

2018

Mind the Gap: Why the FLSA Should Be Over Tacking Claims onto Overtime Compensation

Lauren Croft

Follow this and additional works at: <https://chicagounbound.uchicago.edu/uclf>

Recommended Citation

Croft, Lauren (2018) "Mind the Gap: Why the FLSA Should Be Over Tacking Claims onto Overtime Compensation," *University of Chicago Legal Forum*: Vol. 2017 , Article 25.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/25>

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Mind the Gap: Why the FLSA Should Be Over Tacking Claims onto Overtime Compensation

Lauren Croft[†]

I. INTRODUCTION

“Gap time” compensation under the Fair Labor Standards Act (FLSA) is an area of employment law warranting comment. Gap time claims in general are defined as “uncompensated hours worked that fall between the minimum wage and the overtime provisions of the FLSA.”¹ There is also a recognized difference between pure gap time pay and overtime gap time pay,² based on whether the individual has worked over the forty-hour maximum, set in § 207 of the FLSA.³

Courts have consistently determined that pure gap time pay claims, pertaining to hours worked below the forty-hour maximum, cannot be brought under the FLSA.⁴ However, dissension arises surrounding treatment of overtime gap time pay claims, which pertain to the hours worked above forty hours.⁵ This has led to a circuit split concerning the eligibility of claims for overtime gap time pay under the FLSA, and the Supreme Court has not yet addressed it. The Second Circuit does not support overtime gap time claims⁶ but the Fourth Circuit does.⁷

The split remains in existence even though the overwhelming majority of courts, including the Second Circuit, find that the FLSA does

[†] B.S. 2015, University of Central Florida; J.D. Candidate 2018, The University of Chicago Law School.

¹ *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 (9th Cir. 1999); *see also* *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 115 (2d Cir. 2013) (defining a gap time claim as “one in which an employee has not worked 40 hours in a given week but seeks recovery of unpaid time worked”).

² *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1280 (4th Cir. 1996).

³ Fair Labor Standards Act, 29 U.S.C. § 207 (2012).

⁴ *See, e.g., Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009).

⁵ *See, e.g., Monahan*, 95 F.3d 1263.

⁶ *Lundy*, 711 F.3d at 116.

⁷ *Monahan*, 95 F.3d at 1273.

not cover overtime gap time compensation claims.⁸ There seems to be a resurgence of the matter because courts continue to pay lip service to the split by recognizing the distinction between pure gap time and overtime gap time claims.⁹ Acknowledging the difference between the two claims, without determining whether the FLSA allows the latter, leaves the door open for individuals to seek recourse under a theory of overtime gap time.

The Fourth Circuit is one of the only courts that utilizes the distinction to support the idea that overtime gap time claims are viable under the FLSA.¹⁰ The Fourth Circuit states that when “the employment contract does not expressly or implicitly compensate an employee for non-overtime hours” a claim is enabled under the FLSA.¹¹ When following the Fourth Circuit’s precedent, the Northern District of Texas also noted that employers have not fulfilled the obligation to pay for overtime unless they have also paid all “straight time” compensation for regular workweek hours.¹²

Despite the Fourth Circuit’s enabling of such claims, the split should be decided in favor of the Second Circuit and not allow overtime gap time claims. The issue deserves finality in order to clarify what remedies employees have and what types of claims might loom against employers. Solidifying the rule against overtime gap time compensation claims will provide a necessary level of certainty for employers, stop unfair barring of employees bringing attention to infractions against the FLSA, and cabin the overtime provision to what it was originally meant to cover.

The decision whether to allow recourse is especially relevant given the recent changes to the Department of Labor’s overtime compensation threshold.¹³ Effective December 1, 2016, the Department of Labor “more than double[d] the minimum weekly salary threshold under which salaried workers are eligible for overtime pay.”¹⁴ Changes like this already

⁸ See, e.g., *Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063, 1078–79 (D. Nev. 2016); *Lundy*, 711 F.3d at 116.

⁹ *Davis v. Abington Mem’l Hosp.*, 765 F.3d 236, 244 (3d Cir. 2014) (acknowledging the possibility that the plaintiffs could bring an overtime gap time claim, but declining to address it, because the plaintiffs did not plausibly allege that they worked overtime).

¹⁰ *Monahan*, 95 F.3d at 1284 (“For there to be an overtime gap time cause of action under the FLSA, a violation of section 206 or 207 of the Act must first exist.”); *Valcho v. Dallas Cty. Hosp. Dist.*, 658 F. Supp. 2d 802, 811 (N.D. Tex. 2009) (“The FLSA regulations also support the viability of a straight-time claim for weeks when the employee has worked overtime.”).

¹¹ *Sargent*, 171 F. Supp. 3d at 1078 (citing *Monahan*, 95 F.3d at 1273).

¹² *Valcho*, 658 F. Supp. 2d at 811.

¹³ See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 80 Fed. Reg. 38516 (to be codified in 29 C.F.R. pt. 541).

¹⁴ Andrew Volin, *New Overtime Pay Rules: How to Adjust*, CFO (June 7, 2016), <http://ww2.cfo>.

impose difficulties for employers needing to adjust to the new regulations. The question of whether the restrictions can be manipulated to include gap time claims if they are tacked onto overtime claims adds additional uncertainty to the rules.

To address these concerns, this Comment will present a general overview of the FLSA. This includes the original purpose of the FLSA when it was enacted, some key provisions and their language in the FLSA, standards associated with overtime claims, and FLSA exemptions. Next, the Comment will provide a brief summary of the creation of the circuit split, specifically highlighting the decisions of the Second and Fourth Circuits. The Comment will then discuss recent revisions to the FLSA and their potential bearing on the split, followed by an examination of the level of deference the Department of Labor's interpretation of the FLSA might deserve. Finally, the Comment will conclude with a discussion of possible solutions for the circuit split and an ultimate recommendation.

II. BACKGROUND ON THE FLSA

The FLSA¹⁵ was enacted in 1938, in the wake of a host of Supreme Court decisions that “invalidated both State and Federal labor laws.”¹⁶ The Supreme Court in *Morehead v. New York ex rel. Tiplado*¹⁷ invalidated a New York State minimum wage law, favoring liberty of contract instead.¹⁸ It was a widely criticized decision, so in the years after the decision, President Franklin Roosevelt decided to reintroduce a general fair labor standards act bill.¹⁹ After multiple rounds in Congress, the FLSA finally passed by a vote of 291 to 89 in the House and an unrecorded vote in the Senate.²⁰

com/compensation/2016/06/new-overtime-pay-rules-adjust/ [https://perma.cc/V3R5-MSCJ].

¹⁵ 29 U.S.C. §§ 201–219 (2012).

¹⁶ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 23 (1978) (referencing cases such as *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

¹⁷ 298 U.S. 587 (1936).

¹⁸ *Id.*

¹⁹ Grossman, *supra* note 16, at 24.

²⁰ *Id.* at 28.

A. Purpose and General Provisions

The FLSA sets standards for minimum wages,²¹ maximum hours,²² recordkeeping,²³ and child labor laws.²⁴ The law affects “full-time and part-time workers in the private sector and in federal, state, and local governments.”²⁵ Those workers not qualifying for an exemption under § 213 of the FLSA²⁶ are required by law to be compensated and treated according to its provisions. If employers are found in violation of the FLSA, they may face penalties including, but not limited to, fines, imprisonment, damages, and back pay.²⁷

The FLSA was originally enacted to “protect employees from detrimental labor conditions and provid[ing] for the general well-being of workers.”²⁸ It also wards against “excessive work hours and substandard wages.”²⁹ The FLSA specifically declares that its policy is “to correct and as rapidly as practicable to eliminate [these detrimental employment conditions] without substantially curtailing employment or earning power.”³⁰

One of the corrective solutions implemented during the 1938 enactment was the creation of a federally mandated minimum wage.³¹ The current wage is set at \$7.25 per hour,³² though there are varied requirements for certain jobs such as those providing contract services to the United States, domestic service, and newly hired employees under twenty years old.³³ Workers that fall into this protected category may not receive a wage below that amount; otherwise, they may be entitled to a claim under the FLSA.

²¹ 29 U.S.C. § 206.

²² *Id.* § 207.

²³ *Id.* § 211.

²⁴ *Id.* § 212.

²⁵ *Fair Labor Standards Act (FLSA)*, OFFICE OF FIN. MGMT. (2012), <http://hr.ofm.wa.gov/compensation-job-classes/compensation-administration/fair-labor-standards-act-flsa> [<https://perma.cc/CQV3-QLSL>].

