PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT KENNEY, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. HELIX TCS, INC., Defendant-Appellant	No. 18-1105

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:17-CV-01755-CMA-KMT)

(Filed Sep. 20, 2019)

Jordan D. Factor, (Jeremy T. Jonsen and Carissa V. Sears, with him on the briefs) Allen Vellone Wolf Helfrich & Factor, P.C., Denver, Colorado, for Defendant-Appellant.

Lyndsay R. Itkin, (Michael Andrew Josephson, with her on the brief) Josephson Dunlap Law Firm, Houston, Texas for Plaintiff-Appellee.

Before **HARTZ**, **SEYMOUR**, and **EID**, Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiff Robert Kenney is a former employee of Defendant Helix TCS, Inc. ("Helix"), which provides security services for businesses in Colorado's state-sanctioned marijuana industry. Mr. Kenney filed this lawsuit against Helix under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, alleging that Helix misclassified him and similarly situated workers as exempt from the FLSA's overtime obligations. Helix moved to dismiss Mr. Kenney's claim based on the Controlled Substance Act ("CSA"), 21 U.S.C. §801, *et seq*, arguing that Mr. Kenney's employment activities are in violation of the CSA and are thus not entitled to FLSA protections. The district court denied Helix's motion to dismiss. We affirm.

I.

Between approximately February 2016 and April 2017, Mr. Kenney worked as a security guard for Helix. Mr. Kenney alleges that he and other similarly situated security guards regularly worked more than forty hours per week. Nevertheless, Helix classified these workers as exempt employees under the FLSA and paid them a salary instead of overtime. Mr. Kenney initiated this action against Helix under the collective action provisions of the FLSA, *see* 29 U.S.C. § 216(b),

contending that Helix misclassified the security guards as exempt employees even though they frequently performed non-exempt job duties. He claims Helix is in violation of 29 U.S.C. § 207(a) by willfully failing to pay overtime.

Helix provides security, inventory control, and compliance services to the marijuana industry in Colorado. *Kenney v. Helix TCS, Inc*., 284 F. Supp. 3d 1186, 1188 (D. Colo. 2018). Mr. Kenney's job duties at Helix included monitoring security cameras, patrolling assigned locations, investigating and documenting all facility-related incidents, and enforcing client, local, state, and federal policies and regulations. *Id*. Helix asserts that the FLSA does not apply to workers such as Mr. Kenney because Colorado's recreational marijuana industry is in violation of the Controlled Substances Act. It therefore moved to dismiss Mr. Kenney's FLSA claim for want of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, alternatively, under Rule 12(b)(6) for failure to state a claim.

The district court denied Helix's motion to dismiss and then certified Helix's interlocutory appeal of its order. Exercising jurisdiction pursuant to 28 U.S.C. § 1292(b), we affirm.

II.

Both parties agree that we review *de novo* the district court's denial of Helix's motions to dismiss. A Rule 12(b)(1) motion to dismiss only requires the court to determine whether it has authority to adjudicate the

matter. Helix argued below that the district court lacked subject matter jurisdiction because there is no federal interest at stake. The district court correctly rejected this argument, identifying it as a challenge to the legal sufficiency of Mr. Kenney's claims rather than the jurisdiction of the federal courts. *Kenney*, 284 F. Supp. 3d at 1189 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding statute's definitional requirement of who qualifies as employer "is an element of a plaintiff's claim for relief, not a jurisdictional issue")). Helix only cursorily mentioned this argument in its opening brief and dropped the issue entirely in its reply brief.

A Rule 12(b)(6) motion to dismiss requires the court to evaluate the sufficiency of the plaintiff's allegations. "At this stage in the litigation, we accept as true the well pleaded factual allegations and then determine if the plaintiff has provided enough facts to state a claim to relief that is plausible on its face." *Hogan v. Winder*, 762 F.3d 1096, 1104 (10th Cir. 2014) (internal citation and quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III.

Whether § 207(a) of the FLSA applies to Mr. Kenney is an issue of statutory interpretation, which

always begins with the plain language of the statute. *See*, *e.g.*, *Artis v. D.C.*, 138 S. Ct. 594, 603 (2018). To state a claim for a violation of this FLSA provision, a plaintiff merely must show that he is an employee who (a) worked more than forty hours per week, and (b) is either "engaged in commerce or in the production of goods for commerce" or "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a)(1). The statute then enumerates certain categories of employees that are explicitly exempted from FLSA protections, regardless of whether they meet these requirements. The employer bears the burden to prove that an exemption under the FLSA applies to the plaintiff. *See*, *e.g.*, *Lederman v. Frontier Fire Protection Inc.*, 685 F. 3d 1151, 1157–58 (10th Cir. 2012). Our case law confirms that FLSA protections apply unless an establishment fits "plainly and unmistakably within the terms and the spirit of the exemption invoked." *Schoenhals v. Cockrum*, 647 F.2d 1080, 1081 (10th Cir. 1981).

