**No. 25-____**

IN THE

# Supreme Court of the United States

JERRY MERRITT,

*Petitioner,*

v.

TEXAS FARM BUREAU; TEXAS FARM BUREAU BUSINESS CORPORATION; TEXAS FARM BUREAU CASUALTY INSURANCE COMPANY; TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY; TEXAS FARM BUREAU UNDERWRITERS; FARM BUREAU COUNTY MUTUAL INSURANCE COMPANY OF TEXAS; SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

PETER M. KELLY
*Counsel of Record*
KELLY WATKINS MCPHEETERS LLP
1302 Waugh, Box 596
Houston, Texas 77019
(888) 895-8335
Peter@TexasAppeals.com

June 26, 2026

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTION PRESENTED

Jerry Merritt sued Respondents for unpaid overtime under the Fair Labor Standards Act. The trial court ruled he was a non-exempt employee who had worked an undisputed 816 hours of overtime.

Under the FLSA, an employer must pay a premium for overtime hours it *employs* an employee. 29 U.S.C. § 207. "Employ" as defined "includes to suffer or permit to work." 29 U.S.C. § 203(g). Respondents expressly allowed Merritt to work as much as he wished. Nevertheless, the Fifth Circuit ruled that Respondents need not pay him any overtime premium because they did not know he was working overtime hours.

The question here is whether an employer who permits an employee to work as much as the employee wishes "employs" the worker under the FLSA for overtime worked, or must the worker also show the employer knew about the overtime work.

## CORPORATE DISCLOSURE

Petitioner Jerry Merritt is an individual. He has no parent corporation and no publicly held corporation owns 10% or more of his stock.

## PARTIES TO THE PROCEEDING

**Petitioner—Plaintiff**

Jerry Merritt

**Respondents—Defendants**

Texas Farm Bureau

Texas Farm Bureau Business Corporation

Texas Farm Bureau Casualty Insurance Company

Texas Farm Bureau Mutual Insurance Company

Texas Farm Bureau Underwriters

Farm Bureau County Mutual Insurance Company of Texas

Southern Farm Bureau Life Insurance Company

## RELATED PROCEEDINGS

**United States Court of Appeals, Fifth Circuit**

*Merritt v. Texas Farm Bureau et al.*, No. 24-50127,

Judgment entered on February 6, 2026.

**United States District Court for the Western District of Texas**

*Merritt v. Texas Farm Bureau et al.*, No. 6:19-cv-00679-DTG,

Judgment entered on June 14, 2023.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Rules

## Citation to Opinions and Orders in the Case

*Merritt v. Tex. Farm Bureau*, 166 F.4th 490 (5th Cir. 2026). The Fifth Circuit's opinion is reproduced at App. 4. The order denying en banc rehearing is reproduced at App. 12.

*Merritt v. Tex. Farm Bureau*, No. 6:19-CV-00679-DTG, 2024 WL 6996148 (W.D. Tex. Oct. 11, 2024), aff'd, 166 F.4th 490 (5th Cir. 2026). This opinion is reproduced at App. 18.

*Merritt v. Tex. Farm Bureau*, 673 F. Supp. 3d 859 (W.D. Tex. 2023).

*Merritt v. Tex. Farm Bureau*, No. W-19-CV-00679-DTG, 2023 WL 3520236 (W.D. Tex. May 16, 2023).

*Merritt v. Tex. Farm Bureau*, No. W-19-CV-00679-DTG, 2023 WL 3441573, at *1 (W.D. Tex. May 12, 2023).

*Merritt v. Tex. Farm Bureau*, No. 6:19-CV-00679-ADA, 2020 WL 10056290 (W.D. Tex. July 6, 2020).

*Merritt v. Tex. Farm Bureau*, No. 6:19-CV-00679-ADA-JCM, 2020 WL 10056285, at *1 (W.D. Tex. June 16, 2020), report and recommendation adopted, No. 6:19-CV-00679-ADA, 2020 WL 10056290 (W.D. Tex. July 6, 2020).

## Jurisdictional Statement

The Fifth Circuit entered its judgment on February 6, 2026. On March 30, 2026, the Fifth Circuit denied Petitioner's petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

29 U.S.C. § 203 (App. 37)

As used in this chapter—

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

29 U.S.C. § 207 (App. 50)

(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.

* * *

## STATEMENT OF THE CASE

### I. The trial court had jurisdiction because the case raised a federal question.

The United States District Court for the Western District of Texas had subject matter jurisdiction because the case arises under the Fair Labor Standards Act, a law of the United States. 28 U.S.C. § 1331.

### II. Merritt was permitted to work overtime hours.

Respondents employed Merritt as an Agency Manager but classified him as an independent contractor.[1] Agency Managers like Merritt could work as much or as little as they want to.[2] In fact, Respondents contractually assured him total control over his schedule.[3] Respondents did not require him to track or report his hours, did not prohibit him from working overtime, and did not discourage overtime work.[4] And while the FLSA required Respondents to maintain records of Merritt's hours, they had no timekeeping system for him at all—despite having the resources and ability to maintain one.[5]

It is undisputed that Merritt worked at least 816 hours of overtime over a two-year period—approximately 12 hours of overtime in 68 out of 91

---

[1] App. 18.

[2] App. 20.

[3] App. 20.

[4] App. 20.

[5] App. 20, 27.

weeks.[6] Respondents paid him no overtime premium for any of it.