²⁶ 29 U.S.C. § 213(a) (including exemptions for any employee “(1) . . . employed in a bona fide executive, administrative, or professional capacity,” “(3) . . . employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,” “(8) . . . employed in connection with the publication of any weekly, semi-weekly, or daily newspaper,” etc.).

²⁷ *Id.*

²⁸ *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1267 (4th Cir. 1996).

²⁹ *Id.*

³⁰ 29 U.S.C. § 202(b).

³¹ *Id.* § 206.

³² *Id.* § 206(a)(1)(C).

³³ *Id.* § 206(e)–(g).

B. Overtime Claims under the FLSA

Another provision that was created to combat labor issues concentrated on maximum hour and overtime compensation.³⁴ The FLSA provides a ceiling for the maximum number of hours “[e]mployees engaged in interstate commerce” can work in a typical workweek;³⁵ the standard is set at forty hours.³⁶ It also requires employers to pay employees at least one and a half times regular pay for any hours worked above that maximum.³⁷ This is referred to as overtime compensation.³⁸

Claims under the FLSA typically relate to minimum wage or maximum hour claims, but an increase in straight time compensation claims has created questions regarding FLSA applicability.³⁹ “Straight time” refers to the regular wages employees are entitled to for the hours they work up to the forty-hour maximum or based on their contract.⁴⁰ Overtime compensation claims under the FLSA typically develop when an employee has worked more than his/her contractually required workweek and wishes to bring a claim for deficient or lacking overtime compensation. However, issues arise if the employee has not alleged hours worked above the FLSA forty-hour maximum, as in there was no claim beyond the straight time hours. Courts have historically noted that the presence, or lack thereof, of these maximum hour allegations marks the difference between overtime gap pay and pure gap pay claims.⁴¹ Some courts consider this distinction the lynchpin for viability of claims.⁴²

If an employee has not alleged overtime hours, it is deemed a pure gap time claim and not allowable under the FLSA.⁴³ “Pure gap time” is “straight time wages for unpaid work during pay periods without overtime.”⁴⁴ In a pure gap time scenario, the employee typically has worked

³⁴ *Id.* § 207.

³⁵ *Id.* § 207(a).

³⁶ *Id.* § 207(a)(1).

³⁷ *Id.*

³⁸ *Id.* § 207.

³⁹ *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1267 (4th Cir. 1996).

⁴⁰ See *Overtime (Straight Time and Premium Rates)*, U. OF CAL., RIVERSIDE, <https://hr.ucr.edu/salary/comp/overtime.html> [<https://perma.cc/2HVL-FZGU>]; see also *What Is Straight time? How Is It Used in Work Week Overtime Calculations and Why Is It Necessary?*, REPLICON, <https://www.replicon.com/customer-zone2/kb-4762> [<https://perma.cc/J9B9-3EZH>].

⁴¹ See, e.g., *Carter v. City of Charleston*, 995 F. Supp. 620, 621 (D.S.C. 1997); see also *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 244 (3d Cir. 2014).

⁴² See *Monahan*, 95 F.3d at 1273; see also *Valcho v. Dallas Cty. Hosp. Dist.*, 658 F. Supp. 2d 802, 811 (N.D. Tex 2009).

⁴³ See, e.g., *Carter*, 995 F. Supp. at 621; see also *Davis*, 765 F.3d at 244.

⁴⁴ *Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063, 1077 (D. Nev. 2016); see also *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 115 (2d Cir. 2013).

over the time set in his or her contract, but has not worked more than forty hours. Altogether, pure gap time claims are those in which employees are seeking compensation for the hours they worked and were not paid for, despite not exceeding the FLSA forty-hour threshold. The central claim an employee alleges is that he or she deserves overtime compensation for the hours worked in the gap between their contractual workweek and the FLSA maximum hour threshold. It is generally understood by courts that claims for pure gap time are not viable under the FLSA.⁴⁵ Despite having no available recourse under the FLSA, a remedy may still exist for breaches under contractually defined recourse and/or state contract laws.⁴⁶

If the employee *has* alleged that he/she worked overtime hours, courts will deem it an overtime gap time claim. Courts are divided over whether these claims warrant protection through the FLSA. Overtime gap time is triggered when the employee alleges he/she “exceeds the overtime threshold.”⁴⁷ Specifically, an overtime gap time claim is one in which the employee (1) has allegedly worked forty or more hours, and (2) seeks overtime compensation for his/her overtime hours, but (3) also seeks compensation under the FLSA for those hours worked, but not paid for, *below* the forty-hour maximum threshold.⁴⁸ Some courts have found this is an acceptable claim to bring under the FLSA.⁴⁹ The Fourth Circuit, for example, stated that “the employment contract does not expressly or implicitly compensate an employee for non-overtime hours.”⁵⁰ The Northern District of Texas also noted that employers have not fulfilled their obligation to pay for overtime unless they have also paid all straight time compensation for regular workweek hours.⁵¹ Meaning, when an overtime compensation claim is brought, the straight time compensation must also be paid, which equates to gap time payment in such a scenario. On the other hand, courts that oppose overtime gap time compensation ground their decisions in the text of FLSA.⁵²

⁴⁵ See, e.g., *Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009).

⁴⁶ See *Monahan*, 95 F.3d at 1280.

⁴⁷ *Sargent*, 171 F. Supp. 3d at 1078.

⁴⁸ See, e.g., *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 244 (3d Cir. 2014); see also *Lundy*, 711 F.3d at 115.

⁴⁹ See *Monahan*, 95 F.3d at 1273; see also *Valcho v. Dallas Cty. Hosp. Dist.*, 658 F. Supp. 2d 802, 811 (N.D. Tex 2009).

⁵⁰ *Sargent*, 171 F. Supp. 3d at 1078 (citing *Monahan*, 95 F.3d at 1273).

⁵¹ *Valcho*, 658 F. Supp. 2d at 811.

⁵² *Lundy*, 711 F.3d at 116 (“[T]he text of FLSA requires only payment of minimum wages and overtime wages. It simply does not consider or afford a recovery for gap-time hours.” (citation omitted)).

C. Collective Bargaining and Exemptions

Employers may be exempt from some of these provisions and are also entitled to create employment agreements and collective bargaining agreements.⁵³ Section 213 of the FLSA sets the parameters for the allowable exemptions. Subject to additional requirements, it provides a general excusal from FLSA compliance for “any employee employed in a bona fide executive, administrative, or professional capacity.”⁵⁴ The FLSA also exempts “certain computer employees.”⁵⁵

In order to determine whether a worker’s job qualified for an exemption, the Department of Labor created the job duties test.⁵⁶ The Department of Labor revised the original job duties test in 1949, and it is now commonly referred to as the “short duties test.”⁵⁷ The test required proof that the employee’s primary duty consisted of (i) “[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer,” and (ii) include[d] the exercise of ‘discretion and independent judgment.’”⁵⁸ Despite the seeming simplicity of a two-factored test, the provisions were deemed “complicated and contained difficult provisions to apply,”⁵⁹ so they were replaced in 2004 with the “long duties test.” The new regulations are “essentially the same” for features such as bona fide administrative capacity.⁶⁰ A benefit of the new regulations was purportedly its use of “plain language so that employees can understand their rights to overtime pay and employers can know their responsibilities for overtime pay.”⁶¹ The regulation had to be changed because of the desire to provide certainty about the scope of the rules, which would benefit both the employee and employer.

Despite the improved clarity of the language, employers do not easily qualify for exemptions. The Fourth Circuit noted that “exemptions

⁵³ See 29 U.S.C. § 207(b); see also *Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009) (allowing the use of collective bargaining agreements, and explaining the interworking between contractually defined work schedules and statutorily defined overtime under the FLSA).

⁵⁴ 29 U.S.C. § 213(a)(1).

⁵⁵ *Fact Sheet 17R: Administrative Duties Test: Court Decision*, DEP’T OF LAB., WAGE & HOUR DIV. (July 2008), https://www.dol.gov/whd/overtime/fs17r_geico.htm [<https://perma.cc/BJ2H-JNQE>].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *In re Farmers Ins. Exch., Claims Representatives’ Overtime Pay Litig.*, 481 F.3d 1119, 1127 (9th Cir. 2007) (citing 29 C.F.R. § 541.2 (2004)).

⁵⁹ *Fact Sheet 17R*, *supra* note 55.

⁶⁰ *Robinson-Smith v. Gov’t Emps. Ins. Co.*, 323 F. Supp. 2d 12, 18 (D.D.C. 2004), *rev’d on other grounds*, 590 F.3d 886 (D.C. Cir. 2010).