Helix does not dispute the fact that Mr. Kenney is an employee who worked more than forty hours per week, and Mr. Kenney has clearly alleged that he is covered by the plain language of the FLSA.[1] Nor does

[1] Helix does contest the allegation that it engages in commerce within the meaning of the FLSA, *see generally* 29 U.S.C. § 203(b) ("'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."), arguing for the first time on appeal that Colorado's marijuana industry is only authorized within the state's borders. But Helix has waived this argument by raising it for the first time on appeal. *See Hormel v.*

Helix argue that Mr. Kenney fits into one of the FLSA's enumerated categories of excluded employees. As the Supreme Court has long emphasized, where the statute's language is plain the sole function of the courts is to enforce it according to its terms. *Lucas v. Jerusalem Café*, LLC., 721 F.3d 927, 934 (8th Cir. 2013) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). So Helix's challenge "must fail unless [it] can point to a different statutory basis for limiting 'the broadest definition that has ever been included in any one act.'" *Lucas*, 721 F.3d at 934 (quoting 81 Cong. Rec. 7656–57 (1937) (statement of Sen. Black)).[2]

Although Helix sidesteps the disfavored phrase "implied repeal" and claims to merely be reading the statutes in harmony with each other, in effect it proposes that we interpret the CSA as implicitly repealing the FLSA's overtime mandate for employers in the marijuana industry. *See Epic Systems Corp v. Lewis*, 138 S. Ct. 1612, 1623–24 (2018). Construing this as Helix's true argument is particularly accurate in light of

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Helvering, 312 U.S. 552, 556 (1941); *Tele-Communications, Inc. v. Commissioner of Internal Revenue*, 12 F.3d 1005, 1007 (10th Cir. 1993).

[2] Helix develops several lines of argument that do not bear on the resolution of this appeal. Helix frames the issue as one of preemption by setting state-sanctioned marijuana use in opposition to the CSA, lengthily addresses federal enforcement of the CSA with respect to marijuana offenses, and examines state court treatment of employment protections in the context of marijuana use. None of these arguments pertain to the present case, which concerns not the federal legality of marijuana but the interaction between two federal laws and the resultant application of the FLSA to the plaintiffs here.

marijuana's history as a legal industry. *See, e.g*., Marihuana Tax Act, 50 Stat. 551 (repealed 1970) (regulating all persons dealing with marijuana, including companies and corporations); *see also Raich*, 545 U.S. at 11 (explaining history of marijuana regulation). Prior to enactment of the CSA in 1970, the FLSA unquestionably covered these workers. The Supreme Court recently reiterated that an implied repeal argument "faces a stout uphill climb." *Epic Systems*, 138 S. Ct. at 1624. We approach these arguments with a "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id*. (citation, quotation marks, and brackets omitted). And, as Helix itself declares, Congress is presumed to know the law when legislating. Aplt. Br. at 19; *see also In re Harline*, 950 F.2d 669, 675 (10th Cir. 1991).

Helix argues that inclusion of Mr. Kenney under the FLSA is an overly technical reading of the statute, and that legislative intent with respect to this issue must be inferred from the distinctive purposes of the FLSA and the CSA as the two statutes in question. Helix contrasts the purpose of the FLSA, which it identifies as ensuring "the free flow of goods in commerce" and "the orderly and fair marketing of goods in commerce," Aplt. Br. at 20 (citing 29 U.S.C. § 202), from the purpose of the later-enacted CSA, which it describes as "eliminat[ing] commercial transactions of marijuana in the interstate market in their entirety." *Id*. (citing *Raich*, 545 U.S. at 20) (brackets omitted). Helix then

asserts that Mr. Kenney's interpretation of the FLSA would "create a clear repugnancy" between it and the CSA and impermissibly render the two laws mutually inconsistent. Aplt. Br. at 21. "Extending overtime benefits in this case would require the Court to find that Congress intended to both forbid (under the CSA) and reward (under the FLSA) the same conduct: drug trafficking." *Id*.

