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Appendix A

FOR PUBLICATION

United States Court of Appeals
For the Ninth Circuit

No. 22-16079
D.C. No. 3:20-cv-07400-RS

Kristen Silloway; Christa Duran;
Brigitta Van Ewijk,

Plaintiffs-Appellants,

v.

City and County of San Francisco,

Defendant-Appellee.

No. 22-16568
D.C. No. 3:18-cv-01494-RS

Tatyana Litvinova,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

City and County of San Francisco,

Defendant-Appellee.

OPINION

Appeals from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted February 12, 2024
San Francisco, California

Filed September 11, 2024

Before: Carlos T. Bea, David F. Hamilton,*
and Morgan Christen, Circuit Judges.

Opinion by Judge Hamilton;
Partial Concurrence and Partial Dissent
by Judge Bea

SUMMARY**

Fair Labor Standards Act

The panel reversed the district court's summary judgment for the City and County of San Francisco, and remanded, in two cases in which staff nurses employed by the City allege that the City violated the Fair Labor Standards Act (FLSA) by not paying them time-and-a-half for overtime work.

The FLSA provides that employees should generally receive time-and-a-half pay for working overtime, but one of the Act's exemptions from that requirement

* The Honorable David F. Hamilton, United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

applies to employees working in a bona fide professional capacity. The City claims that staff nurses fall into that exemption.

The dispute over whether the professional-capacity exemption applies to staff nurses depends on whether the City has shown that staff nurses were paid on a "salary basis" during the relevant time. The City claims that staff nurses were compensated on a salary basis because their annual compensation figures were documented at the start of every year through employment agreements and published salary ordinances. The plaintiffs contend that the City compensated them on an hourly basis because it divided those annual figures into hourly rates and paid staff nurses only for each hour worked.

The district court concluded that the annual pay figures published in the salary ordinance provided definitive evidence that the staff nurses were compensated on a salary basis.

The panel held that the district court erred. To determine whether employees are compensated on a salary basis, courts must look beyond conclusory language in contracts and similar documents such as the salary ordinance. Courts must instead analyze how employees are actually paid. The proper focus for the salary basis test is whether an employee receives a predetermined amount of compensation on a weekly or less frequent basis, irrespective of any promises made in an employment contract.

The panel held that material factual questions remain in dispute regarding whether the City satisfied the salary basis test as a matter of practice. Plaintiffs offered evidence showing that the City did not record them as working hours consistent with their full-time

equivalencies in a significant number of pay periods. Those discrepancies raise material factual questions as to whether the staff nurses received their predetermined amounts of compensation in those pay periods. The panel remanded for those factual issues to be resolved.

Judge Bea concurred in part and dissented in part. He agreed that summary judgment in favor of the City should be reversed. But rather than remand for further discovery on whether the plaintiffs are salaried under the FLSA, he would hold that there is no genuine issue of disputed fact as to that question. The plaintiffs are *not* salaried under that statute because the City does not pay them a predetermined amount of compensation each week that is independent of the number of hours they work. He would remand with instructions to grant the plaintiffs' cross-motion for summary judgment on their claim for overtime compensation under the FLSA.

COUNSEL

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Spencer J. Wilson (argued), Anastasia Bondarchuk, Ryan P. McGinley-Stempel, and Linda M. Ross, Renne Public Law Group, San Francisco, California, for Defendant-Appellee.

OPINION

HAMILTON, Circuit Judge:

In these appeals, we address whether staff nurses for the City and County of San Francisco are entitled to time-and-a-half overtime, or whether the method of compensating the nurses satisfies the "salary basis test" in the Fair Labor Standards Act so that the nurses are exempt from the overtime requirement as bona fide professional employees.

The City employs staff nurses in its hospitals, jails, and clinics. Many work more than 40 hours in a week. The Fair Labor Standards Act provides that employees should generally receive time-and-a-half pay for working overtime, but one of the Act's exemptions from that requirement applies to employees working in a bona fide professional capacity. The City claims that staff nurses fall into that exemption. The plaintiffs disagree.

The dispute over whether the professional-capacity exemption applies to staff nurses depends on only one issue: whether the City has shown that staff nurses were paid on a "salary basis" during the relevant time. The City claims that staff nurses were compensated on a salary basis because their annual compensation figures were documented at the start of every year through employment agreements and published salary ordinances. In response, plaintiff nurses contend that the City compensated them on an hourly basis because it divided those annual figures into hourly rates and paid staff nurses only for each hour worked.

The district court granted summary judgment for the City. It concluded that the annual pay figures published in the salary ordinance provided definitive evidence that the staff nurses were compensated on a

salary basis. That was error. To determine whether employees are compensated on a salary basis, courts must look beyond conclusory language in contracts and similar documents such as the salary ordinance. Courts must instead analyze how employees are actually paid. The proper focus for the salary basis test is whether an employee receives a predetermined amount of compensation on a weekly or less frequent basis, irrespective of any promises made in an employment contract.

We must reverse the grant of summary judgment. The City's compensation system does not necessarily flunk the salary basis test, but material factual questions remain in dispute regarding whether the City satisfied the test as a matter of practice. As we explain, plaintiffs offered evidence showing that the City did not record them as working hours consistent with their full-time equivalencies in a significant number of pay periods. Those discrepancies raise material factual questions as to whether the staff nurses received their predetermined amounts of compensation in those pay periods. We reverse and remand this case for those factual issues to be resolved.

I. *Factual Background*

Because plaintiffs lost on summary judgment in the district court, we take the facts in the light most favorable to them as the nonmoving parties, giving them the benefit of factual disputes and reasonable inferences from the evidence. *See Tuuamalemalo v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019).

Staff nurses' compensation is determined by many factors. The base salary for each staff nurse is the starting point. Base salaries are established through negotiations between the City and the nurses' union.

The agreed-upon amounts are subject to approval by the San Francisco Board of Supervisors. If the negotiated amounts are approved, then the salary figures are recorded in a Memorandum of Understanding and published in the City's salary ordinance.

The City's payroll department translates each nurse's annual salary into an hourly rate by dividing the annual amount by 2,080, the number of hours a full-time nurse working 40 hours per week would expect to work in a year. A nurse who works 40 hours every week (or uses accrued time off as discussed below) would receive the full amount published in the salary ordinance.

A staff nurse can choose to work fewer hours than a full-time nurse. For example, a staff nurse could choose to work only 30 hours per week. In accounting jargon, the nurse working 40 hours per week would be referred to as a 1.00 full-time equivalent, or 1.00 FTE for short, while the nurse working 30 hours per week would be referred to as a 0.75 FTE. The staff nurse working three-fourths as much as the full-time nurse would in turn receive three-fourths as much in base salary compensation.

Staff nurses can also earn additional pay to supplement their base pay. One way is by working particular shifts, like evening or night shifts, which earn premium pay on top of normal hourly rates. Another way is by working overtime shifts as a staff nurse. Staff nurses who work overtime earn time-and-a-half (150% of their normal hourly rates) during those shifts.

A third way that staff nurses can earn additional pay is by working so-called "per diem" shifts. Nurses working these shifts are referred to as "per diem nurses." The City offers per diem shifts on an as-needed

basis to staff nurses employed by the City as well as to other nurses not already employed by the City. Staff nurses are never required to work these per diem shifts, but if they choose to do so, they earn 125% of their normal hourly rate regardless of whether they have worked more than, less than, or exactly 40 hours of regular shifts in the applicable week.

Staff nurses also accrue time in designated leave banks while working shifts, accumulating paid time off for vacations, illnesses, and holidays. So long as a staff nurse does not take off more time than the nurse has accrued in a particular leave bank, the nurse will not suffer any reduction in base compensation. However, if a staff nurse takes off more time than he or she has accrued, the City will deduct the amount of compensation equal to the amount of time missed. The City will also deduct pay if a nurse arrives late to a shift without permission from a supervisor.

All of these factors are taken into account when the City runs its payroll every two weeks. The payroll process begins with supervisors reviewing each nurse's work schedule and making adjustments to reflect additional hours worked or time taken off. The supervisors then submit the revised schedules to the payroll department.

Employees in the payroll department manually enter the timesheets into an accounting software system. The hours are entered under payroll codes that reflect the time spent performing different activities. Specific codes designate the amount of time devoted to working regular shifts, shifts earning differential pay, overtime shifts earning time-and-a-half pay, or per diem shifts earning time-and-a-quarter pay. Other payroll codes indicate the amounts of time each nurse

allocated to vacation or illness, as well as the amounts of time consumed by unexcused absences.

After all this information is entered into the system, the payroll department runs the software's final accounting process, which aims to catch any discrepancies between the time reported and payments allowed under the Memorandum of Understanding. This accounting process also flags nurses who have taken off more time than they have accrued in their leave banks. If any errors are identified, the payroll department and the individual nurse work together to resolve the issue.

Sometimes errors slip through. A nurse might realize that she was not paid for all the hours she worked or that her differential pay was not paid properly. When that happens, nurses work with their supervisors and the payroll department to figure out what happened and correct the problem.

II. *Statutory Background*

In 1938, Congress enacted the Fair Labor Standards Act (FLSA) "to eliminate both substandard wages and oppressive working hours." *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 44 (2023) (internal quotation marks and citation omitted). The FLSA curbs extra-long working hours by, among other things, requiring employers to pay employees overtime pay. *Id.* Generally, employers must pay covered employees time-and-a-half when they work more than forty hours in a week. 29 U.S.C. § 207(a)(1).

Many employees, however, are exempt from the overtime requirement. As relevant here, an employer need not pay overtime to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). That exemption is the

focus of this case. The statute gives little guidance on what it means to be a bona fide professional employee, leaving the specifics to be fleshed out through regulations promulgated by the Secretary of Labor.

For a staff nurse to qualify as a bona fide professional, the City must show that the staff nurse's employment satisfies three tests: a duties test, a salary level test, and a salary basis test. *See* 29 C.F.R. § 541.300 (general rules for professional employee exemption); 29 C.F.R. § 541.700 (duties test); 29 C.F.R. § 541.600 (salary level test); 29 C.F.R. § 541.602 (salary basis test). The plaintiffs do not dispute that staff nurses satisfy the first two of these tests. Only the salary basis test is at issue.

A. *The Salary Basis Test*

The regulations establish two paths for satisfying the salary basis test. *Helix*, 598 U.S. at 55. Employees who are compensated on a "weekly[] or less frequent basis" are governed by the test in 29 C.F.R. § 541.602(a), while employees compensated "on an hourly, a daily or a shift basis" are subject to the test in 29 C.F.R. § 541.604(b). *Id.* We discuss each path in turn.[1]

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[1] After giving full citations for each provision, we refer to these regulations simply as § 602, § 604, and so on. Also, to establish by either path that an employee is exempt from overtime as a salaried professional, both § 602(a) and § 604(b) require that the employee be compensated on a salary basis at a rate of at least $684 per week. 29 C.F.R. § 541.600(a). Plaintiffs have not raised any issue here about that requirement. Undisputed facts show that even the lowest-paid plaintiff nurses were paid well above that $684 floor. See *Litvinova v. City and County of San Francisco*, 615 F. Supp. 3d 1061, 1065 (N.D. Cal. 2022). Since these appeals were submitted, the Secretary of Labor has raised the threshold to $844 per week. 89 Fed. Reg. 32842 (Apr. 26, 2024). The change does not affect these appeals.