⁶¹ *Fact Sheet 17R*, *supra* note 55.

from or exceptions to the Act's requirements are to be narrowly construed against the employer asserting them."⁶² The Eighth Circuit also agreed that the "FLSA should be given a broad reading, in favor of coverage."⁶³ Moreover, the Supreme Court determined that application of the FLSA is to be "construed liberally."⁶⁴ This rationale can be said to foreshadow the 2016 expansion of coverage, which will be discussed later in this Comment.

Another option beyond exemption is the ability to engage in bargaining and contracting. However, the Department of Labor imposes additional restrictions if an employer utilizes these employment agreements and collective bargaining.⁶⁵ Section 207 of the FLSA requires that contracts for exemption must stipulate that the employee will be employed no more than "forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week," based on fifty-two consecutive weeks of employment.⁶⁶ Alternative requirements may be met based on a twenty-six week period⁶⁷ or if the employing entity is a qualifying "independently owned and controlled local enterprise."⁶⁸

As long as the provisions of the agreement are in accordance with the FLSA, the agreement should be permitted, even if not expressly written.⁶⁹ At times these agreements may even contractually extend protection beyond what is required by the FLSA.⁷⁰ A key provision of these agreements typically is the demarcation of an employee's "work-week" or expected hour requirement.⁷¹ Violation of these agreements, however, does not immediately trigger protection under the FLSA because not all claims brought pertaining to overtime compensation are applicable under the FLSA. For example, the Maryland District Court held that there was no plausible FLSA claim for overtime compensation, despite contractual language that specified "[w]henver any employee entitled to overtime pay works in excess of *his regularly assigned*

⁶² *Johnson v. City of Columbia, S.C.*, 949 F.2d 127, 129–30 (4th Cir. 1991) (quoting *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982)).

⁶³ *Kelley v. Alamo*, 964 F.2d 747, 749 (8th Cir. 1992).

⁶⁴ *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959).

⁶⁵ 29 U.S.C. § 207(b).

⁶⁶ *Id.* § 207(b)(2).

⁶⁷ *Id.* § 207(b)(1).

⁶⁸ *Id.* § 207(b)(3).

⁶⁹ *See Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1275 (4th Cir. 1996) (determining that an employment agreement "clearly existed," "[a]lthough there were no written contracts between the [parties]").

⁷⁰ *Id.* at 1273 (finding that the county's employment agreement was allowable because it complied with the FLSA regulations and even provided additional, favorable features).

⁷¹ *See Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009).

workweek or work schedule, he shall be paid for such overtime work at a rate of time and one-half for such overtime.”⁷² The Court determined that even if the bargaining agreement had been violated—because the employee may have worked hours in excess of the regularly scheduled workweek without receiving time and one-half pay for it—the employee needed to have exceeded the FLSA designated hours threshold in order to bring the claim.⁷³ The FLSA itself must be violated, not just the contract.⁷⁴

III. CREATION OF THE CIRCUIT SPLIT

Currently, four Circuits have heard cases that included overtime gap time claims: the Second Circuit,⁷⁵ the Third Circuit,⁷⁶ the Fourth Circuit,⁷⁷ and the Ninth Circuit.⁷⁸ The Third Circuit evaded the issue because it found that the plaintiffs did not allege overtime hours; factually, it was merely a pure gap time claim.⁷⁹ The Ninth Circuit similarly avoided deciding the overtime gap time issue because the plaintiffs failed to raise the argument in the lower court.⁸⁰ The Fourth and Second Circuit’s decisions ultimately outline the wedge between pure and overtime gap time claims.

A. The Fourth Circuit: Allowing Overtime Gap Time Claims

The Fourth Circuit in *Monahan v. County of Chesterfield, Va.*⁸¹ created the precedent for allowing overtime gap time claims.⁸² In *Monahan*, twelve police officers requested straight time back pay.⁸³ A partial exemption to the maximum hours rule exists under the FLSA provision 29 U.S.C. § 207(k) for employment of police officers. It “raises the average number of hours the employer can require law enforcement and fire protection personnel to work without triggering the overtime requirement.”⁸⁴ Officers were regularly scheduled to work 135 hours in

⁷² *Id.* (emphasis in original).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013).

⁷⁶ *Davis v. Abington Mem’l Hosp.*, 765 F.3d. 236 (3d Cir. 2014).

⁷⁷ *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263 (4th Cir. 1996).

⁷⁸ *Adair v. City of Kirkland*, 185 F.3d 1055 (9th Cir. 1999).

⁷⁹ *Davis*, 765 F.3d. at 244.

⁸⁰ *Adair*, 185 F.3d at 1062–63.

⁸¹ 95 F.3d 1263 (4th Cir. 1996).

⁸² *Id.* at 1265.

⁸³ *Id.*

⁸⁴ *O’Brien v. Town of Agawam*, 350 F.3d 279, 290 (1st Cir. 2003).

a twenty-four-day cycle and occasionally required to work a 144-hour twenty-four-day cycle.⁸⁵ The overtime threshold in this scenario was 147 hours for a twenty-four-day cycle,⁸⁶ and the County provided time and one-half pay for all hours worked above 147 hours.⁸⁷ There were numerous occasions in which the officers worked above the 135-hour regular cycle but below 147 hours.

The question the court faced was whether the officers should be able to receive the straight time rate of pay for the hours worked within the gap between regular hours and the FLSA overtime threshold for law enforcement. The Court divided the claims into two categories: (1) those associated with pay periods in which officers did exceed the FLSA overtime threshold, or overtime gap time claims, and (2) those associated with pay periods in which officers did *not* exceed the FLSA overtime threshold, also known as pure gap time claims.⁸⁸

The Fourth Circuit ultimately determined that the employees' claims for overtime gap time and pure gap time failed. The conclusion was based on the *factual* finding that the officers had in fact been compensated for all non-overtime hours via their annual salaries.⁸⁹ The salaries were distributed on a fixed biweekly payment schedule.⁹⁰ This is important because the fixed schedule shows that the salary was not contingent on the number of hours worked that week, implying that slight hour fluctuations that remained below the FLSA cap would not deserve additional compensation. This is an idea the First Circuit also discussed in *O'Brien v. Town of Agawam*.⁹¹ *O'Brien* is similar to *Monahan* because it also involved claims for overtime by salaried police officers.⁹² The First Circuit noted that when an annual salary is provided and each hour worked is not tracked for payment alterations, the salary is said to cover both straight time and additional hours worked.⁹³ The First Circuit also declined to call the additional hours worked between the contracted hour limit and FLSA maximum hour "overtime" hours.⁹⁴ Rather, overtime is a technical term when relating to the FLSA, regardless of what the parties agree to in a collective bargaining agreement.

⁸⁵ *Monahan*, 95 F.3d at 1265–66.

⁸⁶ *Id.* at 1265.

⁸⁷ *Id.* at 1266.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1272.

⁹⁰ *Id.* at 1275.

⁹¹ 350 F.3d 279, 286–90 (1st Cir. 2003).

⁹² *Id.*

⁹³ *See id.* at 289.

⁹⁴ *Id.*

The plaintiffs in *Monahan* argued that when officers worked above 135 hours but below 147 hours, the employer stretched their salaries to cover these hours instead of providing an increase, making their wages per hour lower than usual.⁹⁵ The court rejected this argument, noting that government employers should be allowed to balance their budgetary constraints with the FLSA by adjusting or reducing hours, without having to face a FLSA claim.⁹⁶ Additionally, the court found it persuasive that the officers accepted their weekly paychecks at this fixed rate on multiple occasions, furthering the idea that there was no expectation for additional payment between the straight time hours and FLSA cap.⁹⁷

However, the court noted that overtime compensation is not satisfied unless the concomitant straight time compensation for that same work period has also been paid.⁹⁸ This means that the officers could *still* bring a claim under the FLSA overtime provisions so long as the straight time compensation had not been paid, even though no additional overtime compensation would be needed, since the annual salary was already stretched to cover the extra hours. Thus, the court opened the door to overtime gap time claims under the FLSA when workers exceed the maximum hour threshold and straight time compensation was not fully paid.