As outlined below, however, "case law is clear that employers are not excused from complying with federal laws" because of their other federal violations. *Kenney*, 284 F. Supp. 3d at 1190; *accord United States v. Sullivan*, 274 U.S. 259 (1927) (holding there was no reason "why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay"); *Lucas*, 721 F.3d at 934 ("The employers' argument to the contrary rests on a legal theory as flawed today as it was in 1931 when jurors convicted Al Capone of failing to pay taxes on illicit income."). Contrary to Helix's claims, recognizing Mr. Kenney as covered by the FLSA is in line with both the plain reading and the overall purposes of that statute, and doing so does not require disavowal of the CSA.

As we recognized in *Baker v. Flint Engineering & Const. Co*., 137 F.3d 1436, 1440 (10th Cir. 1998), the Supreme Court has emphasized the "striking breadth" of the FLSA's definition of employee, which is purposefully expansive to maximize the full reach of the Act, *see United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). Congress has shown that it knows how to limit this broad definition of employee when it intends to do

so, and it did not do so here. *See* 29 U.S.C. § 203(e); *see also Lucas*, 721 F.3d at 934 (applying FLSA to unauthorized immigrants). Congress has actually amended the FLSA many times since the enactment of the CSA without excluding employees working in the marijuana industry, despite specifically exempting other categories of workers. *See* 29 U.S.C. § 213. The Supreme Court has held that the FLSA's "specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516–17 (1950); *accord Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 35 (1987) ("[W]here the FLSA provides exemptions 'in detail and with particularity,' we have found this to preclude 'enlargement by implication.' ") *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1154 (10th Cir. 2016) ("Because FLSA exemptions are narrowly construed against . . . employers, in considering an FLSA exemption, a court must find that the claimed exemption falls plainly and unmistakably within the terms of the statute.") (internal citations and quotation marks omitted).

Moreover, the purposes of the FLSA do not conflict with the CSA quite as directly as Helix implies. Helix cherry-picks among the enumerated purposes of the FLSA, citing only those most favorable to its arguments. But the FLSA was also enacted to promote "the health, efficiency, and general well-being of workers" and to prevent unfair competition. 29 U.S.C. § 202; *see also Brock*, 483 U.S. at 36–37 (clarifying that FLSA contains more than one goal, including "Congress'

desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions"). The FLSA is a remedial scheme for the benefit of all workers. *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946); *see also Lamon v. City of Shawnee, Kan*., 972 F.2d 1145, 1149 (10th Cir. 1992). Applying the FLSA to workers such as Mr. Kenney does not conflict with these enumerated FLSA purposes.

Helix counters that "Congress did not seek to level the same playing field that it tried to demolish." Aplt. Reply Br. at 5. But adhering to the plain language of the statute here does not level the playing field *within* the illicit marijuana market but rather *beyond* it, preventing these unlawful businesses from procuring an unfair advantage over all other legitimate employers who are required to comply with federal overtime laws. Indeed, applying FLSA protections to workers such as Mr. Kenney will not grant these individuals any surplus benefit that they cannot easily obtain elsewhere, but the reverse would excuse Helix from FLSA costs and obligations and thereby allow it to reap additional benefit from its CSA violations. Denying FLSA protection to workers in the marijuana industry would consequently encourage employers to engage in illegal markets where they are subject to fewer requirements. But together the FLSA and CSA discourage businesses from participating in the marijuana industry by alternatively subjecting them to federal labor obligations and imposing criminal sanctions.[3] Accordingly,

[3] Helix's opening brief cites a variety of jurisprudential arenas as supporting the contention that federal courts "consistently

accepting the plain language interpretation that Mr. Kenney and similarly situated employees are covered by the FLSA promotes the legislature's intent in enacting the statute. *See Brock*, 483 U.S. at 35–36 ("Petitioner urges us to look beyond the plain language of the statute. . . . However, we conclude that the legislative intent fully supports the result achieved by application of the plain language.").

The district court correctly reasoned and case law has repeatedly confirmed that employers are not excused from complying with federal laws just because

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decline to reward participation in the marijuana industry." Aplt. Br. at 10. The only context Helix continued to argue through oral argument is the Trademark Act. Beyond noting that Mr. Kinney convincingly distinguishes each of the contexts and relevant authorities that Helix cites, we will similarly restrict our analysis. A trademark qualifies for registration and its associated benefits if the trademark owner has "used [the mark] in commerce" or has a bona fide intent to do so, 15 U.S.C. § 105, and courts have long held that the commerce must be "lawful" for it to satisfy the "use in commerce" requirement. *See*, *e.g.*, *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1225 (10th Cir. 2000). Helix urges us to adopt a similar interpretation for the FLSA. Although the Trademark Act and FLSA both regulate interstate commerce, however, they function in fundamentally different ways. The Trademark Act confers a benefit on owners who register their marks, securing a registrant's right to benefit from a good reputation and thus protecting him from unfair competition. *See Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017). The FLSA, in contrast, prevents unfair competition, not by conferring a benefit on certain actors but by imposing obligations across the labor market. Reading "lawful" into the threshold commerce requirement here would not further the statute's purposes by denying illegal businesses a benefit, as in the trademark context, but would thwart the FLSA's goals by exempting illicit markets from costs imposed on lawful employers.