Section 602(a) requires an employer to show that the employee at issue receives "on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." If an employee performs any work in a given week, the employee must be paid full compensation for that week. § 602(a)(1). If not, the employee is not regarded as a salaried employee under the FLSA. *Helix*, 598 U.S. at 46. The employer also cannot cause the employee to miss work and receive less pay. "If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." § 602(a)(2). Essentially, § 602(a) requires an employee to receive a fixed amount—referred to as a "predetermined amount"—of compensation every week regardless of the number of days or hours worked. *Helix*, 598 U.S. at 51.

Section 604(b) provides an alternative path for an employer to show that an employee is paid on a salary basis. Under § 604(b), an employer may compensate employees "on an hourly, a daily or a shift basis" without running afoul of the salary basis test so long as two requirements are met: (1) the employment arrangement must include "a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked," and (2) there must be a "reasonable relationship" between the employee's guaranteed amount of money and the money actually earned.

As the regulations show, both § 602(a) and § 604(b) seek to ensure that exempt professional employees receive a fixed minimum amount of money in their paychecks. Implicit in that promise, and made explicit in

29 C.F.R. § 541.603(a), is the general rule that employers are prohibited from taking deductions from a salaried employee's compensation. Only in a few limited circumstances described in § 602(b) can an employer lawfully deduct pay. Under that provision, employers can deduct pay when an employee takes off one or more full days for personal reasons (not including illness or disability). § 602(b)(1). But deductions can be made only for full days missed: "if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence." *Id.* Similarly, if an employee takes off one or more full days due to sickness or disability, the employer may deduct compensation for those full days (and only those full days) if "the deduction is made in accordance with a bona fide plan, policy or practice" that compensates for the loss of salary. § 602(b)(2). An employer may also deduct compensation if an employee violates a written policy and is suspended for one or more full days. § 602(b)(5).

In all these circumstances, the FLSA permits only full-day deductions. Partial-day deductions are off-limits for private employers. Public employers are allowed to make partial-day deductions, as we discuss below, but that flexibility comes not from § 602(b) but a separate FLSA regulation, 29 C.F.R. § 541.710.

Supplemental compensation is a different story under the FLSA. While the FLSA strictly regulates deductions from pay, it permits employers to provide additional compensation on any basis—flat sum, straight-time hourly, or time-and-a-half hourly—without losing the benefit of the exemption, so long as "the employment arrangement . . . includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." § 604(a). Essentially, if an em-

ployer satisfies § 602(a), it can provide additional compensation under § 604(a) on any basis.

B. *The Public Accountability Principle*

Only in the limited circumstances spelled out in § 602(b) may a private employer deduct money from a bona fide professional employee's compensation. But the FLSA gives public employers much more leeway. Most significantly, public employers like the City of San Francisco can deduct pay for partial-day absences without losing the benefit of the exemption. § 710. So if a public employee shows up five minutes late to work and exceeds the time in his accrued leave bank by less than a day, his employer may deduct the corresponding amount of pay. This latitude is based on the "public accountability principle," the idea that taxpayers' money should not be spent on public employees for time they are not working. *See* Exemptions from Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act, 57 Fed. Reg. 37666, 37667 (Aug. 19, 1992). For public employers to make deductions under § 710, the deductions must be made "according to a pay system established by statute, ordinance or regulation." § 710(a).

C. *Improper Deductions*

Aside from the permissible deductions mentioned in § 602(b) and, for public employers the public accountability principle codified in § 710, an employer may not deduct pay from a bona fide professional employee's paycheck without losing the exemption. § 603(a). If facts reveal that an employer maintains an "actual practice of making improper deductions," the employer will lose the benefit of the professional-employee exemption for the period in which the improper deductions were made. § 603(a), (b). Whether an employer

maintained an "actual practice" of improperly deducting pay is a case-specific question of fact that asks whether the employer intended to pay its employees on a salary basis. § 603(a).

All that said, the FLSA's regulations also offer an escape hatch to employers who make only "isolated or inadvertent" improper deductions. Under what is sometimes referred to as the "window of correction," employers can retain the professional-capacity exemption if they reimburse employees for any improper deductions. *See* § 603(c).

D. *The Burden-Shifting Framework*

Courts have developed a burden-shifting framework for applying the FLSA in many contexts. At the outset, when an employee alleges that her employer is violating the FLSA, the employee bears the burden of proving that she performed work for which she was not properly compensated. *Brock v. Seto*, 790 F.2d 1446, 1447–48 (9th Cir. 1986). If an employer invokes the professional-capacity exemption to the FLSA's overtime requirement, then the employer bears the burden of showing that the employee falls within the exemption. *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).[2]

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[2] We have said that the employer must meet its burden "plainly and unmistakably." *Leever v. Carson City*, 360 F.3d 1014, 1018 (9th Cir. 2004). The Supreme Court recently granted certiorari to decide the evidentiary burden an employer bears for proving that an exemption to the FLSA applies. *See E.M.D. Sales, Inc. v. Carrera*, 144 S. Ct. 2656 (2024). We need not decide whether the "plainly and unmistakably" standard applies here because the City would not carry its summary judgment burden under a "plainly and unmistakably" standard, a "clear and convincing" standard, or "preponderance of the evidence" standard.

III. *Procedural Background*

On March 8, 2018, Tatyana Litvinova filed a putative collective-action complaint against the City and County of San Francisco alleging that the City violated the Fair Labor Standards Act by not paying staff nurses time-and-a-half for overtime work, including per diem shifts. *Litvinova v. City and County of San Francisco*, No. 3:18-cv-1494-RS (N.D. Cal.). She moved to certify a collective action under 29 U.S.C. § 216(b), and the district court granted the motion.

On October 22, 2020, Kristen Silloway, Christa Duran, and Brigitta van Ewijk filed a similar complaint on behalf of themselves and "similarly situated dual-status registered nurses." *Silloway v. City and County of San Francisco*, No. 3:20-cv-7400-RS (N.D. Cal.). Given the factual similarity between the two cases, the district court issued an order treating them as related. Between the two separate collective actions, a total of about 353 plaintiffs opted in.

On cross-motions for summary judgment, the district court granted summary judgment in favor of the City, concluding that the staff nurses were paid on a "salary basis" and therefore exempt from the FLSA overtime requirements. *Litvinova v. City and County of San Francisco*, 615 F. Supp. 3d 1061, 1069 (N.D. Cal. 2022). The district court treated the published salary ordinance, which referred to staff nurses as salaried employees, as "dispositive evidence" that the nurses were compensated on a salary basis. *Id.* at 1066. The district court found the nurses' hourly pay rates to be a mere "accounting fiction" used for administrative purposes, *id.* at 1066–67, and it rejected plaintiffs' allegations of improper pay deductions by finding that the City's expert report provided adequate explanations for those discrepancies, *id.* at 1069.

Silloway timely appealed the district court's decision. Litvinova filed a Motion for Reconsideration under Federal Rules of Civil Procedure 59 and 60 and then, after it was denied, timely appealed as well. We have consolidated the two appeals for argument and decision.

IV. *Standard of Review*

On appeal, we review "both the granting of summary judgment and rulings regarding exemptions to the FLSA *de novo*." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014). Summary judgment is not appropriate unless, viewing the evidence in the light most favorable to the nonmoving parties and drawing all reasonable inferences in their favor, no genuine issues of material fact remain in dispute. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In the past, most lower courts have said that they construed the FLSA's exemptions narrowly. In *Encino Motorcars, LLC v. Navarro*, the Supreme Court rejected that approach and instructed that exemptions be given a "fair" construction. 584 U.S. 79, 88–89 (2018).[3]

V. *Analysis*

The district court erred in granting summary judgment to the City. The salary ordinance, which the district court found to be dispositive evidence that the staff nurses were paid on a salary basis, is neither the starting point nor the ending point for that inquiry. Rather, the salary basis test asks whether an employee actually receives a predetermined amount of com-

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[3] Plaintiffs argue that this was dicta in *Encino Motorcars*. We disagree. It is hard to imagine how the Supreme Court could have been clearer on this point.

pensation on a weekly or less frequent basis as a matter of practice.

In this case, the parties dispute several factual issues that are material to answering that question. The most significant is whether staff nurses are guaranteed the opportunity to work the hours corresponding to their full-time equivalency every week. According to an expert report submitted by the City itself, the City recorded staff nurses as working or being credited for fewer hours than their full-time equivalencies in at least 72 employee pay periods out of more than 2,200 reviewed. Because staff nurses are paid according to the number of hours they are recorded as working or otherwise credited, it is uncertain whether staff nurses received their predetermined amounts of compensation during these irregular pay periods.

Additionally, the FLSA's "actual practice" and "window of correction" provisions offer the City no refuge, at least on summary judgment. Assuming that the 72 abnormal pay periods represent improper deductions—as we must in reviewing a grant of summary judgment against the plaintiffs—the City made improper deductions much more frequently than in cases where courts have found that no "actual practice" existed. Questions about the propriety of these 72 deductions leave material factual issues in dispute as to whether the City maintained an "actual practice" of making improper deductions. As for the "window of correction" defense, the City has not provided evidence showing that the staff nurses were reimbursed for any of these possibly improper deductions, so summary judgment cannot be granted or affirmed on that ground, either.

We address these points in more detail below, but the takeaway is this: the plaintiffs identified evidence

that creates a material dispute of fact as to whether staff nurses actually received a predetermined amount of compensation on a weekly or less frequent basis. If they did not, they are not exempt from the overtime requirement. Summary judgment was not appropriate.

A. *The Ordinance and the Memorandum of Understanding*

We start with the district court's reasoning, which centered on the City's published salary ordinance and the Memorandum of Understanding. The salary ordinance lists the low and high ends of the range of biweekly compensation a full-time nurse could expect to receive. Echoing the salary ordinance, the Memorandum of Understanding explained that compensation rates were based on a full-time employee working "on a biweekly basis for a normal work schedule of five days per week, eight hours per day." Throughout these documents, staff nurses were described as receiving salaries. The district court concluded that these public and contractual statements were "dispositive evidence" that the City paid the plaintiff staff nurses on a salaried basis. *Litvinova*, 615 F. Supp. 3d at 1066.

The district court's analysis centered on the wrong evidence. In 2004, the Department of Labor revised the FLSA regulations, shifting the focus of the salary basis test from the "employment agreement" to the pay an employee actually receives. *See Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 847–48 (6th Cir. 2012) (discussing revised regulations). The district court should have determined whether, as a matter of practice, staff nurses received predetermined amounts of compensation on a weekly or less frequent basis. *See* § 602(a).

B. *Section 602(a) and the Public Accountability Principle*

The question of law at the heart of this case is whether the City's compensation scheme, which assigns each staff nurse an hourly rate and computes paychecks based on the number of hours worked, satisfies the salary basis test. More than twenty years ago, we held that municipalities could use an hourly accounting system without offending the salary basis test. *McGuire v. City of Portland*, 159 F.3d 460, 464 (9th Cir. 1998). In light of revisions to the regulations governing the salary basis test, as well as the Supreme Court's recent decision in *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023), we take a fresh look but reach the same conclusion that we did in *McGuire*.[4]

We start by examining the interplay between two provisions in the FLSA's implementing regulations, § 602(a) and § 710. Section 602(a) requires an employer to pay a professional employee "a predetermined amount constituting all or part of the employee's compensation" on a weekly or less frequent basis. Other than a few limited exceptions listed in § 602(b), that predetermined amount cannot be subject to reduction due to the quantity or quality of work performed.