### III. Merritt was denied overtime pay for the overtime work Respondents permitted.

Merritt sued Respondents under the FLSA for unpaid overtime alleging he was misclassified as an independent contractor.[7] The trial court agreed he was an employee and that he was not subject to any exemption from entitlement to overtime pay under the FLSA.[8]

The FLSA requires an employer to pay a premium for overtime hours it employs a non-exempt employee. 29 U.S.C. § 207. Merritt, however, was denied recovery of a premium for his overtime work. The Fifth Circuit found he was not entitled to any overtime premium because Respondents did not have actual or constructive knowledge of his overtime work.[9] *Merritt v. Tex. Farm Bureau*, 166 F.4th 490, 493 (5th Cir. 2026).

## ARGUMENT FOR GRANTING THE WRIT

Can an employer permit an employee to work unlimited overtime, collect the full benefit of that work, and then avoid paying an overtime premium by claiming it did not know the employee was working overtime? The FLSA requires employers to pay an overtime premium for every hour they "employ" a worker beyond forty in a workweek. Congress defined "employ" to mean "to suffer or permit to work." 29 U.S.C. § 203(g). The statute reaches work the employer

---

[6] Farm Bureau did not appeal the finding on Merritt's overtime hours.

[7] App. 4.

[8] App. 18.

[9] App. 4.

welcomed, encouraged, or simply allowed. The question here is what "permit" means when an employer expressly authorizes an employee to work as many hours as the employee wishes, never prohibits or restricts overtime, and collects the full benefit of that work. The answer the text compels is yes—the employer permitted it all. But the Fifth Circuit said no. It held that express permission is not enough because the employee must also prove the employer had actual or constructive knowledge of the specific overtime hours worked. *Merritt v. Tex. Farm Bureau*, 166 F.4th 490, 493 (5th Cir. 2026). That knowledge requirement appears nowhere in the statute. The Fifth Circuit added a limitation to the FLSA that Congress did not enact. And it handed employers a blueprint for gaining unpaid overtime labor—grant unlimited permission, collect unlimited work, keep no time records, and owe nothing. This Court should grant review to correct the law.

## I. Merritt was expressly permitted to work overtime hours.

Respondents expressly permitted Merritt to work as much as he wished. There was no company rule or policy that prohibited, prevented, or even discouraged him from working more than 40 hours a week. Because he was allowed to work as much as he wanted, Respondents necessarily permitted Merritt to work all the hours he worked—including his overtime hours. Respondents have not—indeed cannot—identify a single minute of Merritt's work that they did not permit.

Applying the FLSA's plain text to these facts yields only one conclusion: by permitting all his overtime work, Respondents employed Merritt for all his overtime hours. 29 U.S.C. § 203(g). Therefore, they owe him his unpaid overtime. 29 U.S.C. § 207(a).

## II. The Fifth Circuit imposes a knowledge requirement absent from the statute.

But the Fifth Circuit did not reach that result because it imposed an additional requirement—that an employee prove the employer knew that overtime work was being performed, even when the employer permitted its worker to work as much as the worker wished. *Merritt*, 166 F.4th at 493. To it, regardless of the statutory text, permitting work alone would not suffice: "We have never held that an employer's knowledge of overtime work is irrelevant merely because it permits an employee to work as much (or as little) as he pleases." *Id.* Instead, workers seeking overtime must "prove their employer's knowledge, actual or constructive, that the employees were working overtime." *Id.* (cleaned up).

The FLSA's text does not impose any requirement that the employer have knowledge of overtime work before being liable for an overtime premium.[10][11] Instead, the knowledge requirement the Fifth Circuit applied evolved from cases resolving a different dispute: whether an employer who formally *prohibits* overtime or off-the-clock work nevertheless *knowingly allows* prohibited work to occur.

When overtime work is unauthorized, the answer to whether the employer nevertheless suffers or permits that work turns on whether it knew or should have known the work was happening. For example, when an employer prohibits overtime work, but overtime is nevertheless worked in violation of the employer's

---

[10] App. 4.

[11] *See, generally,* 29 U.S.C. § 201 et seq.

policy.[12] Or when the employer has a time clock or requires time sheets, but off-the-clock or unreported work is done anyway.[13] Courts regularly resolve these disputes by asking whether the employer knew or should have known about the work.

That makes perfect sense. An employer who prohibits unwanted work does not "permit" the work, and one cannot "suffer" something one does not know about.[14] On the other hand, if the employer knows unauthorized work is being done and looks the other way, it is de facto suffering or permitting that work—and it must pay.[15] And so courts have consistently found that whether unauthorized work was "suffered or permitted" turns on whether the employer knew or should have known it was occurring.[16]

### III. Here, there was no unauthorized work—all work was permitted.

But when an employer not only does not prohibit certain work but also actively grants the employee permission to work as much as the employee wishes, there is no unauthorized work to analyze. When every

---

[12] *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995); *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016).

[13] *Loy v. Rehab Synergies, L.L.C.*, 71 F.4th 329 (5th Cir. 2023); *Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428 (5th Cir. 2005); *White v. Patriot Erectors, L.L.C.*, No. 23-50524, 2024 WL 3181455 (5th Cir. June 26, 2024).