their business practices are federally prohibited. *See*, *e.g.*, *Sullivan*, 274 U.S. at 263; *see also Greenwood v. Green Leaf Lab LLC*, 2017 WL 3391671 at *3 (D. Or. July 13, 2017), adopted by district court, 2017 WL 3391671 (D. Or. Aug. 7, 2017) ("[J]ust because an Employer is violating one federal law, does not give it license to violate another.") (internal citation omitted). This has been true with respect to the FLSA in multiple contexts, strengthening the conclusion that it remains true in this novel context of the marijuana industry. *See Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985); *Bustamente*, 2018 WL 2349507 at *1 (workers in an illegal gambling operation).[4] Persuasive case law endorses the concept that the FLSA is focused on regulating the activity of businesses, in part on behalf of the individual workers' wellbeing, rather than regulating the legality of individual workers' activities. *See*, *e.g.*, *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014). ("The FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers.").

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[4] Helix attempts to distinguish these cases on the basis that those employees were engaging in entirely lawful commercial activities, whereas the employees here are engaged in activities that violate the CSA. This argument is not convincing. The illegal nature of the gambling activity in *Bustamente* was directly acknowledged by the court in a footnote, and the innocuous nature of the work being performed by undocumented immigrants in the other cases discussed does not offset their active violations of federal law in obtaining work.

Notably, Helix failed entirely to address the Oregon district court case that was cited here by both the district court and Mr. Kenney and is directly on-point. *Greenwood*, 2017 WL 3391671. The district court in *Greenwood* relied on a legal advice memo written for the National Labor Relations Board to conclude that any possible violations of the CSA are not relevant to whether the FLSA's protections apply to workers in the marijuana industry. *Id*. at *2–3. Considering arguments nearly identical to those made by Helix here, the court in *Greenwood* denied defendant's motion to dismiss. *See*, *e.g.*, *id*. at *3 ("I conclude that any possible violations of the Controlled Substances Act are not relevant to whether the FLSA's protections apply to Plaintiff. . . . There is no inherent conflict between the FLSA's requirements and the Controlled Substances Act's prohibition of marijuana.").

Like the district court in *Greenwood*, we are not drawing any conclusions about the merits of Mr. Kenney's FLSA claims. We hold only that Mr. Kenney and similarly situated individuals are not categorically excluded from FLSA protections. Accordingly, we AFFIRM the district court's denial of Helix's motion to dismiss.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HELIX TCS, INC., Petitioner, v. ROBERT KENNEY, individually and on behalf of all others similarly situated, Respondent.	No. 18-701 (D.C. No. 1:17-CV-01755-CMA-KMT) (D. Colo.)

ORDER

(Filed Mar. 12, 2018)

Before **BRISCOE**, **HOLMES**, and **MCHUGH**, Circuit Judges.

This matter is before us on *Helix TCS, Inc.'s Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure* ("Petition"). We also have a response from plaintiff/respondent, Robert Kenney. Upon careful consideration of the Petition, the response, and the relevant district court orders, the Petition is GRANTED.

Within 14 days of the date of this order, Helix TCS, Inc. shall pay the $505 filing and docketing fees to the Clerk of the U.S. District Court for District of Colorado. *See* Fed. R. App. P. 5(d)(1)(A). A notice of appeal is not required; the date of this order shall serve as the date of the notice of appeal. *Id*. at 5(d)(2). The Clerk of this court shall open a new appeal once the district court Clerk notifies this court that the fees have been paid. *Id*. at 5(d)(3).

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

/s/ [Illegible]
by: Chris Wolpert
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 17-cv-01755-CMA-KMT

ROBERT KENNEY, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

HELIX TCS, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR CERTIFICATION OF APPEAL OF THE COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS

(Filed Jan. 23, 2018)

This matter is before the Court on Defendant Helix TCS, Inc.'s Motion for Certification of Appeal of the Court's Previous Order Denying Defendant's Motion to Dismiss (Doc. # 39). (Doc. # 43.)