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[4] In determining whether the plaintiff staff nurses were compensated on a salary basis, we consider only the money that staff nurses earned while working regular shifts designated for staff nurses. That is because the City argues that the annual figures posted in its salary ordinances were fulfilled if a staff nurse worked the 2,080 hours expected of a 1.00 FTE. The published salary amounts did not incorporate additional sources of income, such as overtime pay, differential pay, or compensation earned while working as a per diem nurse. These supplemental income streams should not be factors in the salary basis test under either § 602(a) or § 604(b). This approach accords with how the City's own expert witnesses defined the staff nurses' compensation

However, § 710 adds another permissible deduction to that list for public employers: partial-day deductions.

The City's ability to make partial-day deductions allows it to reduce staff nurses' compensation in direct correlation to the amount of time worked. The FLSA permits private employers to deduct salaried pay only in full-day increments, but public employers can make minute-by-minute pay deductions for unexcused absences. That is the purpose of the public accountability principle: to prevent public employers from spending taxpayers' money on employees who are not working. Thus, for public employers, § 710 qualifies § 602(a)'s mandate that an employee's predetermined amount of compensation shall not be "subject to reduction because of variations in the . . . quantity of the work performed."

Section 710 does not, however, give public employers free rein to make pay deductions. To keep the benefit of the professional-capacity exemption, public employers must "otherwise meet[] the salary basis requirements of § 541.602." § 710. So while public employers can make partial-day deductions for unexcused absences, they still cannot cause employees to miss work and suffer resulting pay deductions. *See* § 602(a)(2).

Section 710's modification means that, as a practical matter, the salary basis test applies differently to private and public employers. Whereas a private employer must pay its employees predetermined amounts on a weekly or less frequent basis, a public employer must give its employees the *opportunity* to earn predetermined amounts on a weekly or less frequent basis, a prospect that will be fulfilled so long as employees do not miss work for unexcused reasons. In both situations, neither private nor public employers can cause employees to receive less than the predetermined

amounts of compensation. Any deduction must be due to an employee's own actions.

A hypothetical example shows how the salary basis test plays out differently for private and public employers. Imagine that a hospital employs a 1.00 FTE staff nurse and pays her $124,800 per year. That would mean that the staff nurse would have an hourly rate of $60 and earn $2,400 in a typical week. One week, a scheduling error occurs, resulting in the staff nurse being scheduled to work only 38 hours. Additionally, the staff nurse shows up an hour late to work one day that week.

If the hospital is a private employer, it must pay the staff nurse $2,400 for that week. The private employer may not deduct any compensation for the two hours the employer caused the employee to miss work. Nor may the employer deduct compensation for the employee showing up late to work because that would be an impermissible partial-day deduction.

If the hospital is a public employer, however, it must pay the staff nurse only $2,340 for working 39 hours that week. Due to the public accountability principle, the employer is not obliged to pay the staff nurse for the hour that she was late. But it must still pay the staff nurse for the two hours that the employer caused the staff nurse not to work—it did not give the staff nurse the opportunity to work those hours.

From an accounting standpoint, the public employer could determine the compensation owed to the staff nurse by using a top-down approach, starting with a $2,400 weekly amount and then making any necessary deductions—in this example, subtracting $60. Or it could use a bottom-up approach that counts the number of hours actually worked, multiplies them by a $60

hourly rate, and makes any necessary adjustments—in this example, adding $120 because the employer caused the staff nurse to miss two hours. Through both adjustments, the staff nurse would be paid according to the number of hours she worked and not paid for hours she missed due to unexcused absences.

The only substantive disagreement we have with Judge Bea concerns our application of the public accountability principles embodied in § 710. This provision is not a minor afterthought in the regulations. It is the product of a long history of political and constitutional controversy and policy disagreement in applying the FLSA to state and local employers. As originally enacted in 1938, the FLSA defined "employer" so that it "shall not include the United States or any State or political subdivision of a State." 29 U.S.C. § 203(d) (1940 ed.); see generally *National League of Cities v. Usery*, 426 U.S. 833, 836–39 (1976) (reviewing history).

In 1966, Congress amended the FLSA to extend application of the Act to employees of public transit companies, hospitals, schools, and similar entities. That amendment was challenged immediately on constitutional grounds. The Supreme Court upheld application of the FLSA to those state and local employees in *Maryland v. Wirtz*, 392 U.S. 183 (1968). Congress then amended the FLSA in 1974 to broaden its application to almost all categories of state and local government employees, including police, fire, sanitation, public health, and parks employees. In a challenge to those new amendments, the Court overruled *Maryland v. Wirtz* and held that the constitutional commerce power did not authorize Congress to apply the FLSA to employees working in "areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. at 852. And nine years after that, the Court

overruled *National League of Cities* and its "traditional governmental functions" test in *Garcia v. San Antonio Metro. Transit Authority,* 469 U.S. 528, 557 (1985), which allowed broad application of the FLSA to state and local government employees.

In the wake of *Garcia v. San Antonio Transit*, "few public employers compensated employees in a manner that would satisfy the 'on a salary basis' provision" due to public accountability laws, and many local governments feared financial ruin due to the possibility of retroactive overtime payments. See Exemptions from Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act, 57 Fed. Reg. 37666, 37667 (Aug. 19, 1992) (summarizing history of applying FLSA to public sector employees). Congress quickly amended the FLSA later in 1985 to address concerns of state and local governments, especially about retroactive liability for overtime that had not been required under *National League of Cities* but would be required under *Garcia*. *See* Fair Labor Standards Amendments of 1985, Pub. L. 99-150, 99 Stat. 787; see also 57 Fed. Reg. at 37667 (summarizing amendments).

But those statutory amendments did not address one important concern of state and local governments. Many of those governments operate under constitutional, statutory, and/or regulatory provisions that bar governments from paying employees for time not actually worked or covered by accrued leave. Such prohibitions on "ghost employment" are discussed in terms of the "public accountability" principle. The Department of Labor has tried to accommodate that principle while also protecting employees through the revised rule that is now codified as § 710(a). It allows public employers to continue paying employees con-

sistent with public accountability principles. 57 Fed. Reg. at 37670, 37672–73.

Section 710(a) is a critical component in the FLSA's statutory and regulatory treatment of government employees. It is also binding here, and we are required to draw a sharp distinction between practices that are available to public employers but prohibited to private employers.[5]

C. *Applying the Salary Basis Test*

The City failed to show beyond reasonable dispute that it guaranteed staff nurses the opportunity to work the number of hours corresponding to their full-time equivalencies during the relevant time period. The expert report submitted by the City revealed at least 72 employee pay periods in which the City recorded staff nurses as working fewer hours than their full-time equivalencies. These 72 discrepancies create factual questions as to whether the staff nurses received their predetermined amounts of compensation in each of these 72 pay periods.[6]

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[5] Judge Bea's opinion offers an example suggesting that our decision here will undermine overtime protection for private employees. *See post* at 46–47. We address in this decision the requirements for public employers in enforcing the public accountability principle under § 710(a). We do not address here the more demanding requirements applied to private employers under § 602(b) in allowing some pay reductions for personal time off and sick leave and disability leave.

[6] Though the City did not carry its burden on summary judgment in satisfying the salary basis test, the City's Charter has an ordinance that prohibits paying public employees for non-chargeable time. *See* San Francisco Charter § A8.400(g) ("No officer or employee shall be paid for a greater time than that covered by his actual service "). This ordinance satisfies the requirement in § 710 that the City pay its employees "according to a pay system

The City offers two reasons why the discrepancies should not prevent staff nurses from being considered salaried employees. First, the City argues that even if a few errant deductions were made, plaintiffs have not shown that the City maintains an actual practice of paying staff nurses less than their predetermined amounts. Second, the City argues that staff nurses have a window of correction available to them to correct any improper deductions. For the reasons we discuss below, both of these arguments fail, at least as a matter of law on summary judgment.

1. *The Expert Report*

The City retained Dr. Piling Fan and Dr. Hossein Borhani to analyze the payroll data of staff nurses and to opine on whether the City "fulfills its obligation to provide the opportunity to staff nurses to work and be paid based on fixed schedules."[7] Dr. Fan and Dr. Borhani selected a sample of 26 plaintiff-nurses and retrieved about four years of payroll data for each nurse. The experts then graphed the sampled payroll records in a horizontal bar chart. Each horizontal bar in the graph represented one pay period for a single nurse. Within each bar, the experts color-coded the number of hours recorded for specific payroll codes. The color coding allows readers to discern how many hours each nurse spent doing certain activities. For example, by looking at Brigitta Van Ewijk's chart, we can determine that she worked or was credited with 80 hours in the two-week pay period ending on November 17, 2017. She reported 48 of those hours as "Regular Hours—Worked," 16 hours as "Sick Leave

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established by statute, ordinance or regulation."

[7] The complete expert report can be found at pages 1793–1889 of Volume 9 of plaintiff Silloway's excerpts of record.

Pay," 8 hours as "Educational Leave w/ Pay," and 8 hours as "Holiday OT Pay (1.5 times)."

Dr. Fan and Dr. Borhani concluded that "staff nurses work based on fixed schedules and are consistently paid for all the work and non-work hours on their regular work schedules." For the most part, the graphed data supported the experts' conclusion. The staff nurses appear to have worked the hours associated with their full-time equivalencies in over 2,000 employee pay periods across the four years of sample data. However, the graphs show at least 72 employee pay periods in which the sampled staff nurses appear to have worked fewer hours than their full-time equivalencies. Because staff nurses are paid according to the number of hours worked, these discrepancies raise unanswered factual questions as to whether the staff nurses earned their predetermined amounts of compensation in these pay periods.

Consider, for instance, plaintiff Kristen Silloway. During the two-week pay period ending May 31, 2019, Silloway worked 48 hours, which was 24 fewer hours than she had worked in other pay periods spanning from November 2017 to May 2021. The expert report acknowledged this discrepancy but dismissed it, concluding that "it appears Ms. Silloway's schedule [] changed from an FTE of [0].9 to [0].6" for this one pay period. When asked about this conclusion during her deposition, however, Dr. Fan said that she did not verify whether Silloway had reduced her full-time equivalency for that pay period. Dr. Fan had just assumed that Silloway reduced her full-time equivalency because her hours were lower than normal. After being pressed further on the issue, Dr. Fan noted that Silloway had also worked 47 hours in per diem shifts during this pay period.

The additional hours that Silloway worked as a per diem nurse during this pay period are irrelevant for the salary basis test because, as noted above in footnote 4**,** only the hours that staff nurses work *as staff nurses* count toward their base compensation. Per diem shifts do not count. And the City does not dispute that Silloway worked only 48 hours as a staff nurse during this pay period. Because staff nurses' compensation is determined by the number of hours worked, there is a factual dispute as to whether Silloway received her full, predetermined amount of compensation during this pay period. The City has not provided any other evidence showing that she received her full compensation this pay period regardless of the number of hours it recorded her as working.