The *Monahan* court relied on a case from the Tenth Circuit,⁹⁹ which held that the overtime gap time claims brought for meal time compensation were warranted under the FLSA, but at the regular hourly rate, not at time and one-half pay.¹⁰⁰ The Fourth Circuit in *Monahan* also looked to the Department of Labor for interpretive guidance. The court utilized 29 CFR § 778.322, which affirms that any straight time hours compensated within an overtime gap time claim should be based on the regular rate, and overtime hours should be compensated at the time and one-half rate.¹⁰¹ The court also used 29 CFR § 778.315, which supports the concept that overtime compensation “cannot be said to have been paid to an employee unless all the straight time compensation due him for the non-overtime hours under his contract (express or implied) or under any applicable statute has [also] been paid.”¹⁰² Lastly, the

⁹⁵ *Monahan*, 95 F.3d at 1266.

⁹⁶ *Id.* at 1276.

⁹⁷ *Id.* at 1275.

⁹⁸ *Id.* at 1272.

⁹⁹ *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145 (10th Cir. 1992).

¹⁰⁰ *Id.* at 1155.

¹⁰¹ 29 C.F.R. § 778.322.

¹⁰² *Id.* § 778.315.

court turned to 29 CFR § 778.317, which further dictates that agreements not to compensate for non-overtime hours are not appropriate either.¹⁰³ The crux of the issue is that employees must be paid for the straight time hours that remain unpaid before employers can be said to have fulfilled their obligation to pay for overtime.¹⁰⁴

*Koelker v. Mayor of Cumberland (Md.)*¹⁰⁵ represents another case allowing overtime gap time claims.¹⁰⁶ Plaintiffs were firefighters who sought “monetary relief for defendant’s alleged failure to pay wages for all hours worked and time-and-a-half for overtime wages.”¹⁰⁷ The FLSA provision 207(k) provides that firefighters also qualify for special maximum hour calculation.¹⁰⁸ Under these facts, a “204-hour overtime threshold applies.”¹⁰⁹

The plaintiffs also agreed to a collective bargaining agreement, which defined their “regularly assigned workweek or work schedule.”¹¹⁰ The agreement allowed for overtime compensation for hours worked in excess of the assigned workweek in the cases of emergencies, but did not provide full overtime compensation for all overtime hours worked when the department was understaffed.¹¹¹ It was possible for firefighters to work above their contractually defined workweek and not be paid for those hours because they were under the FLSA maximum-hour threshold and receiving compensation above minimum wage.¹¹²

The Maryland District Court found that straight time compensation for work periods during which the employee also alleges “FLSA overtime” should be addressed separately than work periods that did not allege FLSA overtime.¹¹³ Thus, it determined that no overtime compensation would be provided for hours not exceeding the maximum defined in the FLSA, which are pure gap time claims, or did not fall below the statutorily required minimum wage. The court reasoned that “all hours worked under the statutory maximum are non-overtime labor,’ even if the ‘CBAs [collective bargaining agreements] label such extra

¹⁰³ *Id.* § 778.317.

¹⁰⁴ *See id.* § 778.315.

¹⁰⁵ 599 F. Supp. 2d 624, 631 (D. Md. 2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 627.

¹⁰⁸ 29 U.S.C. § 207(k) (Firefighters are not to exceed a ratio of working 216 hours in a 28-day shift. If the firefighter works less than a 28-day shift but more than 7 days, the maximum work hours allowed is diminished proportionally to maintain the 216 hours/28 day ratio.).

¹⁰⁹ *Koelker*, 599 F. Supp. 2d at 630.

¹¹⁰ *Id.* at 628.

¹¹¹ *Id.*

¹¹² *See id.* at 631.

¹¹³ *Id.* at 632–33.

pay overtime.”¹¹⁴ Failure to pay contractually defined overtime at the time and one-half rate is a dispute that should be handled under “a grievance and arbitration procedure.”¹¹⁵

Notably, the plaintiffs also alleged uncompensated overtime hours above the FLSA threshold. The court determined that “a straight time compensation claim ‘for gap hours when overtime hours [are] worked during a pay cycle’” must be compensated.¹¹⁶ The rationale was in accordance with *Monahan*, which notes that payment for previously uncompensated straight time hours is required in order to fulfill the overtime compensation requirements.¹¹⁷

B. The Second Circuit: Disallowing Overtime Gap Time Claims

The Second Circuit, in its 2013 decision of *Lundy v. Catholic Health Sys. of Long Island, Inc.*,¹¹⁸ opposed the Fourth Circuit’s view in *Monahan* and held that there is no FLSA protection for pure gap time claims or overtime gap time claims.¹¹⁹ In *Lundy*, nurses and healthcare providers brought a claim for payment deducted from their paychecks even though they were working through breaks, working additional hours before and after their shifts, and spent time attending training programs.¹²⁰

The Second Circuit held that the “FLSA does not provide for a gap-time claim even when an employee has worked overtime.”¹²¹ The court looked to the FLSA’s text¹²² for direction and expressly denied the persuasiveness of “the interpretive guidance on which *Monahan* relied.”¹²³ It stated that the focus of the FLSA is on minimum wage and maximum hours worked, not gap time claims.¹²⁴ When looking to the intent behind the FLSA, the court’s rationale was founded in the concept that state law claims provide a basis for employment claims and these federal regulations are merely designed to supplement areas that are lacking without creating a federal remedy for all such disputes.¹²⁵ Further, the

¹¹⁴ *Id.* at 631.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 635.

¹¹⁷ *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1273 (4th Cir. 1996).

¹¹⁸ 711 F.3d 106 (2d Cir. 2013).

¹¹⁹ *Id.* at 110.

¹²⁰ *Id.* at 111.

¹²¹ *Id.* at 116.

¹²² See 29 U.S.C. §§ 201–19.

¹²³ *Lundy*, 711 F.3d at 116.

¹²⁴ *Id.*

¹²⁵ *Id.*

Court analyzed how much deference should be given to interpretations, as opposed to the regulations themselves.¹²⁶ It cited a previous Second Circuit case that held that interpretations, such as those promulgated by the Department of Labor, “are not binding and do not have the force of law.”¹²⁷ Adding to this, the court deemed there was no evidence to support the Department of Labor’s interpretation.¹²⁸

Lastly, the court relied heavily on another previous case from the Second Circuit, *United States v. Klinghoffer Bros. Realty Corp.*¹²⁹ The court in *Klinghoffer* ruled that an agreement not to compensate an employee for non-overtime hours “would not violate the limited protections of the FLSA.”¹³⁰ *Klinghoffer* involved claims for nonpayment of compensable hours worked which were “borderline,” such as “lunch on the job, preparation for work, etc.”¹³¹ The court accepted the validity of the agreement for nonpayment of these gap time hours because this merely equated to an acceptance of reduction in pay for the total hours worked below FLSA overtime.¹³² This provision was acceptable as long as the reduced pay rate exceeded the minimum wage requirement.¹³³ If the regular rate is recalculated to account for the effect of the nonpayment for the gap time hours, the rate is not a violation as long as it remains above the minimum wage. *Lundy* reaffirmed this by determining that the “FLSA does not provide recourse for unpaid hours below the 40-hour threshold, even if the employee also works overtime hours the same week,” if the reduced rate is above or at minimum wage.¹³⁴

Klinghoffer also addressed the government’s argument alleging that straight time compensation above the minimum wage could not be reallocated to cover deficiencies in overtime compensation.¹³⁵ The government argued that reallocation of wages would equate to paying one and one-half the minimum rate rather than one and one-half the regular rate.¹³⁶ The court reasoned that § 207 of the FLSA (the maximum hour regulation), and § 206 (the minimum wage provision), were enacted to achieve different purposes.¹³⁷ Weight should be given to the

¹²⁶ *Id.*

¹²⁷ *Id.* (citing *Freeman v. Nat’l Broad. Co., Inc.*, 80 F.3d 78, 83 (2d Cir. 1996)).

¹²⁸ *Id.* at 117.

¹²⁹ 285 F.2d 487 (2d Cir. 1960).

¹³⁰ *Id.* at 494.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. 2013).

¹³⁵ *Klinghoffer*, 285 F.2d at 493.

¹³⁶ *Id.* at 493–94.