I. BACKGROUND

Defendant is in the business of providing security and compliance services to the marijuana industry in Colorado. (Doc. # 13 at 2.) Plaintiff Robert Kenney alleges that Defendant willfully failed to pay overtime

wages to him and other security guards employed by Defendant, and therefore brings a claim against Defendant under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201-19. (Doc. # 1.) The Court's Previous Order provides a detailed recitation of the factual and procedural background of this case and is incorporated herein. *See* (Doc. # 39.)

Defendant filed a Motion to Dismiss on September 13, 2017, asserting that the case must be dismissed for want of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), or alternatively, for failing to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. # 13.) Relevant here, Defendant argued that the Court does not have jurisdiction over Plaintiff's FLSA claim because Plaintiff works in an industry wholly prohibited by federal law—the recreational marijuana industry—and thus is not entitled to the FLSA's protections. (*Id.*)

This Court rejected Defendant's argument and denied its Motion to Dismiss on January 5, 2018. (Doc. # 39.) The Court cited ample authority expressly rejecting Defendant's theory of jurisdiction and concluded that case law is clear that employers are not excused from compliance with federal laws, including the FLSA, solely because their business violates federal law. (*Id.*)

On January 15, 2018, Defendant filed the Motion for Certification of Appeal of the Court's Previous Order Denying Defendant's Motion to Dismiss now before the Court. (Doc. # 43.) Defendant requests that the

Court certify its previous Order Denying Defendant's Motion to Dismiss (Doc. # 39) for interlocutory review pursuant to 28 U.S.C. § 1292(b) and proposes the following question: "Is Plaintiff, an employee working in Colorado's recreational marijuana industry, entitled to the protections of the FLSA, notwithstanding that his employment activities constitute federally criminal conduct?". (*Id.*)

On January 19, 2018, Defendant answered Plaintiff's Complaint and filed a Third Party Complaint against Third Party Defendant HRBenefix CO, LLC. (Doc. # 45.) This third party complaint does not bear on the motion presently before the Court.

II. ANALYSIS

An interlocutory order, generally not appealable, may be appealed where the district court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Where the district court believes these three conditions are satisfied,[1] the court may certify "in writing" an order

[1] "To certify an interlocutory appeal under § 1292(b) the district court must make an order, and must state three things in the order: that it is 'of the opinion' that the order (1) 'involves a controlling question of law,' (2) 'as to which there is substantial ground for difference of opinion,' and (3) 'that an immediate appeal may materially advance the ultimate termination of the

for interlocutory appeal. *Id.* Section 1292(b) is to be used "only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation." *Milbert v. Bison Lab., Inc.*, 260 F.2d 431, 433 (3rd Cir. 1958). Accordingly, the Court strictly construes and applies the three conditions precedent to the granting of permission to appeal. *Id.* at 435; *see* 16 Charles Alan Wright, et al., Federal Practice & Procedure § 3930 (3d ed. 2017).

The Court is persuaded that the three conditions precedent are satisfied with regard to the issue presented for appeal by Defendant. First, the Court's conclusion that it has subject matter jurisdiction because Plaintiff enjoys protections of the FLSA, despite working in the recreational marijuana industry, *see* (Doc. # 39 at 6), "involves a controlling question of law," *see* 28 U.S.C. § 1292(b). A question of law is "controlling" "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). The issue Defendant intends to appeal is certainly controlling: whether an employee is entitled to protections of the FLSA if he or she is engaged in a business illegal under federal law determines if Plaintiff has stated a claim sufficient to survive Defendant's Motion to Dismiss. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) (where an appeal concerned

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litigation.'" 16 Charles Alan Wright, et al., Federal Practice & Procedure § 3930 (3d ed. 2017).

the district court's denial of a party's motion to dismiss for lack of subject matter jurisdiction, it was "apparent that the . . . appeal [did[involve a 'controlling question of law").

Second, the Court is persuaded that there is "substantial ground for difference of opinion" as to its earlier conclusion that Plaintiff enjoys protections of the FLSA. *See* 28 U.S.C. § 1292(b). Defendant correctly observes that no circuit court has addressed the applicability of the FLSA to the recreational marijuana industry. *See* (Doc. # 43 at 4.) Defendant also cites district courts that have declined to extend various federal protections or benefits to parties in the recreational marijuana industry. *See* (id. at 4-5) (citing, *e.g.*, *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 809 (Bankr. D. Colo. 2012) (a party in violation of the Controlled Substances Act as a result of participating in the recreational marijuana industry is not entitled to federal bankruptcy protections)). In light of such case law and the tension between state and federal marijuana policy, the Court believes there may be substantial reason to question its ruling of law in its Order Denying Defendant's Motion to Dismiss, though it nonetheless stands by its ruling therein.