[14] *Id.*

[15] *Id.*

[16] *See, e.g., Newton*, 47 F.3d 746; *Fairchild*, 815 F.3d 959; *Loy*, 71 F.4th 329; *Harvill*, 433 F.3d 428; and *Patriot Erectors*, 2024 WL 3181455.

minute is proactively permitted, the question, "did the employer know about the unauthorized work so it nevertheless suffered or permitted it?" does not arise. All the work was permitted because the employer already said yes to allowing as much work as desired.

The Fifth Circuit accepted that Respondents "permit[ted] an employee to work as much (or as little) as he pleases."[17] Having acknowledged that, it had no basis rooted in the FLSA's text to then conclude that any of Merritt's work was not "suffered or permitted." The further inquiry into knowledge—developed in cases involving employer prohibitions—erroneously rewrote the FLSA's requirements.

## CONCLUSION

The Fifth Circuit's decision is wrong, and this Court should say so. When an employer gives an employee permission to work without limit, every hour that employee works is suffered or permitted—including overtime. No additional showing of employer knowledge is required because no additional showing is possible: the employer has already said yes to all of it. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (cleaned up). But the Fifth Circuit did not enforce the statute's terms. It rewrote them.

The decision below will not stay confined to Jerry Merritt. It affects every employment relationship subject to the FLSA. And its consequences fall hardest on the workers Congress most intended to protect.

[17] App. 7.

Employees in informal, flexible arrangements—those without written contracts, without HR departments tracking their hours, or without the leverage to demand either—now face an impossible burden. They must prove their employer knew the specific hours it had already said yes to. Congress did not impose that burden. The Fifth Circuit invented it.

The decision also creates a perverse and destabilizing set of incentives for employers. Responsible businesses that track their employees' hours—as the FLSA requires—will know when overtime is being worked and must pay the premium. Businesses that ignore their recordkeeping obligations will not know, and under the rule below, will owe nothing. The Fifth Circuit has handed a competitive advantage to the least compliant employers in the market: the less you know, the less you owe. Compliant businesses are penalized for their compliance. That cannot be what Congress intended, and it is not a stable foundation for the employment relationships of millions of workers across the United States.

This Court should grant certiorari, vacate the Fifth Circuit's opinion, and restore what the FLSA has always required—an employer to pay for the work it permits.

Respectfully submitted,

PETER M. KELLY
*Counsel of Record*
KELLY WATKINS MCPHEETERS LLP
1302 Waugh, Box 596
Houston, Texas 77019
(888) 895-8335
Peter@TexasAppeals.com

June 26, 2026

# APPENDIX

APPENDIX TABLE OF CONTENTS

**APPENDIX A**

Opinion of the
United States Court of Appeals
for the Fifth Circuit
*February 6, 2026*

---

United States Court of Appeals
for the Fifth Circuit

---

No. 24-50127

---

JERRY MERRITT,

*Plaintiff—Appellant / Cross-Appellee*,

*versus*

TEXAS FARM BUREAU; TEXAS FARM BUREAU BUSINESS CORPORATION; TEXAS FARM BUREAU CASUALTY INSURANCE COMPANY; TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY; TEXAS FARM BUREAU UNDERWRITERS; FARM BUREAU COUNTY MUTUAL INSURANCE COMPANY OF TEXAS; SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY,

*Defendants—Appellees / Cross-Appellants*.

---

Appeal from the United States District Court for the Western District of Texas USDC No. 6:19-CV-679

---

Before HAYNES, DUNCAN, and RAMIREZ, *Circuit Judges*. STUART KYLE DUNCAN, *Circuit Judge*:

Appellant Jerry Merritt seeks compensation for overtime work during his employment with Appellee Texas Farm Bureau (TFB).[1] A jury found him not entitled to overtime pay because TFB had neither actual nor constructive knowledge of Merritt's overtime. The district court denied Merritt's post-judgment motions seeking to overturn the jury verdict. Merritt now appeals. We AFFIRM.

I

TFB employed Merritt as an Agency Manager. In this position, Merritt supervised a team of insurance agents in various TFB agencies. TFB classified all Agency Managers, including Merritt, as independent contractors. As an independent contractor, Merritt: (1) set his own schedule, (2) decided as much or as few hours he worked every day, and (3) had no obligation to track or disclose to TFB the hours he worked. TFB did not supervise Merritt's hours worked or his completion of daily tasks. Additionally, TFB compensated Merritt not on an hourly basis, but on commission for policies sold and renewed. From 2016 to 2018, he earned between $552,000 and $627,000 annually.

Merritt sued TFB in November 2019 challenging his classification as an independent contractor and seeking unpaid overtime under the Fair Labor Standards Act (FLSA) as an employee. The district court ruled on summary judgment that TFB should have classified

---

[1] "Texas Farm Bureau" refers to a collection of several insurance companies: Texas Farm Bureau Casualty Insurance Company, Texas Farm Bureau Mutual Insurance Company, Texas Farm Bureau Underwriters, Farm Bureau County Mutual Insurance Company of Texas, and Southern Farm Bureau Life Insurance Company.

Merritt as an employee and that he was owed at least 816 hours of overtime. The sole issue for trial was whether TFB had notice of that overtime work.