In fact, the City failed to provide definitive proof that staff nurses received their predetermined amounts of compensation during any of the pay periods in which these 72 discrepancies occurred. Instead, in the district court and on appeal, the City relies upon the unsubstantiated explanations provided by Dr. Fan and Dr. Borhani. We highlight a few of the experts' deficient explanations to demonstrate why they do not satisfactorily resolve the factual disputes lingering around these discrepancies.

First, during the pay period ending on November 3, 2017, Silloway was recorded as working only 48 hours as a staff nurse, again 24 hours shy of her normal 72 hours as a 0.9 FTE. In their expert report, Dr. Fan and Dr. Borhani tried to explain away this discrepancy by saying that Silloway reduced her FTE from 0.9 to 0.6 for that pay period. The experts did not cite any documentation supporting that assertion, and the City has not provided any, either. Instead, when asked about this discrepancy during her deposition, Dr. Fan shifted

her explanation, saying that the discrepancy may have been due to incomplete data. Again, though, Dr. Fan did not research further to confirm her hypothesis. And, more pertinent to the issue of summary judgment, the City has not provided evidence showing beyond reasonable dispute that Silloway received her predetermined amount of compensation for this pay period.

Second, during the pay period ending on January 12, 2018, Silloway was recorded as working 62 hours, of which 38 hours were recorded as "Regular Hours—Worked," 12 hours were recorded as "Holiday OT Pay (1.5 times)," 2.9 hours were recorded as "Sick Leave Pay," and 9.1 hours were recorded as "Sick Leave (Unpaid)." Dr. Fan and Dr. Borhani acknowledged in the expert report that Silloway was credited with 10 fewer hours during this pay period than her normal full-time equivalency. They asserted that this discrepancy was because Silloway "took paid sick leave[] and had insufficient sick leave in her bank to cover the rest of her FTE schedule."

That explanation sounds like a proper invocation of the public accountability principle, but it does not reconcile with the payroll data. As noted, the graph shows that Silloway took 9.1 hours of "Sick Leave (Unpaid)". So if the graphed payroll data show 9.1 hours of unpaid sick leave, it is puzzling why there would be an additional 10 hours of unpaid sick leave unrecorded in the accounting system. Dr. Fan and Dr. Borhani did not investigate this discrepancy any further, leaving it in dispute as to whether this discrepancy was an improper deduction of Silloway's compensation.

The experts did not investigate other discrepancies at all. Plaintiff Analisa Ruiz had nine pay periods between December 2017 and October 2021 in which the City's records credit her with fewer hours than her

full-time equivalency. The expert report did not acknowledge these discrepancies. In its response brief, the City chalked them up to "incomplete payroll data that the experts had not fully investigated." These nine unexplained discrepancies create disputed factual issues as to whether Analisa Ruiz received her predetermined compensation in these pay periods.

The experts' uncorroborated and speculative explanations leave the propriety of the 72 discrepancies unknown. Perhaps there are permissible reasons for each discrepancy, but the City has not provided evidence proving them. Without such evidence, factual questions remain as to whether the staff nurses were provided the opportunity to work their full-time equivalencies in these pay periods and, consequently, whether the staff nurses were paid their predetermined amounts of compensation. Those factual questions lie at the heart of the salary basis test and preclude summary judgment in favor of the City.

2. *Actual Practice*

The City argues that even if the 72 discrepancies were improper deductions from staff nurses' compensation, the City did not *intend* to make improper deductions, so it should not lose the benefit of the professional-capacity exemption. This argument is premised on another FLSA provision, 29 C.F.R. § 541.603(a).

Pursuant to § 603(a), an employer generally loses the benefit of the professional-capacity exemption if "the facts demonstrate that the employer did not intend to pay employees on a salary basis." An employer's intent not to pay employees on a salary basis can be demonstrated by an "actual practice" of making improper deductions. § 603(a). The provision lists five factors for determining if an employer maintains such

an actual practice: (1) the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; (2) the time period during which the employer made improper deductions; (3) the number and geographic location of employees whose salary was improperly reduced; (4) the number and geographic location of managers responsible for taking the improper deductions; and (5) whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. *Id.*

The City's own expert report precludes it from meeting its burden as the moving party to show that no material facts remain in dispute as to whether the City maintained an actual practice of making improper deductions. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) ("The moving party initially bears the burden of proving the absence of a genuine issue of material fact."). Dr. Fan and Dr. Borhani analyzed payroll records for 26 nurses across 140 two-week pay periods. Among all the sampled nurses, the experts analyzed data from 2,251 employee pay periods.[8] Plaintiffs assert that the expert report shows that staff nurses worked or were credited with fewer hours than their full-time equivalencies in 72 of these 2,251 employee pay periods. Because staff nurses are paid according to the number of hours they report, plaintiffs have presented factual disputes as to whether the staff nurses received their predetermined amounts of

[8] This figure does not include pay periods in which a nurse appears not to have worked at all. Specifically, it does not include three pay periods for Kristina Gusman from the pay period ending January 12, 2018 to the one ending July 13, 2018, four pay periods for Nichole Solis from the period ending March 23, 2018 to the one ending November 30, 2018, and six pay periods for Nicole Kenyon from the period ending April 20, 2018 to the one ending September 20, 2019.

compensation in these 72 employee pay periods. And, as discussed above, the City has not provided evidence that would conclusively resolve those factual disputes. In reviewing the grant of summary judgment, we must view these disputed facts in the light most favorable to the plaintiffs and assume that the City paid these staff nurses less than their predetermined amounts of compensation in these pay periods.

Such a high number of improper deductions could support a finding that the City maintains an actual practice of making improper deductions. Plaintiffs identified evidence showing that the City made improper deductions in about 3.2% of employee pay periods. That rate is higher than in other cases where isolated errors did not indicate an actual practice. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (just one improper deduction occurring under "unusual circumstances" did not show an actual practice); *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) (one improper deduction over ten years was not an actual practice); *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1189–90, 1194–96 (10th Cir. 2015) (one improper deduction during employee's more than four years of employment did not show an actual practice); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372 (7th Cir. 2005) (three improper deductions over 470,000 employee work weeks did not show an actual practice); *DiGiore v. Ryan*, 172 F.3d 454, 457–58, 464–65 (7th Cir. 1999) (five improper deductions over about three years did not show an actual practice), *overruled on other grounds by Whetsel v. Network Property Servs., LLC*, 246 F.3d 897, 904 (7th Cir. 2001); *Aiken v. City of Memphis*, 190 F.3d 753, 762 (6th Cir. 1999) (one improper deduction was not an actual practice); *Carpenter v. City & County of Denver*, 115 F.3d 765, 767 (10th Cir. 1997) (two allegedly improper deduc-

tions under unusual circumstances did not show an actual practice); *Ahern v. County of Nassau*, 118 F.3d 118, 120–21 (2d Cir. 1997) (one instance of pay docked for violating employment rules was not an actual practice); *Rebischke v. Tile Shop, LLC*, 229 F. Supp. 3d 840, 852 (D. Minn. 2017) (concluding that improper deductions in 0.5% of paychecks over about three years was an "isolated" practice); *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) (three improper deductions among five employees over four years did not show an actual practice); *Crabtree v. Volkert, Inc.*, 2012 WL 6093802, at *9 (S.D. Ala. Dec. 7, 2012) (improper deductions from 1% of checks issued to certain employees over about four years showed an isolated practice).

The 3.2% error rate precludes summary judgment. Not only is it higher than in other cases where summary judgment was granted, it also suggests that a flaw in the City's accounting process resulted in recurring improper deductions. The data bear out this possibility. In the first 40 pay periods analyzed by the experts—from the period ending June 3, 2016 to the one ending December 1, 2017—17.5% of pay periods included a discrepancy.[9] But those pay periods analyzed data from no more than seven staff nurses. Such a small sample size does not inspire confidence in the statistics drawn from it. Once the sample size was expanded to at least twelve nurses, the error rate jumped to 46%. In other words, in the 100 pay periods from the period ending December 15, 2017 to the one ending October 1, 2021, the City recorded at least one staff nurse as working or being credited with fewer

[9] This figure counts every pay period in which any sampled staff nurse appears to have worked or been credited with fewer hours than her full-time equivalency as a "discrepancy."

hours than her full-time equivalency *in nearly half the pay periods*. And that statistic takes into account only a fraction of the staff nurses employed by the City. A pattern reaching that level of consistency tends to show a gap in the City's accounting process.

Factoring these statistics into the § 603(a) analysis, the City's high error rate—making at least one improper deduction in 46% of pay periods, affecting 3.2% of paychecks—weighs in favor of finding that the City maintained an "actual practice" of making improper deductions. In fact, the City made improper deductions more frequently than employers did in other cases where courts have found actual practices to exist. *See Klem*, 208 F.3d at 1088, 1091, 1095–96 (affirming summary judgment for employees where employer imposed 53 improper disciplinary suspensions among 5,300 employees over six years); *Block v. City of Los Angeles*, 253 F.3d 410, 416, 419 (9th Cir. 2001) (affirming summary judgment for employees where employer imposed 13 improper suspensions over six years); *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776, 781, 784 (6th Cir. 2001) (affirming summary judgment in favor of employees where employer made seven improper deductions in a year and a half).

None of the other § 603(a) factors excuse the City's high error rate. Regarding the third factor, geography of employees, neither party presented evidence showing that staff nurses worked outside of the San Francisco area. As for the fourth factor, the number of responsible managers, there is no evidence suggesting that individual people bore responsibility for the City's improper deductions. The City used a centralized accounting system through which it calculated and distributed compensation for all staff nurses, and the im-

proper deductions could have been made at any step in that accounting process.

Finally, regarding the fifth factor, the parties dispute whether the City had a policy that prohibited improper deductions. The City contends that it did have such a policy and cites provisions from the Memorandum of Understanding that it claims guaranteed staff nurses the opportunity to work at least the hours associated with their full-time equivalencies. The plaintiffs disagree, arguing that far from prohibiting improper deductions, the Memorandum of Understanding explicitly *permitted* them. Plaintiffs cite provisions that purportedly authorized the City to cancel shifts without pay for reasons of "inclement weather conditions, shortage of supplies, traffic conditions, or other unusual circumstances." Plaintiffs argue that these provisions violate § 602(a)(2), which specifies that employers cannot take deductions from compensation for absences occasioned by the employer.

In response, the City contends that these provisions were merely "boilerplate language" lifted from other contracts the City has made. The City also asserts that these provisions were never invoked against staff nurses. In support of that assertion, the City cites an email from Steven Ponder, Classification and Compensation Director, to the Department of Public Health's Human Resources Director and Payroll Manager in December 2019, saying that the provisions permitting the City to cancel shifts did not apply to staff nurses. Plaintiffs attack the credibility of this email, noting that it was sent almost a year after Litvinova filed suit. Aside from convenient timing, plaintiffs also argue that the content of the email was never communicated to staff nurses or other relevant employees as required by the fifth ele-

ment. *See* § 603(a) (instructing courts to consider "whether the employer has a *clearly communicated* policy permitting or prohibiting improper deductions" (emphasis added)).