Third, "an immediate appeal may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b). Should the Tenth Circuit accept Defendant's appeal and reverse this Court's Order Denying Defendant's Motion to Dismiss, Plaintiff's sole claim against Defendant would be dismissed. "That is sufficient to advance materially the litigation, and

therefore certification of the interlocutory appeal [is] permissible." *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

Having satisfied the three conditions precedent of 28 U.S.C. § 1292(b), Defendant is entitled to a certification of appeal.

III. CONCLUSION

For the foregoing reasons, it is ORDERED that Defendant's Motion for Certification for Appeal (Doc. # 43) is GRANTED.

DATED:
January 23, 2018

BY THE COURT:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 17-cv-01755-CMA-KMT

ROBERT KENNEY, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

HELIX TCS, INC.,

Defendant.

ORDER DENYING
DEFENDANT'S MOTION TO DISMISS

(Filed Jan. 5, 2018)

This matter is before the Court on Defendant Helix TCS, Inc.'s Motion to Dismiss. (Doc. # 13.) Defendant argues that Plaintiff Robert Kenney's claim against it must be dismissed for want of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), or alternatively, for failing to state claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (*Id*. at 1–2.) For the reasons stated below, Defendant's Motion to Dismiss is denied.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant's sole business purpose is to "provid[e] security, inventory control, and compliance services to the marijuana industry in Colorado." (Doc. # 13 at 2.) Between approximately February 2016 and April 2017, Plaintiff worked for Defendant as a security guard, alternatively referred to by Defendant as a "site supervisor."[1] (Doc. # 1 at 2.) Plaintiff's job duties included "monitoring security cameras, patrolling assigned locations, investigating and documenting all facility-related incidents, and enforcing client, local, state, and federal policies and regulations." (*Id*. at 3.) Defendant classified Plaintiff as an exempt employee under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201–19, and paid him a salary. (*Id*.)

Plaintiff alleges that he and other similarly-situated security guards frequently performed non-exempt job duties that were "routine" and "predetermined" by Defendant or its clients and regularly worked in excess of 40 hours per week. (*Id*.) Plaintiff contends that he was not an exempt employee under any applicable exemption of the FLSA and is thus owed overtime compensation under 29 U.S.C. § 207(a). (*Id*.)

On July 20, 2017, Plaintiff initiated this action against Defendant on behalf of himself and all others

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[1] In reviewing a motion to dismiss, the Court is bound to take the well-pleaded factual allegations in the Complaint as true and view them in the light most favorable to the nonmoving party. *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

similarly situated[2] under the collective action provisions of the FLSA. (*Id*. at 2); *see* 29 U.S.C. § 216(b). He asserts a single claim: willful failure to pay "overtime at rates not less than one and one-half times the regular rate," in violation of 29 U.S.C. § 207(a). (Doc. # 1 at 5.) Plaintiff seeks recovery of unpaid overtime compensation, liquidated damages, attorney's fees, and costs. (*Id*. at 5–6.)

Defendant filed the Motion to Dismiss now before the Court on September 13, 2017. (Doc. # 13.) Plaintiff responded in opposition to the Motion to Dismiss on October 2, 2017. (Doc. # 28.) Defendant replied on October 25, 2017 (Doc. # 34.)

II. LEGAL PRINCIPLES GOVERNING A MOTION TO DISMISS

Defendant moves under Rule 12(b)(1) and Rule 12(b)(6) to dismiss Plaintiff's claim. (Doc. # 13 at 1.) Where, as here, a defendant seeks dismissal under Rule 12(b)(1) and Rule 12(b)(6) in the alternative, "the court must decide first the 12(b)(1) motion for the 12(b)(6) challenge would be moot if the court lacked subject matter jurisdiction." *Mounkes v. Conklin*, 922 F. Supp. 1501, 1506 (D. Kan. 1996) (citing *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)).

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[2] Plaintiff defines the class of similarly-situated workers as "all security guards and/or site supervisors employed by Helix TCS, Inc. during the past three (3) years who received a salary and no overtime compensation." (Doc. # 1 at 2.)

Rule 12(b)(1) provides for challenges to a court's subject matter jurisdiction. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1294 (10th Cir. 2003). The court's task in resolving a Rule 12(b)(1) motion is a relatively limited one; it is only whether the court lacks authority to adjudicate the matter. *Glapion v. Castro*, 79 F. Supp. 3d 1207, 1212 (D. Colo. 2015) (citing *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994)). "The issue is not whether plaintiff will ultimately succeed on the merits." *Hanford Downwinders Coalition, Inc. v. Dowdle*, 841 F. Supp. 1050, 1057 (E.D. Wash. 1993). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974).