Following jury arguments, Merritt moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court orally denied the motion and charged the jury with the following instruction modeled after the Fifth Circuit's pattern jury instructions: "[A]n employee has a duty to notify his employer when he is working extra hours. . . . If the employer neither knew nor had reason to believe that overtime work was being performed, that time does not constitute hours worked." *See* Pattern Civ. Jury Inst. 5th Cir. 11.24 (2020), at 280, 284. The jury decided TFB had neither actual or constructive knowledge of Merritt's overtime. Merritt filed a Rule 50(b) renewed motion for judgment as a matter of law and an alternative Rule 59 motion to vacate and grant a new trial. Both were denied.

Merritt now appeals the denials of his Rule 50(a), Rule 50(b), and Rule 59 motions. He also appeals the district court's summary judgment decision determining how to calculate his overtime. As cross-appellant, TFB conditionally appeals various other summary-judgment rulings.

II

We review the denial of a Rule 50 motion *de novo*, asking "'whether a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Carter v. Loc. 556, Transp. Workers Union of Am.*, 156 F.4th 459, 478 (5th Cir. 2025) (quoting *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 799 F.3d 374, 377–78 (5th Cir. 2015)). We afford the jury verdict "great deference . . . , viewing all the evidence and drawing all reasonable inferences in the light most favorable to the verdict." *Thomas v. Tex. Dep't of Crim. Just.*, 220 F.3d 389, 392 (5th Cir. 2000).

We review the denial of a Rule 59 motion for a new trial for an abuse of discretion. *Harmon v. Collier*, 158 F.4th 595, 607 (5th Cir. 2025) ("The district court abuses its discretion by denying a new trial only when there is an absolute absence of evidence to support the jury's verdict." (quoting *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 614 (5th Cir. 2018))).

III

TFB and Merritt agree that, throughout his employment, Merritt was classified as an independent contractor paid on commission with no obligation to report hours worked. Despite that, we proceed on the assumption that the district court correctly decided Merritt was *not* an independent contractor, but an employee. Merritt presents three arguments in support of his contention that the district court erroneously denied his Rule 50 and 59 motions. Each fails.

A

First, Merritt cites the FLSA's definition of "employ," which means "to suffer or permit to work." 29 U.S.C. § 203(g). He contends TFB owes him overtime pay because it "suffered" or "permitted" him to work as much as he wanted. Because TFB permitted Merritt to work unlimited hours, Merritt argues TFB's knowledge of his overtime work is irrelevant.[2]

This argument fails. Allowing Merritt to work as much as he pleased cannot mean TFB automatically

---

[2] TFB argues Merritt has waived this argument. Because we reject Merritt's argument on the merits, we need not address waiver.

owes Merritt for any time he happened to work overtime, regardless of TFB's knowledge of those overtime hours. We have never held that an employer's knowledge of overtime work is irrelevant merely because it permits an employee to work as much (or as little) as he pleases. Rather, we have consistently required employees claiming an entitlement to overtime pay to prove their employer's "knowledge, actual or constructive, that [the employees] w[ere] working" overtime. *Newton P. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995); *Loy P. Rehab Synergies, L.L.C.*, 71 F.4th 329, 337 (5th Cir. 2023); *White v. Patriot Erectors, L.L.C.*, No. 23-50524, 2024 WL 3181455, at *4 (5th Cir. June 26, 2024).

Those precedents foreclose Merritt's argument, which the district court correctly rejected.

B

Next, Merritt argues the district court incorrectly ruled that TFB lacked constructive knowledge of his overtime. Constructive knowledge exists if an employer "had the 'opportunity through reasonable diligence to acquire knowledge.'" *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 827 (5th Cir. 1973) (quoting *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969)). Merritt argues TFB had constructive knowledge because it made "no effort" to record Merritt's time despite an alleged legal requirement to do so. This lack of a timekeeping system, he argues, amounts to "constructive knowledge" because it shows TFB's failure to exercise "reasonable diligence" to find out about his overtime. Merritt adds he had no "common-law" duty to notify TFB of his overtime; his only duty was to comply with TFB's timekeeping system, a system that did not exist.

We disagree. First, it was Merritt's burden to show TFB knew he was working overtime. *See Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App'x 448, 455 (5th Cir. 2009) ("[A]n employee must prove that he was 'employed' during the time for which he seeks overtime compensation, which requires a showing that the employer had either actual or constructive knowledge that he was working overtime." (quoting *Newton*, 47 F.3d at 748)). To say that TFB's lack of a timekeeping system equals constructive knowledge of overtime would incorrectly flip Merritt's burden onto TFB. We decline to do so.

Moreover, we have never held that an employer's failure to maintain a timekeeping system in itself constitutes constructive knowledge of an employee's overtime work. The cases Merritt cites do not support this proposition. They teach only that constructive knowledge can be based on how the business operates. *See Brennan*, 482 F.2d at 827–28 (finding constructive knowledge when supervisors encouraged employees to report artificially low overtime hours); *U.S. Dep't of Lab. v. Five Star Automatic Fire Prot., L.L.C.*, 987 F.3d 436, 444 (5th Cir. 2021) (finding constructive knowledge when supervisor instructed or implied that employees should not record overtime hours).

As noted, TFB permitted Agency Managers like Merritt to work autonomously, without direct daily supervision and in a different location from TFB management. TFB did not require Agency Managers to track their time, nor did it pay them hourly. Consequently, TFB had no reason to think of Merritt's labor in terms of regular versus overtime hours. Accordingly, we cannot conclude the district court erred by finding a lack of reasonable diligence on

TFB's part simply because it did not maintain a timekeeping system.