As one last piece of evidence in support of its argument, the City cites deposition testimony from multiple staff nurses saying that the City has never exercised these provisions against them. All of the deposed staff nurses testified that they could not recall an instance in which the City denied them the opportunity to work a shift as a staff nurse. Plaintiffs respond by arguing that even if the deposed staff nurses could not recall an instance in which they had a shift cancelled, the City does not audit its payroll data to ensure that staff nurses actually received their guaranteed hours. And, as the 72 discrepancies show, plaintiffs have evidence that staff nurses sometimes worked or were credited with fewer than their guaranteed hours without receiving their regular salaries.

Suffice it to say, each side has marshaled evidence in support of its interpretation of the Memorandum of Understanding. The plaintiffs cite two provisions that seem to allow the City to make improper deductions. The City cites deposition testimony indicating that, as a matter of practice, those provisions have never been applied to staff nurses. This factor does not weigh in favor of either side.

In sum, the district court erred in concluding that no material factual questions remain in dispute as to whether the City maintained an actual practice of making improper deductions. In considering summary judgment, the number of discrepancies in the payroll data cannot be dismissed as mere isolated incidents. Nor can they be swept under the rug as the misdeeds of a single rogue manager. The Memoran-

dum of Understanding includes provisions from which a reasonable person could conclude that the City retained the ability to cancel shifts. The possibility that those provisions could lead the City to make improper deductions caused the City's Compensation Director to clarify that those provisions cannot be exercised against staff nurses.

We offer no definitive answer as to whether the 72 discrepancies showed actual improper deductions from staff nurses' predetermined amounts of compensation. All we decide is that the answer depends on disputed factual questions.

3. *Window of Correction*

The City also contends that even if the 72 discrepancies were improper deductions, they were merely "isolated or inadvertent" errors fixable through a correction process. This argument relies on 29 C.F.R. § 541.603(c), known as the "window of correction" provision. *Ellis*, 779 F.3d at 1189 (citation omitted). It provides that an employer does not lose the benefit of the professional-capacity exemption for "isolated or inadvertent" deductions so long as the employer reimburses employees for any improper deductions. § 603(c).

Regarding the second part of that provision, the City has a process in place for making corrections. Once an error is discovered, the payroll department works with nurses and their supervisors to rectify the issue. The City presented evidence showing that this process works in practice, at least some of the time. For example, it was discovered that Kristen Silloway was not "paid up to [her] FTE due to short education credits" during the pay period ending on October 16, 2020. The payroll team worked with Silloway to create a Problem Description form to track the issue and

resolve it. In that instance, Silloway chose to use 10 hours of accrued vacation leave and ended up receiving her full predetermined amount of compensation.

The resolution of that issue, however, raises questions as to why the error correction process was not used to remedy the other 72 discrepancies. The expert report shows that after the correction was made, Silloway's reported hours for the pay period ending October 16, 2020 matched her full-time equivalency. In other words, this pay period was not one of the 72 discrepancies identified by the plaintiffs, but it would have resembled those discrepancies if the correction had not been made.

The City failed to show that corrections were made for the other 72 discrepancies. Again, because these appeals come to us from a grant of summary judgment, we construe the facts in the light most favorable to the plaintiffs and assume that each of the 72 instances of underreported time resulted in an improper deduction of compensation. Just as the City did not provide evidence showing that the employees received their predetermined compensation in these pay periods, the City also has provided no evidence that it reimbursed the employees for any improper deductions. Without that evidence, the City cannot make use of § 603(c).

Facts also remain in dispute concerning the first element of § 603(c), which requires showing that any improper deductions were "isolated or inadvertent." This element can be satisfied through two alternative paths—an employer may make use of the "window of correction" defense by showing that the improper deductions were either "isolated" or "inadvertent." *Ellis*, 779 F.3d at 1203–05; *Rebischke*, 229 F. Supp. 3d at

850–56. Based on the evidence before us, the City has not shown conclusively that it has satisfied either path.

a. *"Isolated" Improper Deductions*

The Department of Labor explained that the same factors for determining whether an employer maintains an "actual practice" determine whether improper deductions were "isolated." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22181 (Apr. 23, 2004) (commentary on revisions to § 603). As discussed above, material facts remain in dispute as to whether the City maintains an "actual practice" of taking improper deductions from pay. Those same disputed facts preclude summary judgment on the "isolated" issue.

b. *"Inadvertent" Improper Deductions*

Material facts are also in dispute as to whether the improper deductions were "inadvertent." The same Department of Labor commentary defines "inadvertent deductions" as "those taken unintentionally, for example, as a result of a clerical or time-keeping error." 69 Fed. Reg. at 22181. Perhaps that is true of the apparent errors here. A supervisor reviewing time records might have forgotten to make a necessary correction before sending a timesheet to payroll. Or, while manually entering the timesheets into the City's accounting system, a payroll employee could have accidentally entered the wrong time in the payroll software, causing the employee's records to show a lower-than-normal number of hours. However, the City has not provided evidence explaining what caused hours to be underreported in these pay periods. Without that evidence, whether these deductions were inadvertent remains a disputed factual issue.

VI. *Conclusion*

We reverse the judgment of the district court. Material factual questions remain in dispute as to whether the plaintiff staff nurses received predetermined amounts of compensation on a weekly or less frequent basis during the relevant time. We remand for those factual issues to be resolved consistent with this opinion.

REVERSED AND REMANDED.

BEA, Circuit Judge, concurring in part and dissenting in part:

The district court's grant of summary judgment in favor of the City and County of San Francisco (City) should be reversed. On that, the majority and I agree. But rather than remand for further discovery on whether the Plaintiffs-Appellants (Nurses) are salaried under the Fair Labor Standards Act (FLSA), I would hold that there is no genuine dispute of fact as to that question. The Nurses are *not* salaried under that statute because the City does not pay the Nurses a predetermined amount of compensation each week that is independent of the number of hours they work. I would therefore remand with instructions to grant the Nurses' cross-motion for summary judgment on their claim for overtime pay under the FLSA.

I

The FLSA requires public and private employers to pay their workers time-and-a-half "for work over 40 hours a week." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023). But the statute also "exempts certain categories of workers" from this overtime compensation requirement. *Id.* Under § 13(a)(1) of the FLSA, "bona fide . . . professional" employees "ha[ve] no right to overtime wages," and Congress has authorized the Labor Secretary to pass rules "for determining when an employee" falls within that statutory category. *Id.* Under the Secretary's rules, a worker must meet three criteria to qualify as a bona fide professional employee. *Id.* at 44–45. As the majority notes, the parties here dispute only whether the Nurses meet one of those criteria—the "salary-basis" requirement. Maj. Op. at 10. The parties agree that the Nurses meet the other two criteria to be classified as salaried.

Two "pathways" exist for meeting the salary-basis requirement under the Secretary's rules. *Hewitt*, 598 U.S. at 57. The first is set forth in 29 C.F.R. § 541.602(a). Under § 602(a), "[a]n employee will be considered to be paid on a 'salary basis'" if he "regularly receives" a "predetermined amount" of compensation on "a weekly, or less frequent basis" that "is not subject to reduction because of variations in the quality or quantity of the work performed." In *Hewitt*, the Supreme Court recently held that an employee is paid on a salary basis under § 602(a) *only if* the "unit or method used to calculate [the employee's] earnings" is a "weekly" or "less frequent basis" (*e.g.*, monthly, yearly, and so on). 598 U.S. at 53. If an employee, for example, normally "works seven days a week" at a rate of $1,000 a day, but he receives only $2,000 for a given week because he took off work for sickness or personal reasons on five out of seven of those days, then he is paid on a daily basis, not a "weekly or less frequent basis" as § 602(a) expressly requires. *See id.* at 51. It does not matter that he worked only for two of the seven days for that week. *Hewitt* holds that "[w]henever an employee works *at all* in a week," § 602(a) requires that "he must get his 'full salary for [that] week,'" or what § 602(a) "calls the 'predetermined amount'" of compensation. *Id.* at 51 (emphasis added).

While § 602(a) thus "pertains only to employees paid by the week (or longer)" and "excludes [hourly- and] daily-rate workers," *id.* at 57, 58, "[t]hat is not to say that an hourly or daily rate [employee] can *never* meet the salary-basis test" under the Secretary's rules, *Hewitt v. Helix Energy Solutions Group, Inc.*, 15 F.4th 289, 291 (5th Cir. 2021) (emphasis in original). They can—but only through the "second route" laid out in 29 C.F.R. § 541.604(b). *Hewitt*, 598 U.S. at 55.

Under § 604(b), an employer "may . . . compute[]" its employees' pay "on an hourly" or "daily . . . basis, without . . . violating the salary basis requirement," *id.*, if (but only if) "two conditions are met," *Hewitt*, 598 U.S. at 47. First, the employer, on top of paying the worker for the days or hours that he works, "must 'also' guarantee the employee" a minimum weekly required amount of compensation paid on a salary basis "regardless of the number of hours, days, or shifts worked." *Id.* at 47 (quoting § 604(b)). Second, "that promised amount . . . must be 'roughly equivalent to the employee's usual earnings at the assigned hourly[] [or] daily . . . rate." *Id.* Together, § 604(b)'s two requirements "create a compensation system functioning much like a true salary" to which weekly-rate employees are entitled under § 602(a). *Id.*

Finally, while § 602(a) and § 604(b) lay out the two divergent pathways for meeting the salary-basis requirement, the rules are joined at the hip by § 600. By its terms, § 600 provides that "[t]o qualify as an exempt . . . professional employee . . . an employee must be compensated on a salary basis at a rate" of not less than $684 per week. *Id.* § 600(a).[1] Section 600's requirement thus sets the salary floor that an employee must receive to count as salaried under either § 602(a) or § 604(b) as $684 per week. Whether we are talking about the "predetermined amount" of compensation for a weekly-rate employee under § 602(a), or the "minimum weekly required amount" of pay for an hourly-or daily-rate employee under § 604(b), those earnings

[1] After submission of this case, the Secretary raised the baseline salary required under § 600 from $684 to $844. *See* Defining and Delimiting the Exemptions for Exemptions for Executive, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024).

must, at a minimum, equal $684 per week or they do not count as a "salary" under the Secretary's rules.

II

It is undisputed that—on paper and in practice—the City pays the Nurses by the hour with no promise of "a preset and non-reducible" amount of pay. *See Hewitt*, 598 U.S. at 52. The City's own charter prohibits its public employees from receiving compensation for hours they do not work. *See* San Francisco Charter § A8.400(g). The Memorandum of Understanding between the City and the Nurses—which outlines the Nurse's compensation scheme—provides that the Nurse's "[s]alaries . . . shall be calculated . . . proportionate to the hours *actually worked*." The City's own expert and Director of Compensation admitted at deposition that the Nurses' "compensation . . . [is] based on [the] hours they worked." And to calculate the Nurses' paychecks, the City's payroll system relies solely on the hours that the Nurses work. There is simply no dispute that the Nurses are hourly-rate employees under the City's compensation scheme.

With facts like these, the City does not pay the Nurses on a salary basis under a plain English reading of either § 602(a) or § 604(b). Rather than pay the Nurses a weekly "predetermined amount" of money of at least $684 per week "without regard to the number of . . . hours worked" as § 602(a) requires, the City pays the Nurses "precisely *with* regard to that number," *see Hewitt*, 598 U.S. at 51 (emphasis in original), or (as the majority puts it) "in direct correlation to the amount of time worked," Maj. Op. at 20. While that makes the Nurses hourly rate employees who "may qualify as paid on [a] salary [basis] only under § 604(b)," the City "d[oes] not meet § 604(b)'s conditions" either. *See Hewitt*, 598 U.S. at 61–62. The City

"compute[s]" the Nurses' pay "on an hourly . . . basis" as § 604(b) allows but without the follow-up "guarantee of at least the minimum" $684-per-week baseline salary that § 604(b) requires.