¹³⁷ *Id.* at 494 (elucidating that § 206(a), the minimum wage provision, “is directed at providing

different wording used. Section 207 is the provision governing the maximum hour and overtime compensation provisions and calls for “one and one-half times the *regular rate* at which he is employed.”¹³⁸ To this point, the Second Circuit seems to be in accordance with the Fourth Circuit. Both agree that the “base for computing ‘time and a half’ is the regular, rather than the minimum, wage.”¹³⁹

C. Continued Acknowledgement of the Distinction between Pure Gap Time and Overtime Gap Time

Recent decisions pertaining to this topic have either acknowledged but avoided taking a stance on the split or sided with the Second Circuit. In 2014, the Third Circuit acknowledged the split between the Second and Fourth Circuits. The court reaffirmed the precedent across many courts denying pure gap time claims.¹⁴⁰ Nonetheless, the Third Circuit refrained from addressing whether overtime gap time claims are possible under the FLSA because the plaintiffs in the case did not allege any overtime hours.¹⁴¹ Both the District Court of Nevada and the District Court of New Jersey sided with the Second Circuit in respective 2016 opinions.¹⁴² In *Sargent v. HG Staffing, LLC*,¹⁴³ the Nevada District Court merely stated that it could not find persuasive support to rule against the Second Circuit.¹⁴⁴ In *Hensley v. First Student Mgmt., LLC*,¹⁴⁵ plaintiffs did allege uncompensated time in excess of forty hours.¹⁴⁶ The New Jersey District Court found the Second Circuit’s appraisal persuasive regarding the unreliability of the Department of Labor’s interpretation. The court determined that any gap in coverage should be covered by state law.¹⁴⁷

a minimum living standard, and can be satisfied so long as the weekly wage is sufficient to provide that minimum. Section 207(a), on the other hand, is concerned also with deterring long hours by making such long hours more expensive for the employer.”)

¹³⁸ 29 U.S.C. § 207(a)(1) (emphasis added).

¹³⁹ *Klinghoffer*, 285 F.2d at 494; see also *Fact Sheet 17R*, *supra* note 55.

¹⁴⁰ *Davis v. Abington Mem’l Hosp.*, 765 F.3d 236, 244 (3d Cir. 2014).

¹⁴¹ *Id.*

¹⁴² *Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063, 1078–79 (D. Nev. 2016) (“[t]he plain language of the FLSA does not encompass gap time pay”); see also *Hensley v. First Student Mgmt., LLC*, 2016 WL 1259968, at *4 (D.N.J. Mar. 31, 2016).

¹⁴³ 171 F. Supp. 3d 1063 (D. Nev. 2016).

¹⁴⁴ *Id.* at 1078.

¹⁴⁵ 2016 WL 1259968 (D.N.J. Mar. 31, 2016).

¹⁴⁶ *Id.* at *3.

¹⁴⁷ *Id.* at *4.

IV. NEW REGULATIONS UNDER THE FLSA

The FLSA provisions allow specific exemptions for the overtime pay regulation,¹⁴⁸ but FLSA regulations continue to be updated.¹⁴⁹ In 2016 the Department of Labor proposed a rule (“Final Rule”) that would extend the FLSA’s overtime compensation eligibility, increasing the scope of protection to include an additional 4.2 million workers across the country.¹⁵⁰ The dollar impact would equate to an extra \$1.2 billion per year in compensation for workers across the country.¹⁵¹ However, on November 22, 2016, an emergency preliminary injunction stopped the changes from taking effect.¹⁵² Since the preliminary injunction, the Fifth Circuit has granted the Department of Labor an extension until June 30, 2017 to file its reply brief.¹⁵³

The bearing of these revisions on the job market creates a pressing need for certainty surrounding the types of overtime compensations claims that can be brought under the FLSA. Clarification benefits employers and employees alike because it enables employers to prepare for the type of liability they may face and delineates the solutions available to employees. The resolution of this decision is also imperative for determining the type of liability employers may be exposed to. Complications from the Final Rule being in flux have already occurred, as some employers began complying with the Final Rule prior to November 22;¹⁵⁴ it is uncertain how the payment these employers have already made will impact the pending litigation or potential Final Rule modifications.

Current goals under the Trump Administration have sparked further talk of the many issues with the Final Rule; some have proposed adopting a more modest rule,¹⁵⁵ which would likely cause employers to breathe a small sigh of relief. Some of the major concerns behind the

¹⁴⁸ See discussion *supra* Section II.D.

¹⁴⁹ See WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL32088, THE FAIR LABOR STANDARDS ACT: A HISTORICAL SKETCH OF THE OVERTIME PAY REQUIREMENTS OF SECTION 13(A)(1) (May 9, 2005) (outlining various revisions to the FLSA throughout its history).

¹⁵⁰ See *Final Rule: Overtime*, DEP’T OF LAB., WAGE & HOUR DIV. <https://www.dol.gov/whd/overtime/final2016/> [<https://perma.cc/GM8T-CXQV>].

¹⁵¹ *Id.*

¹⁵² *Nevada v. U.S. Dep’t of Labor*, 218 F.Supp.3d 520 (E.D. Tex. 2016).

¹⁵³ *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern District of Texas*, U.S. DEP’T OF LAB., <https://www.dol.gov/whd/overtime/final2016/litigation.htm> [<https://perma.cc/F5EQ-XZ3F>].

¹⁵⁴ Ben Penn, *Overtime Rule Under Trump Enters Repeal and Replace Talks*, BLOOMBERG BNA (March 1, 2017), <https://www.bna.com/overtime-rule-trump-n57982084585/> [<https://perma.cc/8SVE-J3J3>].

¹⁵⁵ *Id.*

current Final Rule include “impos[ing] unwieldy costs and time-tracking obligations on employers and mak[ing] it harder for workers to climb the corporate ladder by eliminating lower-level manager positions”¹⁵⁶ and “making it impossible for employers and employees to set flexible work schedules.”¹⁵⁷

Prior to 2016, the last updates to the overtime regulations occurred in 2004.¹⁵⁸ According to the Department of Labor, the salary level set in 2004 was too low¹⁵⁹ and was insufficient given the current duties test.¹⁶⁰ The Department of Labor must balance the rigor of the duties test it employs and the appropriate height of the salary threshold it sets.¹⁶¹ The less rigorous the duties test is, the higher the salary threshold will be, and vice versa. Because the Department of Labor currently employs the short duties test, meaning more employees are exempt from FLSA protection, the Department of Labor determined the salary threshold needed to be higher, which would make more people qualify again. Further, the Department of Labor based this particular salary level¹⁶² on the standard salary level of the fortieth percentile within the lowest-wage Census Region in the United States.¹⁶³

V. LEVEL OF DEFERENCE GIVEN TO THE DEPARTMENT OF LABOR’S INTERPRETATION

The Department of Labor issues official interpretations that provide guidance for understanding the application of the FLSA,¹⁶⁴ and Part 778 of the Code of Federal Regulations “constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements.”¹⁶⁵ These were the regulations the Fourth Circuit analyzed in its opinion.¹⁶⁶ Both the FLSA statutes and the Department of Labor’s

¹⁵⁶ *Id.*

¹⁵⁷ Sean Higgins, *Trump Court Filing Could Be End of Obama Overtime Rule*, WASHINGTON EXAMINER (Jan. 25, 2017), <http://www.washingtonexaminer.com/trump-court-filing-could-be-end-of-obama-overtime-rule/article/2612960> [<https://perma.cc/2HSJ-L7K6>].

¹⁵⁸ *Questions and Answers*, DEP’T OF LAB., WAGE & HOUR DIV. (2016), <https://www.dol.gov/whd/overtime/final2016/faq.htm> [<https://perma.cc/6884-DAYV>].

¹⁵⁹ *Id.* (Salary Level ¶ 2).

¹⁶⁰ *See id.* (Salary Level ¶¶ 2, 5); *see also supra* notes 55–60 and accompanying text (discussing the tests provided by the Department of Labor used for determining employee eligibility for exemption from the FLSA).

¹⁶¹ *Questions and Answers*, *supra* note 158 (Salary Level ¶ 4).

¹⁶² *Id.* (Salary Level ¶ 1) (“[T]he ‘standard’ salary level will increase to \$913 per week.”).

¹⁶³ *Id.* (Salary Level ¶ 5).

¹⁶⁴ *See* 29 C.F.R. §§ 778.0–.603.

¹⁶⁵ *Id.* § 778.1.