C

Finally, Merritt argues the district court erroneously charged the jury with the "misleading" and "misguided" instruction that Merritt had a duty to notify TFB he was working overtime.

We again disagree. The district court's jury charge was modeled after the Fifth Circuit's pattern jury instructions. The court did not err in doing so. *See United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009) ("It is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law."). Merritt cites no authority to support his argument that the jury charge incorrectly stated Fifth Circuit law.

IV

The district court's denial of Merritt's post-judgment motions is AFFIRMED.[3]

[3] As a result, we need not address Merritt's alternative arguments related to the correct overtime multiplier, nor need we address TFB's conditional cross-appeals.

**APPENDIX B**

Order Denying Rehearing En Banc
*March 30, 2026*

---

United States Court of Appeals
for the Fifth Circuit

---

No. 24-50127

---

JERRY MERRITT,

*Plaintiff—Appellant / Cross-Appellee,*

*versus*

TEXAS FARM BUREAU; TEXAS FARM BUREAU BUSINESS CORPORATION; TEXAS FARM BUREAU CASUALTY INSURANCE COMPANY; TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY; TEXAS FARM BUREAU UNDERWRITERS; FARM BUREAU COUNTY MUTUAL INSURANCE COMPANY OF TEXAS; SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY,

*Defendants—Appellees / Cross-Appellants.*

---

Appeal from the United States District Court for the Western District of Texas USDC No. 6:19-CV-679

---

ON PETITION FOR REHEARING EN BANC

Before HAYNES, DUNCAN, and RAMIREZ, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

**APPENDIX C**

Final Judgment, United States District Court,
Western District of Texas
*June 14, 2023*

---

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

---

CASE NO. 6:19-CV-00679

---

JERRY MERRITT,

*Plaintiff,*

v.

TEXAS FARM BUREAU, TEXAS FARM BUREAU BUSINESS CORPORATION, TEXAS FARM BUREAU CASUALTY INSURANCE COMPANY, TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY, TEXAS FARM BUREAU UNDERWRITERS, FARM BUREAU COUNTY MUTUAL INSURANCE COMPANY OF TEXAS, and SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY

*Defendants.*

---

FINAL JUDGMENT

This action was tried before a jury from May 22, 2023, through May 24, 2023, on the sole issue of whether Defendants had knowledge, either actual or constructive, that Plaintiff Jerry Merritt was working more than 40 hours in any given workweek during the relevant time period. The jury unanimously answered

"No" and returned its verdict on all questions in favor of Defendants. ECF No. 213. It is therefore,

**ORDERED AND ADJUDGED** that Plaintiff take nothing by this suit, that this action be dismissed on its merits, and that Defendants recover its costs from Plaintiff.

It is further **ORDERED** that this take nothing judgment in favor of Defendants is effective as to all claim filed in this action by Plaintiffs.

It is further **ORDERED** that Defendants are directed to file a bill of costs, in accordance with Local Rule 54, within fourteen days of entry of this Final Judgment.

It is further **ORDERED** that this is a final judgment that disposes of all claims and parties and execution shall issue for this judgment as permitted by law.

**JUDGMENT IS HEREBY GRANTED** in favor of Defendants and against Plaintiff. Defendants are fully and finally released, acquitted, and discharged from any and all liability to Plaintiff for any and all causes of action that have been pled or could have been pled in this case.

SO ORDERED this 14th day of June 2023.

/s/Derek T, Gilliland
HONORABLE DEREK T. GILLILAND
U.S. MAGISTRATE JUDGE

**APPENDIX D**

Order Denying Plaintiff's Rule 50 Motion for Judgment as a Matter of Law
*October 11, 2024*

---

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

---

CASE NO. 6:19-CV-00679-DTG

---

JERRY MERRITT,

*Plaintiff*,

v.

TEXAS FARM BUREAU, TEXAS FARM BUREAU BUSINESS CORPORATION, TEXAS FARM BUREAU CASUALTY INSURANCE COMPANY, TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY, TEXAS FARM BUREAU UNDERWRITERS, FARM BUREAU COUNTY MUTUAL INSURANCE COMPANY OF TEXAS, AND SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY

*Defendants*.

---

ORDER DENYING PLAINTIFF'S RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW (ECF NO. 220)

and

DENYING PLAINTIFF'S RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW AND ALTERNATIVE RULE 59 MOTION TO VACATE AND GRANT NEW TRIAL (ECF NO. 224)

Before the Court is Plaintiff's Rule 50 Motion for Judgment as a Matter of Law and Alternative Rule 59 Motion to Vacate and Grant New Trial (ECF No. 224) ("Plaintiff's Motion").[1] Defendants Texas Farm Bureau, Texas Farm Bureau Business Corporation, Texas Farm Bureau Casualty Insurance Company, Texas Farm Bureau Underwriters, Texas Farm Bureau County Mutual Insurance Company of Texas, and Southern Farm Bureau Life Insurance Company ("Defendants") responded, ECF No. 232, and Plaintiff filed a Reply. ECF No. 233. The Court heard oral argument on Plaintiff's Motion on January 24, 2024, where, after considering the record, and the arguments of counsel, the Court orally denied the Motion and concluded that the jury's verdict was properly supported by the evidence adduced at trial and that it should not be disturbed. This Order memorializes that ruling for the record.

