18; ALASKA H. FIN. COMM. MINUTES, *supra* note 129, at 4–5.

Development to interpret those definitions under the AWHA. Instead of taking this approach, the Alaska Legislature emphasized that the exemptions have "the meaning and shall be interpreted in accordance with [federal law]."[189] Moreover, the Alaska Legislature did not anchor its amendment in time. Instead, as the FLSA or its regulations are amended or revised in the future, the AWHA will automatically track those amendments.

These considerations support the argument that HB 182 is a changed condition that essentially abrogates or supersedes the *Fred Meyer* standard. The Alaska Legislature intended that the same law should be governed by the same standards. Allowing a different burden of proof to govern the same facts and same standards is inconsistent with HB 182. Accordingly, short of asking the court to overrule *Fred Meyer*, an employer could argue that HB 182 legislatively accomplished that task already.

B. Legislative

From the perspective of stability, predictability, and confidence in the judiciary, precedent should seldom be overruled. Although *Fred Meyer* represents a poor rule, it would be difficult to secure its abrogation or to have the case overruled by the Alaska Supreme Court. The right case would have to come along at the right moment.

A more time and cost efficient solution would be for the Alaska Legislature to simply amend the AWHA. This could be completed in one session. Section 23.10.060 of the Alaska Statutes could be amended to add one subdivision: "(k) In an action to recover unpaid overtime compensation or unpaid minimum wages, the defendant shall have the burden of proof to establish the existence of any claimed exemptions by a preponderance of the evidence."

The only problem with the legislative option relates to the practical dynamics of the process. The Alaska Legislature convenes for ninety day sessions. This does not necessarily allow for measured deliberation. A concerted lobbying effort would probably be necessary to identify and explain the issue in advance and to build the required support to secure passage within the legislature's short session. However, legislators would presumably recognize the value in an amendment that is not only business-friendly but that also protects workers' rights and carries the added advantage of bringing clarity and uniformity to the law.

189. ALASKA STAT. § 23.10.055(c)(1) (2010).

CONCLUSION

A sound rule of law should be based on reason, policy, and precedent. The *Fred Meyer* standard is not—it finds no support in reason, policy, or precedent. Whether by judicial or legislative action, the *Fred Meyer* standard should be abandoned in favor of the majority rule that has stood the test of time.