¹⁶⁶ *See supra* text accompanying notes 101–104.

interpretations are entitled to deference, but the precise weight given to each will vary.¹⁶⁷

Typically, courts “defer to an agency’s reasonable construction of an ambiguous statute,”¹⁶⁸ which is referred to as *Chevron*¹⁶⁹ deference.¹⁷⁰ When the interpretation is disseminated in a formal manner, like the Code of Federal Regulations, precedent dictates that statutory ambiguity warrants *Chevron* deference.¹⁷¹ *Chevron* can be distilled to a two-step process for interpretation. First, a court must determine “whether Congress has directly spoken to the precise question at issue.”¹⁷² If Congressional intent is clear, the court is to follow it.¹⁷³ If “Congress has not directly addressed the precise question at issue,” the court proceeds to the next step, which dictates that “if the statute is silent or ambiguous with respect to the specific issue,” the court is to address “whether the agency’s answer is based on a permissible construction of the statute.”¹⁷⁴

*Seminole Rock*¹⁷⁵ and *Auer*¹⁷⁶ deference have developed prominence as alternatives to *Chevron*.¹⁷⁷ *Seminole Rock* and *Auer* deference are often used interchangeably.¹⁷⁸ They typically apply when an agency interprets “the *regulations* they write,” as opposed to when they “adopt reasonable agency interpretations of the *statutes* they administer,” which exemplifies *Chevron*.¹⁷⁹ A court should “enforce an agency’s interpretation of its own rules unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”¹⁸⁰ Notably, *Auer* deference

¹⁶⁷ See *Freeman v. Nat’l Broad. Co., Inc.*, 80 F.3d 78, 83–84 (2d Cir. 1996) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)).

¹⁶⁸ Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85 (2011).

¹⁶⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁷⁰ See *id.* at 844 (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer[.]”).

¹⁷¹ See *id.*

¹⁷² *Id.* at 842.

¹⁷³ *Id.* at 842–43.

¹⁷⁴ *Id.* at 843.

¹⁷⁵ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

¹⁷⁶ *Auer v. Robbins*, 519 U.S. 452 (1997).

¹⁷⁷ See Charles A. Breer & Scot W. Anderson, *Regulation Without Rulemaking: The Force and Authority of Informal Agency Action*, 47 ROCKY MTN. MIN. L. INST. 5-1, 5-24–39 (2001) (discussing the various applications of *Chevron*, *Auer*, and *Seminole Rock* deference).

¹⁷⁸ Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 814 (2015).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

has received much negative treatment.¹⁸¹ Although the Supreme Court recently denied certiorari to overrule *Auer v. Robbins*, Justice Clarence Thomas noted in his dissent “that the doctrine is on its last gasp.”¹⁸² Despite the denial of certiorari, the debate has not subsided. The Supreme Court granted certiorari for a Fourth Circuit case, *G.G. ex rel. Grimm v. Gloucester City School Board*,¹⁸³ pertaining to *Auer* deference. The case surrounds a regulation about transgender access to restrooms. The Department of Education provided in its regulations of Title IX that restrooms could be divided by sex.¹⁸⁴ In 2015, the Department of Education issued an opinion letter stating that, for the purposes of that regulation, transgender students must be distinguished by their gender identity.¹⁸⁵ The Gloucester City School Board disagreed and interpreted the term “sex” to mean “biological gender.”¹⁸⁶ Because a regulation was at issue, and not a statute, *Auer* applied instead of *Chevron*. The Fourth Circuit held that the Department’s interpretation deserved *Auer* deference.¹⁸⁷

Applying the *Auer* test, the Court determined that the regulation was ambiguous, the interpretation was not plainly erroneous, and was a result of fair judgment. Ambiguity arose because of the dissension between the parties’ interpretations.¹⁸⁸ After looking to various dictionary definitions of “sex” and how it was understood at the time of the Title IX regulations’ dissemination, the Court further determined the Department’s interpretation was not plainly erroneous or inconsistent with the text of the regulation.¹⁸⁹ Lastly, the Court determined it was a result of fair and considered judgment because it did not conflict with prior interpretations and was not merely a convenient litigating position or post hoc rationalization.¹⁹⁰ The Supreme Court did not grant Certiorari on the issue of whether to retain the *Auer* doctrine in general,

¹⁸¹ Barmore, *Auer in Action*, *supra* note 178, at 814.

¹⁸² *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari).

¹⁸³ 822 F.3d 709 (4th Cir. 2016) *cert. granted*, 137 S. Ct. 369 (2016), and *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017). The Court granted certiorari for the following issues: “2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought? 3. With or without deference to the agency, should the Department’s specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?” Petition for Writ of Certiorari, *Gloucester Cty. Sch. Bd.*, 137 S. Ct. 369 (No. 16-273).

¹⁸⁴ *G.G.*, 822 F.3d at 715.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 720–721.

¹⁸⁷ *Id.* at 723.

¹⁸⁸ *Id.* at 720–21.

¹⁸⁹ *Id.* at 721–22.

¹⁹⁰ *Id.* at 722.

but issues left to be addressed were whether *Auer* should be extended to unpublished opinion letters that carry no weight of law and whether the Department's interpretation should be given weight regardless of the deference determination.¹⁹¹ As of March 6, 2017, the judgment was vacated and the case remanded to "the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and the Department of Justice on February 22, 2017."¹⁹² The letter issued by the Departments withdrew the previously issued interpretive guidance "in order to further and more completely consider the legal issues involved."¹⁹³

In 2001, *United States v. Mead Corp.*¹⁹⁴ restricted *Chevron's* applicability to "cases where the agency was acting under a congressional delegation of lawmaking authority to the agency."¹⁹⁵ Justice Scalia's dissent critiqued the result in *Mead* for enabling legislative ambiguity to be decided by judges.¹⁹⁶ Justice Scalia reasoned that agency deference, as opposed to letting the judicial branch have the final say, "was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches."¹⁹⁷ Instead of accepting the premise that courts should depart from using *Chevron* in these cases, "Justice Scalia's dissent assumed that *Seminole Rock* deference survives and augments *Chevron*."¹⁹⁸ Under Justice Scalia's view, both *Seminole Rock* and *Chevron* are valid though distinct. Ultimately deference to the agency is of substantial importance.

VI. SOLUTIONS FOR THE SPLIT

There are two possible avenues for deciding this split: allowing or not allowing overtime gap time claims under the FLSA. Possible reasons for not allowing overtime gap time claims under the FLSA include a strict textualist reading of the statute, relying on contract law to provide a remedy for these claims, looking to the interpretive guidance set forth by the Department of Labor, and principles of equity for employers

¹⁹¹ *Gloucester County School Board v. G.G.*, SCOTUSBLOG (Mar. 6, 2017), <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/> [<https://perma.cc/MGE4-P8AS>].

¹⁹² *Id.*

¹⁹³ See *Dear Colleague Letter on Transgender Students*, DEP'T OF JUST. (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/XK7G-JMCM>].

¹⁹⁴ 533 U.S. 218 (2001).

¹⁹⁵ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088 (2008).

¹⁹⁶ *Mead*, 533 U.S. at 243 (Scalia, J., dissenting).

¹⁹⁷ *Id.* at 241.

¹⁹⁸ Eskridge & Baer, *supra* note 195, at 1089.

and employees. On the other hand, principles of equity may weigh in favor of allowing overtime gap time claims under the FLSA, and courts might not be compliant with the spirit of the FLSA unless they allow overtime gap time claims. When analyzing the Second Circuit's decision not to allow overtime gap time claims, there are some potential faults. First, the court did not provide any rationale for its additional assertions that the Department of Labor's interpretations were incorrect. Second, the Fourth Circuit's decision to allow overtime gap time claims remained relatively undisturbed for decades without any interference from the legislature. Despite potential arguments in favor of allowing these claims, however, the weight of reasoning tips in favor of not allowing overtime gap time claims.

A. Textualist Reading of the FLSA

Looking to the text of the FLSA provisions themselves, there is simply no stated recourse for straight time claims, which implicitly means there is no textual rationale for a FLSA-protected overtime gap time claim.¹⁹⁹ The root of the overtime gap time claim is a combination of alleged straight time payment deficiencies and overtime payment deficiencies. Employees can pursue the alleged overtime payment shortages because the FLSA is specifically aimed at establishing a federal minimum wage and an appropriate level of overtime compensation.²⁰⁰ However, as long as employers pay the overtime compensation, the statute's requirements are met, and the FLSA has been complied with.²⁰¹ This leaves no room to pursue straight time compensation, whether on its own or in conjunction with overtime claims.

The Fourth Circuit used the counterargument that an employer has not fully paid overtime compensation until the concomitant straight time compensation has also been adequately fulfilled.²⁰² However, the precise wording of the statute is as follows:

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

¹⁹⁹ See 29 U.S.C. §§ 201–219.

²⁰⁰ See *id.* §§ 206, 207.

²⁰¹ See, e.g., *Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009) (noting that a violation of a collective bargaining agreement does not enable an overtime compensation claim if the FLSA has not actually been violated).

²⁰² See *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1272 (4th Cir. 1996).