This FLSA case culminated in a three-day jury trial that resulted in a take nothing verdict for Defendants on May 24, 2023. ECF No. 21. A final judgment was issued on June 14, 2023. ECF No. 217. The sole question at trial was whether Plaintiff had proven that Defendants had knowledge, either actual or constructive, that he was working more than 40 hours in any given workweek. ECF No. 213, Jury Verdict Form, at 1. The jury responded "no." *Id*. Plaintiff now brings this motion claiming that the jury was improperly charged by instructing it that Plaintiff had a duty to notify

[1] Plaintiff filed the identical Motion one day apart. ECF Nos. 220 and 224. The first Motion was filed before the Court granted leave to exceed the page limits, and once after. The Motions are identical and the Parties refer to the document filed at ECF No. 224 as the controlling motion. The Court therefore DENIES ECF No. 220 as MOOT.

Defendants about his overtime, thus warranting a new trial. ECF No. 220 at 2. Plaintiff also argues that the evidence at trial established that Defendants had actual or constructive knowledge of Plaintiff working overtime, that the jury's verdict is against the clear weight of the evidence, and that either judgment should be entered in Plaintiff's favor, or a new trial should be ordered. *Id*.

## I. BACKGROUND.

Plaintiff Jerry Merritt worked as an Agency Manager for Defendants and filed this suit claiming he was misclassified as an independent contractor under the Fair Labor Standards Act ("FLSA"), and that he had worked overtime hours for which he had not been compensated. ECF No. 235 at 2. At the summary judgment stage, the Court resolved several of the parties' disputes as matters of law. Of importance here, the Court held that Plaintiff was an employee under the FLSA and not exempt from coverage under it. The Court also found that Plaintiff had worked at least 816 hours of overtime in the relevant two-year lookback period. ECF No. 224 at 2 (citing ECF Nos. 181, 182, 186, 187). Following an entry of an agreed-upon set of stipulations reached by the parties (ECF 191-2), the sole question for trial was whether Plaintiff satisfied his burden of demonstrating that Defendants had actual or constructive notice of his alleged overtime work. ECF No. 224 at 3; ECF No. 235 at 2.

The jury heard evidence over a two-day period, with Plaintiff calling six witnesses— three of Defendants' sales and marketing executives, two of Defendants' district sales managers, and Plaintiff. Defendant cross-examined the witness and rested immediately after Plaintiff rested without calling any additional witnesses. The jury heard that Plaintiff signed multiple contracts agreeing to be an independent contractor and that he did not object to those agreements. ECF No. 250 at 88-99. Witnesses testified that Defendants did not impose hour requirements, there was no policy for how many hours an Agency Manager should work, and that the "working hours are up to each Agency Manger as they see fit." *Id*. at 132-135, 139. The jury heard that Defendants did not have a policy or procedure for reporting or tracking hours worked. *Id*. at 133. Defendants also did not track Plaintiff's hours, nor did it have a policy prohibiting Plaintiff from working overtime. ECF No. 249 at 132-133, 135, 148-149. Plaintiff set his own schedule and determined when and how he worked. *Id*. at 132, 135, 158, 164, and 199. Plaintiff did not inform Defendants of his schedule, and did not need or ask for permission to take time off. ECF No. 249 at 201-04; ECF No. 250 at 72, 73, 193-97, and 250-52. Defendants did not know how many hours Agency Managers like Plaintiff worked in a given week and testified that, "[W]e have no idea how many hours a week they are working." ECF No. 248 at 164. Plaintiff also testified that he never notified Defendants that he was working overtime. For example, Plaintiff testified that, "I never told anybody I was working overtime." ECF No. 250 at 68.

At the close of the evidence, the parties cross-moved for judgments under Rule 59(a), which were both denied. The Court instructed the jury, in pertinent part, as follows:

> [Y]our role will be limited to determining the following: whether the Plaintiff has proven, by a preponderance of the evidence, that the...Defendants for whom Plaintiff was working had knowledge, either actual or

constructive, that he was working more than 40 hours in any work-week during that period.

* * *

An employee's time spent primarily for the benefit of an employer or the employer's business is "hours worked" only if the employer has notice, that is, that the employer knew or had reason to believe that the employee was doing the work. At the same time, an employer who knows that an employee is working overtime and does not want the work to be done must make reasonable efforts to prevent it. If an employee in fact does overtime work and the employer knows or has reason to believe it, the employer cannot stand idly by and allow the employee to perform the work without proper compensation ... An employer has the right to require an employee to adhere to its procedures for claiming overtime and an employee has a duty to notify his employer when he is working extra hours. If the employee fails to notify the employer of the overtime work or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of the FLSA. If the employer neither knew nor had reason to believe that overtime work was being performed, the time does not constitute "hours worked."

Constructive knowledge exists if an employer exercising reasonable diligence would become aware that an employee is working overtime. But if the employee fails to notify the

> employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of the FLSA.

ECF No. 206 at 6-8; ECF No. 251 at 22-25.

The Jury was asked a single question: "Has Mr. Merritt proven that Defendants had knowledge, either actual or constructive, that he was working more than 40 hours in any workweek during the period?" ECF No. 213. The jury responded by checking "No." *Id*.