Dismissal is appropriate under Rule 12(b)(6) if the plaintiff fails to state a claim upon which relief can be granted. To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility in this context means that the plaintiff pled factual content which allows "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The plausibility standard is not a probability requirement, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

III. ANALYSIS

A. DEFENDANT'S JURSIDICTIONAL ARGUMENT

Defendant argues that the Court must dismiss this case pursuant to Rule 12(b)(1) because the Court lacks subject matter jurisdiction. (Doc. # 13 at 4–13.) Defendant reasons that because Plaintiff is employed in the marijuana industry, an industry "entirely forbidden" by the Federal Controlled Substances Act (the "CSA"), 21 U.S.C. § 812, Plaintiff does not enjoy the protections of the FLSA, and thus, the Court does not have subject matter jurisdiction over Plaintiff's claim. (*Id*.) According to Defendant, "[t]he protections of federal law . . . are simply unavailable to an individual or business choosing to participate in an industry that is criminalized under federal law." (*Id*. at 12.)

At the outset, the Court observes that Defendant appears to be confused about the concept of jurisdiction. Its argument does not concern jurisdiction at all. Plaintiff claims that Defendant violated a federal statute—the FLSA—and this Court therefore has subject matter jurisdiction (and specifically, federal question jurisdiction) over the case. *See Breuer v. Jim's Concrete of Brevard, Inc*., 538 U.S. 691, 695 (2003) ("The FLSA provides that an action 'may be maintained . . . in any Federal or State court of competent jurisdiction,' 29 U.S.C. §216(b), and the [federal] district courts would in any event have original jurisdiction over FLSA claims under 28 U.S.C. § 1331 . . . and § 1337(a)").

Defendant's argument actually goes to the sufficiency of Plaintiff's claim. As Plaintiff observes (Doc.

28 at 3–5), Defendant is actually disputing the legal sufficiency of Plaintiff's FLSA claim. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (holding that a statute's definitional requirement of who qualifies as an "employer" "is an element of a plaintiff's claim for relief, not a jurisdictional issue"); *Fuqua v. Celebrity Enter., Inc.*, No. 12-cv-0208-WJM-KMT, 2012 WL 4088857, *2 (D. Colo. Sept. 17, 2012) (denying employer's Rule 12(b)(1) motion to dismiss in an FLSA collective action where employer argued plaintiff was not a protected employee). Accordingly, Defendant's argument should be considered an argument made pursuant to Rule 12(b)(6). *Greenwood v. Green Leaf Lab LLC*, No. 3:17-cv-00515-PK, 2017 WL 3391671, *1 (D. Or. July 13, 2017), *adopted at* 2017 WL 3391671 (D. Or. Aug. 7, 2017) (where defendant argued that the court lacked jurisdiction to hear plaintiff's FLSA claim because the business was illegal under federal law, finding that defendant was challenging the legal sufficiency of plaintiff's FLSA claim and treating defendant's motion to dismiss as being brought under Rule 12(b)(6)).

Defendant's argument fails. Defendant does not cite to **any** authority adopting its novel theory of jurisdiction. However, ample authority expressly rejecting Defendant's argument exists. In *Greenwood v. Green Leaf Lab LLC*, for example, the District of Oregon rejected Defendant's argument in a nearly-identical case. 2017 WL 3391671 at *1. There, the plaintiff worked for the defendant marijuana-testing laboratory as a courier and brought FLSA claims against the defendant, alleging that the defendant failed to pay him and

others similarly-situated minimum wage or overtime pay. *Id*. The defendant-employer moved to dismiss the plaintiff's FLSA claims for lack of subject matter jurisdiction, arguing that FLSA claims were barred by the CSA. *Id*. The court refused to accept the defendant's argument, concluding that "any possible violations of the [CSA] are not relevant to whether the FLSA's protections apply" to the plaintiff. *Id*. at *3.

Apart from the context of the FLSA, case law is clear that employers are not excused from complying with federal laws, such as the FLSA, just because their business practices may violate federal law. *E.g.*, *United States v. Sullivan*, 274 U.S. 259, 263 (1927) (where defendant's business violated federal prohibition laws, holding that there was no reason "why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay"); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985) (finding FLSA violations where defendant employed illegal aliens in violation of federal law).