In holding that the Nurses can nevertheless be considered salaried under the FLSA, the majority revises key parts of the Secretary's rules and practically writes out others altogether. For example, § 604(b)—arguably the only relevant rule here because it is the only one to speak about the salaried status of hourly-rate employees—makes only a brief appearance in the majority's analysis before it is "cart[ed] . . . off the stage." *Hewitt*, 598 U.S. at 56; *see* Maj. Op. at 11. The majority also concludes that § 600's requirement that the Nurses be paid at least $684 per week under either pathway to be considered salaried is not at issue because "[u]ndisputed facts show that even the lowest-paid plaintiff nurses were paid well above that $684 floor." Maj. Op. at 10 n.1. But it is also "undisputed" that the Nurses were not paid a *predetermined* amount of at least $684, as § 602(a)—the majority's chosen "pathway"—expressly requires. Section 602(a) instead takes on an entirely different meaning under the majority's reading of the rule. Rather than entitle them to a "predetermined amount" of money "regularly receive[d]," *id.*, my colleagues tell us that § 602(a) guarantees the Nurses only the "opportunity" to work the hours needed "to earn" that "predetermined" pay, Maj. Op. at 20–21—a reading that makes the Nurses look a lot more like "wage" earners and a lot less like "salaried" employees. *See Hewitt*, 598 U.S. at 51–52 ("Take away that kind of paycheck security and the idea of a salary also dissolves.").

To justify this remodeling of the regulatory text, the majority relies on § 602(a)'s neighbor many doors

down—§ 710—a lesser known, rarely litigated regulation found in the backpages of the Secretary's implementing regulations.[2] That provision, nestled among the "Definitions and Miscellaneous Provisions" of the Secretary's rules, allows public employers to reduce an employee's pay "for absences . . . of less than one work-day" where paid leave is not sought or is exhausted. *Id.* § 710(a). Because § 710 applies solely to public employers, and because it allows them to make partial-day deductions for hours not worked, the majority reasons that public employers may calculate an employee's pay at an hourly rate without converting him into a non-salaried employee, while private employers cannot. *Contra* § 604(b) (permitting all employers, public or private, to calculate pay by the hour, but subject to certain conditions). As my colleagues describe it, public employers can calculate pay by the hour "top-down"—by starting with the full salary the employee *would have* earned had he worked the full week and then "making any necessary deductions" under § 710. Maj. Op. at 21. Or they can calculate pay from a "bottom-up" angle—where they simply compute pay based only on the hours worked. *Id.* at 21–22. Whatever the accounting technique, it makes no dif-

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[2] The majority recounts a bit of statutory history to make the point that § 710 was not an "afterthought" but rather an intentional addition to the regulatory scheme as a means of "allow[ing] public employers to continue paying employees consistent with public accountability principles." Maj. Op. at 22-24. I do not disagree with my colleagues that § 710 was intended to give public employers more leeway to make deductions. And it does just that, by allowing public employers, unlike private employers, to make partial-day deductions for partial-day absences for personal reasons. But I would not read § 710's protections for public employers so broadly as to allow public employers to evade almost completely the otherwise clear requirements of § 602(a) to pay "salaried" workers a predetermined amount.

ference "as a practical matter" according to my colleagues. *Id.* at 20. Because § 710 allows public employers to deduct pay "in direct correlation to the amount of time worked," the majority concludes that § 602(a)'s key requirement—that employers pay their workers a "predetermined amount" "without regard to . . . hours worked"—does not apply to public employers such as the City. Maj. Op. at 20. Only private employers must obey this mandate. *See id.*

The problem with the majority's "public vs. private" employer distinction is that it does not hold up under closer scrutiny. As my colleagues concede, public employers are not the only ones who may permissibly deduct pay under the Secretary's rules. Maj. Op. at 12. Section 602(b), in particular, allows private employers to deduct pay for full-day absences due to personal reasons. 29 C.F.R. § 541.602(b). Thus, following the majority's logic, a private employer could just as easily claim exemption from § 602(a)'s "predetermined amount" requirement by relying on its own ability to dock a worker's pay for time not worked.

To see how this could play out in practice, consider a slightly tweaked version of the majority's own hypothetical. In the case of a privately employed nurse who works at a rate of $60 an hour for 40 hours a week, assume that he misses four full workdays for personal reasons instead of one "partial day" of work. Maj. Op. at 21–22; *see Hewitt*, 598 U.S. at 51. If his average workweek is divided into five eight-hour workdays (totaling 40 hours), what is the "predetermined amount" of compensation that the hospital "must pay" the nurse under § 602(a) for him to be considered salaried under that rule?

Taking the majority's reasoning to its logical conclusion, the answer would be $480. The private hospi-

tal "is not obliged to pay the staff nurse for the" four workdays that he missed because those days count as "full-day absences" under § 602(b). *See* Maj. Op. at 21–22; § 602(b)(2). The only "amount" of pay that the hospital owes the nurse, in other words, is for the amount that he *actually* worked that week (one eight-hour workday x $60 hourly rate = $480). But that would allow the private employer to evade § 602(a)'s "predetermined amount" requirement in at least two ways. For one, that $480 weekly salary would fall below the $684 weekly-salary baseline that sets the floor of § 602(a)'s "predetermined amount." *See* § 600. And second, nothing about that "amount" would be "predetermined." It would instead be "a function of how many days [the nurse] . . . labored" for that week, "not, as § 602(a) requires," a "predetermined amount" that is paid "without regard" to that number. *Hewitt*, 598 U.S. at 51; § 602(a)(1).

To get around this problem, my colleagues explain that their reasoning is limited to § 710(a)'s rules for public employers and does not affect the rules governing private employers in § 602(b) because the latter's requirements are "more demanding." Maj. Op. at 24 n.5. How so? A reading of the two sets of exceptions does not reveal such a distinction—if anything, § 710(a) imposes more requirements on public employers to make partial-day deductions than it does on private employers to make full-day deductions. *Compare* § 602(b)(1) (allowing private employers to deduct pay "when an exempt employee is absent from work for one or more full days for personal reasons"), *with* § 710(a) (allowing public employers to make partial-day deductions "on the basis . . . [of] a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee ac-

crues personal leave . . . and which requires the public agency employee's pay to be reduced . . . for absences for personal reasons . . . of less than one work day when accrued leave is not used by an employee because" one of three conditions is met).

Thus, the limiting principle that supposedly reins in the majority's public-private distinction does not exist. If we follow my colleagues' reading of "the interplay" between § 602(a)'s requirements and an employer's ability to make permissible pay deductions, Maj. Op. at 19, then private employees are no more entitled to § 602(a)'s promise of a "fixed compensation" than are public employees, *Hewitt*, 598 U.S. at 51. That is because private and public employers can use the same "top-down" accounting method to "reduce staff . . . compensation in direct correlation to the amount of time worked." Maj. Op. at 20. The only difference is one of degree: public employers may deduct pay by the hour, § 710, private employers by the day, § 602(b). But the bottom line is the same in both scenarios under the majority's reasoning because § 602(b) and § 710, when read in a vacuum, appear to allow for either employee's pay to rise or fall depending on the amount of time he worked for that week—not *whether* he worked that week at all. Neither employee is entitled to a "'full salary for [that] week'" of at least $684, or "what § 602(a) . . . calls the 'predetermined amount.'" *Hewitt*, 598 U.S. at 51.

What is left of § 602(a)'s text in future cases such as this one, where an employer, calculating pay "top-down," reduces its workers' compensation to an hourly- or daily-rate under § 710 or § 602(b)? Not much it seems. "Every part" of § 602(a) that describes when an employee can be considered salaried works "hand in hand" with § 602(a)'s predetermined-amount require-

ment to ensure "that [the] employee receive[s] a fixed amount for a week no matter how many days [or hours] he has worked." *Id.* at 51, 54. The predetermined amount must be paid on a "weekly basis," § 602(a), meaning "the unit of time used to calculate pay . . . must be a week or less frequent measure," not a "day or, or other more frequent measure," *Hewitt*, 598 U.S. at 52. Thus, an employee's pay cannot be "subject to reduction because of variations in . . . quantity of the work performed" within that week. § 602(a). The employee, the rule drives home, "must 'receive [his] full salary for any week' in which he works at all." *Hewitt*, 598 U.S. at 54 (quoting § 602(a)(1)). Because nothing about this language "fits" the daily- or hourly-rate employee whose pay is calculated "top down"—since "by definition [he] is paid for each day [or hour] he works and no others"—the majority must "power past" all this regulatory text to hold that § 602(a) covers such workers. *Id.* at 51, 54 n.5.

"The broader regulatory structure" at play also suffers a blow with the majority's holding today. *Id.* at 55. As mentioned earlier, my colleagues all but read out § 600's $684 salary basis floor requirement. But recall also the role that § 604(b) is supposed to play alongside § 602(a). Together, the two rules "offer non-overlapping paths to satisfy the salary-basis requirement." *Id.* at 56. While § 602(a) "pertains . . . to employees paid by the week" and thus "excludes [hourly- and] daily-rate workers," § 604(b)'s "explicit function" is to describe how that second category of workers may qualify as salaried. *Id.* at 56–57. A worker's pay "may be computed on an hourly" or "daily . . . basis, without . . . violating the salary basis requirement," § 604(b) says, so long as he is "also" guaranteed a "minimum weekly" amount of pay that approximates his usual earnings for that week but is no less than $684. One would think

that these textual hints all point to § 604(b) as the only proper pathway for evaluating whether the Nurses—as "top down" hourly-rate employees—are salaried under the Secretary's rules. Yet in holding (at least implicitly) that § 602(a)—not § 604(b)—applies to such workers, the majority "subvert[s] § 604(b)'s strict conditions on when th[ose] [employees'] pay counts as a 'salary.'" *Id.* at 56; *see id.* ("[I]t is anomalous to read § 602(a) as covering daily-rate workers when that is § 604(b)'s explicit function.").

* * *

The City is free to pay the Nurses solely by the hour, but that does not satisfy the salary-basis test under the Secretary's rules. Until the City guarantees them a fixed amount of pay that does not depend on the days or hours they work, the Nurses are not salaried under the FLSA, and the City must pay them overtime under that statute. For these reasons, the district court entered summary judgment for the wrong party. I would reverse and remand with instructions to grant summary judgment in favor of the Nurses on their claim for overtime compensation under the FLSA.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 18-cv-01494-RS

TATYANA LITVINOVA,

Plaintiff,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 20-cv-7400-RS

KRISTEN SILLOWAY,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

ORDER GRANTING DEFENDANT'S AND DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs are nurses employed by the City and County of San Francisco who argue they are being denied overtime in violation of the Fair Labor Standards

Act ("FLSA") when they volunteer to work extra shifts under a program open to all nurses. Plaintiffs argue they are hourly employees, but the evidence establishes they are salaried. Plaintiffs also argue that Defendant, the City and County of San Francisco, improperly deducts from their pay. However, the City is required only to pay workers for time they actually work, and the FLSA permits public employers to reduce salaried employees' pay for various reasons. The City's motion for summary judgment is granted. Plaintiffs' cross motions are denied. All other motions are denied as moot.