## II. PLAINTIFF IS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW UNDER RULE 50(b).

### A. Rule 50 Legal Standard.

A motion for judgment as a matter of law under Rule 50 should be denied unless "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on that issue." *Seibert v. Jackson Cnty.*, 851 F.3d 430, 434 (5th Cir. 2017). Review of a "jury's verdict is highly deferential." *Young v. Bd. of Supervisors of Humphreys Cnty., Miss.*, 927 F.3d 898, 903 (5th Cir. 2019). The Court must "draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party, and will uphold the verdict unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Cowart v. Erwin*, 837 F.3d 444, 450 (5th Cir. 2016).

### B. Argument and Analysis.

Plaintiff argues that "the Court applied and charged the jury with the wrong legal standard for constructive knowledge." ECF No.224 at 5. Plaintiff contends that under the proper legal standard Defendants had constructive knowledge, as a matter of law, because Defendants permitted Plaintiff to work overtime, violated their duty to track his hours worked, and prevented him from reporting his overtime. ECF No. 224 at 5. Plaintiff contends that the applicable caselaw holds that an employer who violates its FLSA recordkeeping duties has constructive knowledge of overtime as a matter of law. ECF No. 224 at 12 (citing *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969), *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981), and *Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F. Supp. 2d 372 (E.D.N.Y. 2012)).

To recover in an FLSA case, "an employee must prove that he was 'employed' during the time for which he seeks overtime compensation, which requires a showing that the employer had either actual or constructive knowledge that he was working overtime." *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 Fed. Appx. 448, 455 (5th Cir. 2009) (citing *Newton v. City of Henderson,* 47 F.3d 746, 748 (5th Cir.1995). The parties agree that the "actual or constructive knowledge" requirement is derived from the FLSA's definition of "employ," which broadly covers work the employer "suffers" or "permits" the employee to do. ECF No. 224 at 6; ECF No. 235 at 13; *see also* 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work"); 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time"). An employer's actual or constructive knowledge that an employee is working overtime is therefore "a necessary condition to finding the employer suffers or permits that work." *Chao v. Gotham Registry, Inc.,* 514 F.3d 280, 287 (2d Cir. 2008). Constructive knowledge exists if an employer "exercising reasonable diligence would acquire knowledge of this fact." *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 827 (5th Cir. 1973). "An employer who is armed with [knowledge that an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 441 (5th Cir.2005) (alteration in original) (quoting *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir.1995)). An employee, however, cannot prevail on an FLSA claim if that "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work." *Id.* (quoting *Newton*, 47 F.3d at 748).

Plaintiff's argument rests on the theory that constructive knowledge is established when an employer violates its recordkeeping duties. ECF No. 224 at 6. Plaintiff claims this premise is implied from the three cases it cites, but none actually stand for this broad sweeping proposition. Plaintiff first cites *Gulf King Shrimp* in support of its argument. ECF No. 224 at 6-9. There, the Fifth Circuit found that Gulf King had constructive knowledge of minors working within its shrimp "heading shed" when all of the minors' work was done on Defendant's premises, the work was directed by the supervisor of the shed, the supervisor testified that it was a "common practice" for multiple members of a family including minor children to head shrimp under a single punch card, the Department of Labor previously found minors working on two occasions, and one of the minors was issued a punch card and was on the company payroll. *Gulf King Shrimp,* 407 F.2d at 513. The *Gulf King* case does not support Plaintiff's proposition. Instead, it holds that an employer's knowledge is determined in light of how the business operates and constructive knowledge is based on whether reasonable diligence would alert the employer about overtime work. *Id.* at 407 F.2d at 512.

The facts of *Gulf King* are far different than the present case. Here, Plaintiff was not performing work on premises in a factory, Plaintiff was not directly supervised by Defendants on a daily basis, and there were no previous FLSA violations covering the employees like Plaintiff. Those facts were all important in *Gulf King* and none exist here.

Plaintiff's reliance on *Forrester*, 646 F.2d 413 and *Berrios*, 849 F. Supp. 2d 372, fare no better. In *Forrester*, the employer had no knowledge of the employee working overtime, the employee testified that he never told anyone about his overtime hours, the employee did not report his overtime hours, and the employee deliberately omitted overtime hours from his time sheet though he knew his employer would have paid him for the overtime. *Forrester*, 646 F.2d at 414. Plaintiff relies on the bolded sentence from the penultimate paragraph of the opinion to support its proposition:

> An employer must have an opportunity to comply with the provisions of the FLSA. This is not to say that an employer may escape responsibility by negligently maintaining records required by the FLSA, or by deliberately turning its back on a situation. However, where the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of s 207(a).

*Id*. at 414–15. That sentence does not say that a recordkeeping violation eliminates Plaintiff's burden to prove constructive knowledge.

When read in context, that sentence is the result of Forrester impeding his employer's ability to comply with the FLSA. Forrester never gave his employer the opportunity to comply with the FLSA because he never told his employer that he was working overtime. Forrester prevented his employer from learning about his overtime, and he never gave his employer a chance to comply with the statute. *Id*. at 414. The Ninth Circuit affirmed the grant of summary judgment against Forrester for lack of notice. That is similar to Plaintiff's situation, except rather than the Court deciding against Plaintiff as a matter of law, the jury resolved the fact question of notice against Plaintiff.