For these reasons and those put forth by Plaintiff in his Response to the Motion to Dismiss[3] (Doc. # 28), the Court has jurisdiction over the instant action and squarely rejects Defendant's argument otherwise.

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[3] Plaintiff argues at length that the cases cited in Defendant's Motion to Dismiss are inapposite. (Doc. # 28 at 8–10.) The Court agrees and incorporates Plaintiff's analysis by reference.

B. DEFENDANT'S NON-EXEMPT EMPLOYEE ARGUMENT

Alternatively, Defendant moves to dismiss Plaintiff's claim pursuant to Rule 12(b)(6) on the basis that Plaintiff "fails to sufficiently allege the basis" for his assertion "that he was a non-exempt employee subject to relief." (Doc. # 13 at 14–15.) Noting that the FLSA does not apply to an employee "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), Defendant contends that Plaintiff's Complaint "simply cherry picks certain job duties," even though Plaintiff's "essential job functions and duties are to manage [Defendant's] site employees." (Doc. # 13 at 14.) Defendant argues that Plaintiff's factual pleadings are "not sufficient" to establish that he was a non-exempt employee with a right to relief under the FLSA. (*Id.*)

The Court is not persuaded. It is Defendant's burden to prove that a statutory exemption applies to Plaintiff. *See Lederman v. Frontier Fire Protection, Inc.*, 685 F.3d 1151, 1157–58 (10th Cir. 2012). Plaintiff need not plead facts establishing that he is a non-exempt employee because an exemption under the FLSA is an affirmative defense for which the employer bears the burden of proof. *See Dejesus v. HF Mgmt. Serv.*, LLC, 726 F.3d 85, 91 n.7 (2nd Cir. 2013).

IV. CONCLUSION

In accordance with the foregoing, it is ORDERED that Defendant's Motion to Dismiss (Doc. # 13) is DENIED.

DATED:
January 5, 2018

BY THE COURT:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT KENNEY, individually and on behalf of all others similarly situated, Plaintiff - Appellee, v. HELIX TCS, INC., Defendant - Appellant.	No. 18-1105

ORDER

(Filed Jan. 31, 2020)

Before **HARTZ**, **SEYMOUR** and **EID**, Circuit Judges.

This matter is before the court on Appellant's *Petition for Rehearing En Banc.* The petition for rehearing is denied. The petition for rehearing en banc was transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service requested that the court

be polled, the petition for rehearing en banc is denied pursuant to Fed. R. App. P. 35(f).

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

29 U.S.C. § 203(a)-(e)

As used in this chapter –

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means –

> **(A)** any individual employed by the Government of the United States –

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the[1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual –

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who –

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if –

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political

subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

29 U.S.C. § 207(a)

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 –

> **(A)** for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
>
> **(B)** for a workweek longer than forty-two hours during the second year from such date, or
>
> **(C)** for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213 (a)-(b)

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its

average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if

such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5;

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is –

> **(A)** the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour; or

(18) any employee who is a border patrol agent, as defined in section 5550(a) of Title 5; or

(19) any employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 206(a) of this title for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to –

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49; or

(3) any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act; or

(4) Repealed. Pub.L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub.L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68

(8) Repealed. Pub.L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or

town of twenty-five thousand population or less, which is part of such an area but is at least 40 air-line miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub.L. 93-259, §§ 15(c), 16(b), Apr. 8, 1974, 88 Stat. 65

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub.L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249

(23) Repealed. Pub.L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children –

> **(A)** who are orphans or one of whose natural parents is deceased, or
>
> **(B)** who are enrolled in such institution and reside in residential facilities of the institution, while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such Institution, and are together compensated, on a cash

basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub.L. 95-151, §§ 6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of Title 5.

21 U.S.C. § 812(a)-(b)(1)

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I –

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C.A. § 841(a)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

18 U.S.C.A. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

13 C.F.R. § 120.110

The following types of businesses are ineligible:

(a) Non-profit businesses (for-profit subsidiaries are eligible);

(b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);

(c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);

(d) Life insurance companies;

(e) Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);

(f) Pyramid sale distribution plans;

(g) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;

(h) Businesses engaged in any illegal activity;

(i) Private clubs and businesses which limit the number of memberships for reasons other than capacity;

(j) Government-owned entities (except for businesses owned or controlled by a Native American tribe);

(k) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;

(l) [Reserved by 82 FR 39502]

(m) Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;

(n) Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;

(o) Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;

(p) Businesses which:

(1) Present live performances of a prurient sexual nature; or

(2) Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(q) Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

(r) Businesses primarily engaged in political or lobbying activities; and

(s) Speculative businesses (such as oil wildcatting).