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.²⁰³

As the section clearly states, the overtime compensation is specifically cabined to the hours worked “in excess” of the forty-hour cap. The overtime language says nothing about deficient payment for hours worked below forty hours. Overtime gap time claims inherently include allegations about hours worked below forty hours. That aspect of the compensation claims has no founding in the text.

As noted in *Klinghoffer*, even if funds are reallocated to balance deficiencies in overtime compensation, if the overtime compensation is paid at the proper rate (time and one-half of the regular rate), the FLSA provision has been fulfilled.²⁰⁴ This means that it is an acceptable form of business structuring to intentionally take compensation away from straight time compensation and use it to pay for overtime hours, rather than providing extra pay.²⁰⁵

Notably, there may be tension between the minimum wage provision²⁰⁶ and the overtime provision²⁰⁷ if the straight time compensation reallocation causes the employer to violate the minimum wage provision. The minimum wage provision states that:

Every employer shall pay . . . wages at the following rates:
(1) except as otherwise provided in this section, not less than—

. . . .

(C) \$7.25 an hour[.]²⁰⁸

Reading this provision and the preceding one together, the reallocation of straight time compensation is still an acceptable strategy, as long as it does not result in the straight time compensation falling below \$7.25 an hour. *Klinghoffer* provided this argument,²⁰⁹ which the Second Circuit also cited.²¹⁰

²⁰³ 29 U.S.C. § 207(a)(1) (emphasis added).

²⁰⁴ See *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 493–94 (2d Cir. 1960); see also *supra* notes 85–90 and accompanying text (discussing *Monahan*’s enabling of stretching annual police salaries to cover additional, uncompensated hours worked).

²⁰⁵ See *supra* notes 85–90 and accompanying text.

²⁰⁶ 29 U.S.C. § 206.

²⁰⁷ *Id.* § 207.

²⁰⁸ *Id.* § 206.

²⁰⁹ *Klinghoffer*, 285 F.2d at 494.

²¹⁰ See *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 117 (2d Cir. 2013).

One argument against this might be that *Klinghoffer* appears to be internally inconsistent. The *Klinghoffer* court decided that a reduced rate of straight time compensation can still satisfy the FLSA's requirements if it at least meets minimum wage.²¹¹ Its reasoning was "an agreement does not become illegal merely because it takes the form of additional hours worked without compensation, rather than of an express reduction of the hourly rate."²¹² However, in the preceding discussion, the court also discussed that reallocation of wages should be based on the *regular* rate, rather than the *minimum* rate.²¹³ The discussion focused on the specific language used by the overtime provision, which requires *regular* rates to be utilized.²¹⁴ By emphasizing this language, the court implicitly disapproved of a reallocation if it lowers payment below the regular rate.

This creates tension as to whether the regular rate should be based on the contractually agreed upon rate or the normal straight time payment the employee usually receives. If the regular rate is indeed the typical straight time rate, then *Klinghoffer* is inconsistent when it allows the regular rate to be adjusted in order to engage in straight time compensation reallocation. When employers reallocate straight time compensation that already exceeds the minimum wage to contribute to overtime compensation, it retroactively lowers the regular rate of compensation. This is inconsistent because in one line of reasoning, the court allows for reduced rates, so long as the new rate still meets minimum wage. However, the court also emphasized that § 207 of the FLSA, the overtime provision, explicitly requires compensation be calculated based on "regular" rates, not "minimum" rates. There is a conflict between setting the minimum rate as the standard versus the regular rate.

A solution to this tension might be that the overtime compensation must initially be calculated at the regular rate, but employers can make retroactive adjustments. A court might find that the amount of overtime compensation that is due can be calculated prior to removing the funds. The regular rate would still be the base rate for determining what the overall lump sum of time and one-half compensation should have equated to during the work periods that the shift was made. In practice, if the regular hourly rate was ten dollars per hour, and an employee worked forty regular hours and ten overtime hours, the time and a half would be calculated from the regular rate (\$10/hour x 1.5). The fifteen-

²¹¹ *Klinghoffer*, 285 F.2d at 494.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 493-94 (citing 29 U.S.C. § 207(a)).

dollar overtime compensation due could then be taken from the forty hours worked, which would only mean an average of a thirty-seven-cent reduction for each hour, well within the minimum wage requirements. Facially, this remains compliant with the FLSA, and the overtime compensation is still based on the regular rate, even though the regular rate for the straight time hours was ultimately reduced during the pay period.

The follow-up argument against the Second Circuit's reallocation theory might be that allowing this process circumvents the original intention of the FLSA. Although the overtime compensation is being paid in full, the reallocation process enables intentional contract deviation on the back end. Allowing for this type of rule would create detrimental incentives for employers to imply both higher wages and compliant overtime compensation, when in reality the worker will be paid less. A final response to such an argument might be that this is a primary motivation behind contract law. State laws regarding contracts can protect employees against these types of bargains. Finally, we might only expect these cases to occur on the margins. There might not be many occasions in which an employer would intend to structure an employment agreement this way and even fewer scenarios for which the circumstances would play out as needed to foster this circumvention. Because of this, the better rule would be to leave the decision to the states, as acknowledged in *Lundy*,²¹⁵ rather than create a federally mandated regime.

B. Contract Law as an Alternative Remedy

Another reason why courts should deny overtime gap time claims is because they should be covered by contract law. It is sensible to allocate claims to the law that is intended to govern them. Straight time values are typically arranged by employment or collective bargaining agreements.²¹⁶ These bargaining agreements are first analyzed for whether they violate the FLSA;²¹⁷ if they do not, they have satisfied the statute's requirements.²¹⁸ Any later violations of the contract should not *then* be allowed to claim FLSA violations when they 1) passed FLSA inspection in the first place, and 2) are truly just claims about violating contracts.

²¹⁵ *Lundy*, 711 F.3d at 116.

²¹⁶ See *supra* text accompanying notes 69–74 (discussing a case with an employment contract that stated what the straight time or regular rate of compensation should be).

²¹⁷ See *supra* Section II.D (outlining the process for determining whether an exemption or collective bargaining agreement has satisfied the FLSA).

²¹⁸ *Id.*

Therefore, overtime claims should be governed by § 207 of the FLSA, and straight time claims should be governed by the contract law that covers the bargain itself and whether it was violated. This is a solution the *Monahan* court even acknowledged.²¹⁹ This does not intuitively mean that FLSA claims and contract violations cannot occur simultaneously, but it leaves room for distinct analysis. Also, it could mean that an employee still has a potential cause of action under a contract violation, even if there is no FLSA violation. This was what occurred in *Koelker*, which was a case where there was no FLSA claim, but the contract violation claim was still viable.²²⁰

C. Interpretive Guidance from the Department of Labor

In deciding how much weight to give the Department of Labor's interpretations, the Second Circuit acknowledged that the guidelines deserve deference but ultimately decided that certain provisions²²¹ were proselytized without any "statutory support or reasoned explanation."²²² When deciding the persuasiveness of the Department of Labor's interpretations, courts should apply *Chevron's* two-step analysis because the Department of Labor is interpreting a statute, not a regulation.²²³

One argument against the Second Circuit is that much of the court's rationale relied upon negative treatment of the Department of Labor's interpretation. However, no actual rationale is given for why the interpretation is inaccurate. The court merely claims that the interpretation is wrong, without indicating why.

A second possible argument against the Second Circuit might be that the court too flippantly dismissed the Department of Labor's interpretations without recognizing the appropriate level of deference they deserved. As previously discussed, overtime compensation can be calculated at the regular rate prior to any reallocation, still satisfying 29

²¹⁹ See *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1279–80 (4th Cir. 1996) (finding that a contract remedy may still exist, even though there was no remedy under the FLSA).

²²⁰ See *Koelker v. Mayor of Cumberland (Md.)*, 599 F. Supp. 2d 624, 631 (D. Md. 2009).

²²¹ See, e.g., 29 C.F.R. § 778.315.

²²² *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 117 (2d Cir. 2013).

²²³ See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

C.F.R. § 778.322.²²⁴ However, 29 C.F.R. § 778.315²²⁵ and 29 C.F.R. § 778.317²²⁶ are sticking points.

Under *Chevron* deference, we see that Congress has yet to address either of these specific provisions. Moving to the second step of the process, we must address whether the interpretation is a permissible construction under the statute.²²⁷ As iterated previously, the statute's language pertaining to fulfillment of the overtime compensation obligation states, "no employer shall employ any of his employees . . . [above the maximum hour cap] unless such employee receives compensation for his employment *in excess of the hours*."²²⁸ Again, it is clear the text says nothing of straight time hours. Moreover, it would be impermissible to read into this section a requirement beyond payment of excess hours, because it is similar to a post hoc rationalization.²²⁹ There is no established set of guidance from other agencies mirroring the Department of Labor's interpretation.²³⁰ Arguably, contract law's existence in handling these disputes is a signal *against* relying on overtime statutes as a remedy. Lastly, it is impermissible because the legislature *inclusio unius est exclusio alterius* refrained from specifying that the language included hours below the maximum threshold. Therefore, 29 CFR § 778.315 should not be considered persuasive.