II. BACKGROUND

A. Procedural Background

There are two sets of Plaintiffs, in related cases, *Litvinova,* Case No. 18-cv-1494, and *Silloway,* Case No. 20-cv-7400, representing different groups of opt-in Plaintiffs. However, for purposes of these motions, the cases can be treated as one. The *Litvinova* Plaintiffs filed a motion for partial summary judgment, framed as attacking the City's affirmative defenses, but it trod much of the same ground as the *Silloway* Plaintiffs' motion for complete summary judgment, and then the *Litvinova* Plaintiffs joined the *Silloway* motion. (The City responded to each motion in one opposition brief.) The City also moved for summary judgment, and in the alternative, decertification of the cases as collective actions. Finally, the *Silloway* Plaintiffs moved to continue the trial date.

B. Plaintiffs' Dual Status

Plaintiffs are nurses who are employed by the City's Department of Public Health, e.g., in its hospitals, jails, and clinics. Specifically, Plaintiffs are nurses

who were employed as full-time or part-time staff nurses, and also volunteer to work more shifts as "per diem" nurses. The per diem shifts exist because the City is perennially short-staffed, so the staff nurses cannot cover the load with their normal shifts. Any nurse can sign up for a per diem shift ad hoc; a nurse might sign up for an individual shift the following day. Some nurses who work for private employers also work per diem shifts to earn additional income. These nurses are called "external per diem nurses." By contrast, staff nurses who pick up per diem shifts are referred to as "internal per diem nurses" or "dual status nurses." Many documents also refer to nurses by the codes the City uses: "2320 nurses" are staff nurses, and "P103 nurses" are per diem nurses; a 2320 staff nurse becomes a dual status nurse when he or she works a P103 per diem shift.[1] When a staff nurse works a P103 shift, hours are logged separately, so a nurse might log an eight hour shift as a 2320 nurse, and a four hour shift as a P103 nurse, but will not receive overtime as they would if they had worked a 12-hour 2320 shift.

Plaintiffs claim their dual status violates the overtime requirements of the FLSA; when they work more than 40 hours per week or eight hours per day, they should have been paid overtime. In essence, their case boils down to the idea that the distinction between their regular shifts and the per diem shifts is irrelevant: if they work an 8-hour salaried shift, and then a 4 hour per diem shift, they should be compensated for the per diem shift at their overtime salaried rate. The

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[1] A few of the staff nurses in this action have classifications other than 2320, because they are in more specialized roles, but the vast majority of staff nurses, including those in this action, are coded as 2320.

rate for a per diem shift is 25% over the rate for a regular salaried shift, while the overtime pay for a salaried shift is a 50% premium over the regular salaried rate. (The per diem shifts are compensated at a higher rate than regular shifts because the per diem only nurses have no job protections and benefits.)

C. Salary vs. Hourly Employment

There is an even more fundamental disagreement about the nurses' pay structure: the nurses argue they are hourly employees, while the City says they are salaried. Plaintiffs have a laundry list of evidence that purportedly proves their case: for example, their paychecks feature an hourly rate of pay, the City's compensation manual states they are nonexempt from overtime, and they describe experiences where they have been paid less when they worked fewer hours.

The City, however, adduces definitive evidence that it compensates the nurses on a salary basis, biweekly, according to a memorandum of understanding ("MOU") between the City and the nurses' union, SEIU, and published pay schedules approved by the City's Board of Supervisors. First, the current pay ordinance conclusively identifies 2320 nurses as salaried. *Litvinova* Dkt. No. 91-3 at 366. Also, the MOU has a section entitled "Salary Step Plan and Salary Adjustment" and contains numerous discussions of the details of the salaried positions, e.g.:

> All wage increases provided in this Agreement will commence at the start of the payroll period closest to the date specified for the wage increase, unless noted otherwise, and shall be rounded to the nearest whole dollar bi-weekly salary. Rates for employees' classes are on a biweekly basis for a nor-

> mal work schedule of five days per week, eight hours per day.

Litvinova Dkt. No. 91-3 at 52, 66. (The MOU also refers to an "hourly" rate of pay, but this is best understood as an effective hourly rate, as explained in the Discussion section below.) The MOU also sets out the standard workweek of five days of eight hours each.

At the current pay schedules, full time staff nurses make at least $142,220 per year. Part time nurses are paid according to their "full time equivalent," or the portion of a 40-hour week that they work, e.g., if they work 75% of a 40-hour week, they are paid 75% of the wages of a full time nurse, and referred to as a .75 FTE. No staff nurses work less than .5 FTE. Part time nurses work a consistent schedule, e.g., they are not like per diem nurses, picking up individual shifts on the fly. Nurses cannot be denied the right to work if they are scheduled for a salaried shift, and Plaintiffs' depositions confirms that they have never been denied the right to work their regularly scheduled shifts. *See, e.g.,* Silloway Depo., Ex. H to Defendant's MSJ, at 21:4-23:6.) The MOU also establishes overtime pay for certain situations, e.g., if a salaried nurse was ordered to work more than 40 hours per week. However, the City maintains that this is not required by the FLSA-only the MOU.

Plaintiffs introduce evidence that their paychecks varied week to week; this is relevant both for the salary vs. hourly question, but also as a potential standalone violation of the FLSA for improper deductions from salary.[2] The City accounts for this evidence by

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[2] Each case's Complaint makes out only a claim for overtime violations, although the briefing verges into addressing the deductions as a standalone violation, to which the City does

noting that the MOU also contains requirements that the City pay extra for certain shifts or duties, e.g., night shifts are compensated at a higher rate. Further, it deducts pay for various situations, for example, when a nurse is late, or takes brief leave.[3]

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). "The non-moving party must then offer evidence of such a caliber that 'a fair minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient.'" *United States v. Wilson,* 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986)). "The deciding court must view the evidence, including all reasonable inferences, in favor of the non-moving party." *Reed v. Lieurance,* 863 F.3d 1196, 1204 (9th Cir.

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not object, although it is possible it interprets them only to be discussing the deductions as relevant for the salary vs. hourly question.

[3] Each side makes various evidentiary objections. The most prominent of these are Plaintiffs' objections to the expert report and the Ponder declaration. These are denied. Because none of the rest affect the outcome of this order, they need not be addressed individually.

2017). On summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Evid. 56(c)(2).

IV. DISCUSSION

A. Salaried vs. Hourly Employees

The City argues Plaintiffs are not eligible for overtime under the FLSA because they are salaried "learned professionals." The parties dispute who has the burden of proof: as exemption from FLSA's overtime requirements is an affirmative defense, it is the City.[4] *Cleveland v. City of Los Angeles,* 420 F.3d 981, 988 (9th Cir. 2005). There is a two-part test to determine whether someone qualifies as a learned professional: a duties test and a salary basis test. 29 C.F.R. § 541.300(a). Plaintiffs concede they meet the duties test but argue they do not meet the salary basis test. The test is met where an employer provides a "predetermined amount constituting all or part of the employee's compensation" on a weekly or less frequent basis, regardless of the quality or quantity of work performed. 29 C.F.R. § 541.602(a). Currently, the amount must be at least $684 per week, or $35,568 per year. 29 C.F.R. § 541.600(a). (Even the lowest-paid staff nurses, .5 FTE nurses, make roughly double this amount. Declaration of Steven Ponder, *Silloway* Dkt. No. 61-3, ¶ 11(j).)

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[4] Plaintiffs also argue FLSA's exceptions must be narrowly construed, and the City must show that they plainly and unmistakably fall into an exception. The City responds that this standard was overruled in *Encino Motorcars, LLC v. Navarro,* 138 S.Ct. 1134 (2018). Plaintiffs in turn counter that that was dicta. That is incorrect. *Encino Motorcars* squarely held that the exemptions are to be construed fairly, not narrowly. *Id.*

1. The City's Evidence

The City argues it meets this test because staff nurses are paid on a predetermined basis every two weeks depending on their exact role, salary step, and FTE. These salaries are negotiated between the City and the nurses' union, SEIU; approved by the Board of Supervisors; and published, including online.[5] The City's published salary database and compensation manual do not indicate one way or another whether the nurses are hourly or salaried, however, the published salary ordinance identifies nurses as salaried. *Litvinova* Dkt. No. 91-3 at 366. Additionally, Steven Ponder, the Classification and Compensation Director for the City's Department of Human Resources, submits in a declaration that nurses are salaried and their compensation is determined on an annual basis, and then converted into hourly pay for convenience with the City's payroll software.[6]

The salary ordinance is dispositive evidence that the City pays ". . . a predetermined amount constituting all or part of the employee's compensation . . ." on a weekly or less frequent basis. The one place where the City clearly states whether the nurses are salaried or hourly, it says they are salaried. The other evidence, including Ponder's declaration, bolsters that conclusion. 29 C.F.R. § 541.602(a). There can be no genuine dispute that the nurses are salaried. *See* Fed. R. Civ. P. 56(a).

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[5] The City's motion provides a link to the database which appears to be outdated; it appears it meant to refer to the database currently available at https://careers.sf.gov/classifications/.

[6] Ponder is also the employee who analyzed the dual status system to make sure it was FLSA-compliant, albeit long after it had been implemented.

2. Plaintiffs' Evidence

Plaintiffs respond there are numerous indicators that have led them to believe they are hourly workers. Their misunderstanding is reasonable: the City's payroll system seems actively to foster this mistaken belief. Apparently they are not informed of any minimum salary; their paychecks have an hourly rate of pay; they are marked as non-exempt from FLSA's overtime requirements on their paychecks (exempt employees have the letter "Z" and they have none) and in the City's compensation manual; they must clock in and out; and the MOU allows the City to reduce their schedule. Further, the payroll system appears to calculate their paychecks using an hourly rate of pay, with no checks to ensure they are being paid the minimum salary owed.

Yet the question here is not whether there is a genuine dispute as to whether the nurses believe they are hourly or salaried employees: it is whether they are in fact paid hourly or salaried. The salary ordinance establishes that they are in fact salaried, bolstered by Ponder's declaration; furthermore, the City can explain each of the facts that Plaintiffs rely on. They are marked as non exempt because they have overtime through the MOU. They must clock in because the City cannot pay them for time they do not work, even though they are salaried, as discussed below.

The MOU's references to an hourly rate of pay do not rebut that the "salary" section provides evidence of the nurses being salaried, for several reasons. First, there is no equivalent "hourly pay plan" section. The structure of the "pay, hours and benefits" part of the MOU in which the "salary" section appears sets out what a normal work schedule looks like for staff nurses, and how per diem nurses are paid. The "hourly"

references uniformly occur when referring to extra pay for certain shifts, in which case it is much more natural to refer to a 20% premium on an (implied) hourly rate, as compared to the tiny difference in an annual salary. For example, nobody would say "I earn .078% more for a night shift" (roughly the premium as a percentage of an annual salary). Instead, one would say "I earn 20% more for a night shift," referring to the per hour or per shift premium. Finally, the MOU applies to both staff nurses and per diem-only nurses, and the per diem nurses only have an hourly rate.