Regarding 29 CFR § 778.317, the same argument against deferring to the Department of Labor would work. The relevant section of the FLSA for bargaining agreements is § 207.²³¹ The section lists acceptable forms of employment agreements and states that it is acceptable to have a contract if the agreement meets one of the qualifications listed and if the "employee receives compensation for employment in excess of twelve hours in any workday, or 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."²³² Therefore, it might be possible for an agreement

²²⁴ 29 C.F.R. § 778.322 (setting the guidelines for reducing the fixed workweek for which a salary is paid).

²²⁵ *Id.* § 778.315 ("[E]xtra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract . . . has been paid[.]").

²²⁶ *Id.* § 778.317 ("An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation.").

²²⁷ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²²⁸ 29 U.S.C. § 207(a)(1) (emphasis added).

²²⁹ See *supra* text accompanying note 190.

²³⁰ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722–23 (4th Cir. 2016).

²³¹ 29 U.S.C. § 207(b).

²³² *Id.*

satisfying § 207 to specify different overtime compensation rules between forty and fifty-six hours.

Lastly, under a formalistic reading, an agreement to allow straight time compensation reallocation is not the same as an agreement not to pay overtime compensation at all, despite the Department of Labor's intentions to consider these as structurally the same. A common principle in corporate law is the ability to intentionally structure your business in ways to avoid liability.²³³ Form is preeminent to spirit in business dealings, because clarity of law and limitation of liability are essential building blocks for competitive markets. We can apply the same principle to the competitive market of employment law. Plainly, compensation reallocation is a different type of payment agreement than one that refuses to pay any overtime. There is a formalistic difference between the two. For the reasons discussed above, 29 CFR § 778.317 should not be persuasive either.

In conclusion, the Department's interpretations should not survive *Chevron* deference, negating their power.

D. Principles of Equity

Disallowing the survival overtime gap time claims is equitable because it sets a clear standard for when employees can bring claims. Such clarity benefits both employers and employees. As discussed previously,²³⁴ the Department of Labor intended the new duties test to contain "plain language so that employees can understand their rights to overtime pay and employers can know their responsibilities for overtime pay."²³⁵ The concept blatantly specifies that part of the goal behind FLSA provisions is to clarify responsibilities and rights. Occasionally allowing employees to tack gap time claims onto overtime claims obscures clear cut indications of when employees have claims or not.

The Department of Labor should draw bright lines for FLSA compensation claims, resulting in claims that fall within the boundaries of either (1) payments, not qualifying for an exception, that dip below the minimum wage or (2) overtime hours. These lines are based on the actual sections specified in the statute,²³⁶ which already seem aimed at

²³³ *Walkovszky v. Carlton*, 18 N.Y.2d 414 (1966) (finding that a business owner was allowed to intentionally structure his taxi cab business in such a way as to limit liability, as long as they existed as formally distinct companies).

²³⁴ See *supra* text accompanying notes 55–61.

²³⁵ *Fact Sheet 17R*, *supra* note 55; see also *Robinson-Smith v. Gov't Emps. Ins. Co.*, 323 F. Supp. 2d 12, 18 (D.D.C. 2004), *rev'd on other grounds*, 590 F.3d 886 (D.C. Cir. 2010).

²³⁶ 29 U.S.C. §§ 206–207.

creating specific cut-offs. The second line becomes tenuous when plaintiffs try to muddle the distinction between straight time and overtime. A muddled line is problematic for employees because they do not know what their available remedies are, and it is an issue for employers because they do not know what type of liability they may be exposed to. Further, employers are left with fewer business strategies to implement (like straight time compensation reallocation), which could have a chilling effect on employer-employee contracting.

Allowing employees to bring straight time and overtime claims together may seem efficient, but only marginally so. Courts and Congress must consider the effect of a rule beyond the litigation itself. In an employment relationship, benefits are lost when employers are artificially restricted from innovating in the workplace because they are unclear what liability they face. In this case, contracts and bargaining agreements could suffer because employers are not incentivized to create alternative overtime payment or bonus schemes. These schemes may have been more beneficial for employees; they certainly would not be more harmful, because the bright lines of the FLSA provisions would still provide a compensation floor which employers cannot dip beneath.

Alternative agreements may actually be more beneficial to employees and would likely flourish upon clarification of whether the FLSA applies to form versus substance. The FLSA lends itself to equity in form, given its heavy emphasis on discrete numbers. As it stands, incentive schemes can be destroyed by ambiguous attacks on particular *forms* of agreements, even if they are structurally FLSA-compliant. An example of this would be the attacking of any contract designed to enable straight time reallocation, though, realistically, the contract has only altered straight time requirements and not touched overtime regulations. Ironically, these attacks succeed using rationale regarding the *spirit* of the agreements. For example, one bringing an overtime gap time claim might state that straight time reallocation is unfair to employees because it appears to substantively alter when overtime compensation is paid out. Without clarity about whether the FLSA is supposed to protect the substance or the form of overtime compensation, that employee might succeed on the substantive equity argument. Fortunately, courts can provide clarity if employers and employees know that overtime claims do not include straight time claims.

Disallowing overtime gap time claims is also equitable if we consider that courts should give credence to the widely accepted premise that pure gap time claims are not allowed. The reasoning for this precedent is easily transferable to overtime gap time claims. As many courts have already established, pure gap time claims are not allowable because the FLSA does not cover straight time claims. It would therefore

be inappropriate to set a precedent allowing straight time claims to proceed via the FLSA under the guise of an overtime claim.

A final equity argument against overtime gap time claims is the fact that cases that are brought up through the courts are ones on the margin. The cases of error and insufficient compensation do not represent the majority of overtime interactions that occur because “[m]ost collective bargaining agreements provide overtime compensation far more generously than the FLSA mandates.”²³⁷ Beyond this, the cases in which overtime pay is allegedly insufficient normally fall into a category easily within the scope of the FLSA. Employers can implement competitive practices regarding their overtime compensation, which will attract employees. The minute instances of overtime gap time claims do not need to be forcibly undertaken by the FLSA when we can rely on contract law to handle these scenarios.

VII. CONCLUSION

The split should be decided in favor of the Second Circuit’s conclusion that overtime gap time claims are not actionable under the FLSA. The FLSA should not be interpreted to allow overtime gap time claims because it is not covered in the text of the statute. Further, the Department’s interpretations do not deserve deference because the conclusions drawn are impermissible and lack foundation. Additionally, the overwhelming reasoning for disallowing pure gap time claims, on which all courts appear to agree, should be given weight for its treatment of straight time pay.

The better precedent would follow a narrower reading of the FLSA and allow state contract law to fill in the gaps as necessary. This solution will be beneficial because it will not preclude employees from protection, but simply resist overregulation. If Congress deems this too narrow of an interpretation, it can always clarify or address straight time compensation as a separate concern.

The negation of overtime gap time claims will also be important for its impact on the Department of Labor’s interpretive guidance. Although this Comment analyzed the statute under *Chevron*, departure from the Department of Labor’s guidance might further destroy *Auer* deference. If the Supreme Court ever hears argument about *Auer* deference for agency interpretations²³⁸ the decision will likely have an an-

²³⁷ *Gap Time Explained*, COLLINS, LOUGHRAN & PELOQUIN, P.C. (Mar. 28, 2014), <http://colinslabor.com/wp-content/uploads/pdfs/Gap-Time.pdf> [<https://perma.cc/9YRM-A53A>].

²³⁸ See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 137 S. Ct. 369 (2016), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017) (Although *G.G.* was remanded, it represents the very real possibility of the Court hearing a challenge to the relevance of *Auer* deference.)

cillary effect on Department of Labor interpretations. Whatever the outcome is, interpretations about overtime gap time claims will need to be squared with the decision. If the case and the concern about overtime gap time claims are decided against agency interpretations, it could have significant effect on how agency interpretations are viewed thenceforth. Agencies may face heightened requirements for disseminating their interpretations and may also have a higher burden for rationalizing what they opine. Ultimately, this is an unsettled but important matter for agencies, employers, and employees, and the Second Circuit's resolution should be upheld.