Nor does the City's use of an "hourly" rate for nurses' paychecks establish that they are not hourly workers. *See McGuire v. City of Portland,* 159 F.3d 460, 464 (9th Cir. 1998). Agencies are allowed to convert annual salaries into hourly increments, and use this system when calculating payroll. *Id.* The City notes that even the Mayor's salary is expressed as an "hourly" rate on her paycheck: that is simply an artificial bureaucratic misnomer.[7] Plaintiffs' cherry-picked use of deposition testimony in which payroll employees note

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[7] Plaintiffs also argue that because their pay is calculated on an hourly basis, the City must show there is a reasonable relationship between the guaranteed salary and wages actually paid, under 29 C.F.R. § 541.604(b). That section of the code appears to be inapplicable: it refers to cases in which an employee is actually paid by the hour, day, or shift, but also has a salary as a guaranteed backstop.

The section is intended to guard against employers putting hourly employees on a lowball guaranteed salary in order to exempt them from the FLSA's hourly provisions: an employer cannot say an employee is "salaried" if their "salary" is $200 per week when their usual earnings from hourly work per week are $1,000. (A reasonable relationship is, e.g., the earnings should not be more than 50% of than the salary. Opinion Letter Fair Labor Standards Act (FLSA), 2018 WL 5921453, at *2.)

that the pay is calculated on an hourly basis cannot overcome the broader context in which this is an administrative convenience, and also accounts for the fact that by definition, Plaintiffs work a fluctuating number of hours beyond their normal salary, as they occasionally pick up per diem shifts, and the City must also ensure it does not pay them for certain periods of leave. True, the payroll system does not check that nurses' paychecks meet their minimum salary, but the guarantee of their shifts ensures it just as effectively.

Many of the cases Plaintiffs cite, e.g., *Hughes,* deal with an entirely different fact pattern. *Hughes v. Gulf Interstate Field Servs., Inc.,* 878 F.3d 183 (6th Cir.

The code section makes clear it does not apply to regular salaried employees who also receive some variable compensation: it ends "[this section] does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary." Thus, courts have held an employer who shows an employee is salaried under another code section need not also prove there is a reasonable relationship between the salary and total compensation. *E.g., Litz v. Saint Consulting Group,* 772 F.3d 1, 1, 5 (1st Cir. 2014). Just because the City's payroll system uses an hourly rate does not mean the pay is actually "computed" hourly. The shift schedule effectively computes the nurses' pay, and it is a regular, salaried schedule.

Consequently, this section's language about a "guarantee" does not apply, and the fact that the MOU has language that would undercut a "guarantee" is of no moment. In any case, Plaintiffs' clear understanding that they were entitled to work their shifts establishes that their salary was a "matter of right" not a "matter of grace." *Hughes v. Gulf Interstate Field Servs., Inc.,* 878 F.3d 183, 191 (6th Cir. 2017). Even if this section did apply, nurses are guaranteed shifts (and thus a baseline salary) and it appears their compensation has a reasonable relationship to their salary.

2017). In *Hughes,* the workers were actually paid by the day: it was not simply an accounting fiction, as here. Also, the employer was private, not public. (The public accountability principles discussed below do not convert salaried public employees into hourly workers for this purpose, but it does mean public employers must ensure pay is not disbursed for unworked hours, even for salaried employees.)

The declaration of SEIU Employee Nato Green also does not create a genuine dispute of material fact as to whether Plaintiffs are salaried. For example, Green states "I am also readily familiar with the language and interpretation of MOU ¶ 311, which states, 'Salaries for part time services shall be calculated upon the compensation for normal work schedules proportionate to the hours actually worked.'" *Silloway* Dkt. No. 67-1 at 4. Green interprets "hours actually worked" to mean nurses are paid hourly: in context, the provision means at most that pay is calculated for the part time schedule, adjusted for hours actually worked, because the City cannot pay for hours not worked, as discussed below.

Green's vague declaration that the City has cut nurse's schedules does not create a genuine dispute of fact when weighed against the numerous depositions of nurses who explained their personal experience of never having their schedules cut nor hearing of it ever happening to colleagues. The City also introduces evidence it has instructed managers not to reduce nurse's schedules. (Plaintiffs' argument that this suggests cuts had been made previously falls flat in the absence of any specific evidence of cuts.)

Beyond that, there are several elephants in the room that Plaintiffs either do not acknowledge or barely so. First, each nurse is well aware of their FTE.

All recognize that there are full-time and part-time nurses, and that entails working a set number of shifts per pay period. This is a guarantee of a minimum amount of compensation. Each deposed Plaintiff acknowledges never having been denied the right to work their scheduled shifts. That is the essence of being a salaried worker under the FLSA. Further, Plaintiffs do not attempt to explain the MOU's discussion of "salary" and "salaries" in various places, nor the negotiated salary bands that the MOU contemplates and the Board of Supervisors in fact approves and publishes.

3. Dual Status System

Nothing about the dual shift system itself means that Plaintiffs are not salaried, and the system does not violate the FLSA. Essentially, Plaintiffs are choosing to work a second type of job for the same employer. The City notes that FLSA allows employers to provide additional compensation "on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis)" 29 C.F.R. § 604(a).

In Plaintiffs' framing, the City is creating an arbitrary distinction: a nurse might work a regular shift, and then keep working in the same ward, on the same day, pushing past 40 hours for the week, yet because the nurse signed up for the extra shift, he or she is not paid overtime according to the MOU or the FLSA. Plaintiffs' attempt to paint this distinction as contrived or technical obscures that it stems from an exceedingly important distinction: the extra shifts are outside of Plaintiffs' job duties. Plaintiffs are voluntarily choosing to work extra shifts, knowing that these different shifts come with different pay.

Plaintiffs view the dual status system as a nefarious plot by the City to do an end run around FLSA's requirements because of short staffing. The undisputed evidence, by contrast, shows the City is not forcing them to pick up these extra shifts in a P103 capacity. If staff nurses do not fill them, external per diem nurses might, or shifts might go unfilled. That is a problem for the City, not the internal per diem nurses, even if understaffing makes their already difficult jobs even more demanding.

B. Deductions

Plaintiffs also argue they are not salaried because the City constantly deducts from their ostensible salary to the point that they must not be salaried. (As noted above, the briefing also veers into discussing this as a standalone FLSA violation, although the Complaints do not specifically aver any such violation.) In general, under the FLSA, salaried employees cannot have their paychecks reduced because, for example, there was not enough work to go around on a given day. If the employee is "ready, willing, and able to work" deductions cannot be made from his or her amount for absences "occasioned by the employer." 29 C.F.R. § 541.602(a). However, there are several exceptions. Most relevant here, public employers are allowed to operate under principles of "public accountability." Thus, when a public employee takes brief periods of leave, the employer can deduct pay or require that they use personal or sick leave, and if the employee has run out of those leave banks, that they take unpaid leave. 29 C.F.R. § 541.710(a). The employer can also deduct pay if "permission for [use of accrued leave] has not been sought or has been sought and denied." *Id.* Plaintiffs barely address this regulation in their briefing. Admittedly, it does not square

well with other parts of FLSA, and effectively creates a sort of chimera between hourly and salaried employees. Still, nothing in the City's deductions creates a genuine dispute of material fact as to whether the employees are salaried, or whether there is a standalone FLSA violation.

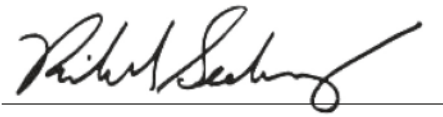
A court in this district has already found that the City's pay system is one of public accountability. Stewart v. City and County of San Francisco, 834 F.Supp. 1233 (N.D. Cal. 1993). Defendants submit an expert report that purports to analyze a random subset of Plaintiffs' deductions, although Plaintiffs dispute that it is reliable. The report's methodology is reliable enough to determine that there is neither an "actual practice of making such [inappropriate] deductions" nor a "significant likelihood" of them occurring, and the City's FLSA compliance has been in good faith, at least for the period applicable for this case. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). (While the City could have done more to ensure FLSA compliance earlier, as the lone employee to analyze its compliance before this lawsuit was a nonlawyer, Steven Ponder, and he did so after the dual-status program was implemented, the City's conduct, in context, establishes good faith, at least for the period at issue here.) Any noncompliant deductions are best characterized as isolated and inadvertent, which is insufficient for finding a FLSA violation. 29 C.F.R. § 541.603(a). The majority of the fairly limited deductions are allowable: either an employee had exhausted his or her leave bank, or some other exception applies, e.g., the employee was tardy. Nothing in the City's deductions establishes a genuine dispute of material fact as to whether Plaintiffs are salaried or whether the dual status system violates the FLSA.

V. CONCLUSION

The City's motion for summary judgment is granted, and Plaintiffs' summary judgment motions are denied. The remaining motions are denied as moot.

IT IS SO ORDERED.

Dated: July 15, 2022



RICHARD SEEBORG
Chief United States District Judge

Appendix C

United States Court of Appeals
For the Ninth Circuit

FILED OCT 23 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 22-16079
D.C. No. 3:20-cv-07400-RS
Northern District of California, San Francisco

Kristen Silloway; Christa Duran;
Brigitta Van Ewijk,

Plaintiffs-Appellants,

v.

City and County of San Francisco,

Defendant-Appellee.

No. 22-16568
D.C. No. 3:18-cv-01494-RS
Northern District of California, San Francisco

Tatyana Litvinova,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

City and County of San Francisco,

Defendant-Appellee.

ORDER

Before: BEA, HAMILTON,* and CHRISTEN, Circuit Judges.

The motion of Litvinova Appellants to join in the Silloway Appellants' petition for panel rehearing and rehearing en banc [Dkt. #62], filed on September 25, 2024, is GRANTED.

In consideration of Silloway Appellants' petition for panel rehearing and rehearing en banc [Dkt. #61], Judge Hamilton and Judge Christen have voted to deny the petition for panel rehearing, and Judge Bea has voted to grant the petition for panel rehearing. Judge Christen has voted to deny the petition for rehearing en banc, Judge Bea recommends granting the petition for rehearing en banc, and Judge Hamilton recommends denying that petition.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

Plaintiffs-Appellants' petition for panel rehearing and rehearing en banc, filed on September 25, 2024, is DENIED.

* The Honorable David F. Hamilton, United States Circuit Judge for the Court of Appeals for the Seventh Circuit, sitting by designation.

Appendix D

29 U.S.C. § 207(a)(1) – Maximum hours.

(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.

29 U.S.C. § 213(a)(1) – Exemptions.

(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

29 CFR § 541.602—Salary basis.

(a) ***General rule.*** An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(3) Up to ten percent of the salary amount required by § 541.600(a) through (c) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an

anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under § 541.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by § 541.600(a) through (c), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a ***pro rata*** portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

(b) ***Exceptions.*** The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's sala-

ried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts re-

ceived by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

29 CFR § 541.604—Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example under the salary requirement described in § 541.600(a)(2), an exempt employee guaranteed at least $1,128 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $1,128 each week paid on a salary basis. Similarly,

the exemption is not lost if an exempt employee who is guaranteed at least $1,128 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example under the salary requirement described in § 541.600(a)(2), an exempt employee guaranteed compensation of at least $1,210 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $350 per shift without violating the $1,128 per week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

29 CFR § 541.710—Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.