The *Berrios* case also does not support Plaintiff's proposition. In *Berrios*, the defendants argued that "any overtime worked by Plaintiffs was in violation of its policies and practices and therefore did not violate the FLSA." *Berrios*, 849 F. Supp. 2d at 379, 387. The Court found that the employer was not entitled to summary judgment on the notice issue, because the employer failed to present evidence supporting a policy that prohibited overtime and failed to keep adequate records of hours worked during the relevant time period, and the employee presented evidence showing that assistant trainers supervised the employees on a daily basis. *Id*. at 384-85, 388. The *Berrios* court even noted that the employers readily admitted that the employees worked over 40 hours a week for some purposes but denied it for others—which "strains credibility." *Id*. at 388. A complete reading of *Berrios* fails to support Plaintiff's contention that "that when an employer violates its FLSA recordkeeping duties, it has constructive knowledge." ECF No. 224 at 12.

Plaintiff's proposition would also automatically excuse him from an element on which he bears the burden. The requirement that an employer have notice of overtime being worked is supported by this Circuit's FLSA caselaw. An employee "has a duty to notify his employer when he is working extra hours." *Von Friewalde*, 339 F. App'x at 455, 459. An employee "cannot prevail on an FLSA overtime claim" if he fails to notify the employer of the overtime work or prevents the employer from acquiring knowledge of the overtime work, as an "employer's failure to pay for the overtime hours" when notice is lacking "is not a violation of § 207." *Id.* at 455, 459. The Fifth Circuit Pattern Jury Instructions, on which the Court modeled its instructions, support Plaintiff's burden of proving notice—"If the employer neither knew nor had reason to believe that overtime work was being performed, the time does not constitute 'hours worked.'" 5th Cir. Pattern Civ. Jury Instr. § 11.24 (2020) at 284. Plaintiff had the burden of proof on this issue. *See Godert v. Palo Alto Networks, Inc.,*2017 WL 5901003, at *6 (N.D. Tex. Nov. 30, 2017) (holding that a plaintiff bears the burden of proving "that he was employed during the time for which he seeks overtime compensation, which requires a showing that the employer had either actual or constructive knowledge that he was working overtime").

At least one other Court has rejected a similar argument made by Plaintiff. In *Alston v. DIRECTV, Inc.,* 254 F. Supp. 3d 765, 774–75 (D.S.C. 2017), the plaintiffs argued that "when an alleged employer disavows the employment relationship and has made no attempt to monitor or record a putative employee's work hours, the requirement that the alleged employer have actual or constructive knowledge of the putative employee's uncompensated work hours should not apply." The *Alston* court squarely rejected that argument, however, and noted that doing so would incorrectly place the burden on Defendant. *Id*. at 775 (holding that a failure to require the plaintiff to prove actual or constructive knowledge would eliminate plaintiff's burden to prove the employer suffered or permitted the work to be done and "upends FLSA analysis."). This Court agrees and finds no support in the caselaw for eliminating Plaintiff's burden to prove notice solely because of an alleged timekeeping violation.

Plaintiff also makes a related argument that "concocting a duty for [Plaintiff] to notify....would create a conflict with other FLSA cannons." ECF No. 224 at 18-19, 24. Plaintiff argues such a duty would conflict with the seminal FLSA case, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683 (1946). While Defendants do not directly address this point, the *Alston* Court does and dismisses this argument. *Alston*, 254 F. Supp. 3d at 775 (citing *Craig v. Bridges Bros. Trucking, LLC*, 823 F.3d 382, 391–92 (6th Cir. 2016) (warning against "conflat[ing] the issues" by equating *Mt. Clemens*' standard for proving that a plaintiff performed the work with the standard of proving that a defendant had actual or constructive knowledge of the work)). This Court agrees and finds that Plaintiff's burden to prove notice does not conflict with *Mt. Clemens*.

The Court also does believe requiring Plaintiff to prove notice conflicts with FLSA principles on estoppel, as Plaintiff contends. ECF No. 224 at 24. Plaintiff argues that the notice requirement is a backdoor attempt to introduce an estoppel defense by requiring

Plaintiff to affirmatively prove notice. *Id*. The caselaw, however, is clear that the burden to establish notice falls squarely on Plaintiff and not Defendants. *Pforr v. Food Lion, Inc*., 851 F.2d 106, 109 (4th Cir. 1988) (noting that a defendant "is not required to show lack of knowledge as an affirmative defense.").

C. The Jury's Findings on Notice Were Supported by Sufficient Evidence.

Plaintiff contends that, using its theory of notice articulated above, the record evidence showed that Defendants had constructive knowledge of Plaintiff working overtime. ECF No. 224 at 12-15. But the evidence was far from conclusive. The jury heard that Defendants had the resources to track time and comply with its recordkeeping duties if it wanted, never told Plaintiff to not work overtime, never put limits on Agency Manager's hours, gave Plaintiff total control over his schedule, never inquired into Plaintiff's hours worked, and Defendant knew Plaintiff was "going to work and expected to be there as a full-time position." ECF No. 224 at 13; ECF No. 249 at 137; ECF No. 2. On the other hand, Plaintiff testified that he "never told anybody [he] was working overtime," he said he "did not ask to be paid overtime pay," and all of Defendants' witnesses testified that they were unaware of Plaintiff working overtime. ECF No. 235 at 18; ECF No. 250 at 61, 68, 185, 204, 210, 248 and 254. The jury also heard testimony that none of Defendants supervised Plaintiff's daily tasks and work hours. ECF No. 249 at 140-141, 155-158, 217, and 240. Plaintiff testified that he worked hard, ran a generally successful agency, and did some activities that were outside the traditional workday. ECF No. 235 at 6. Plaintiff also testified, however, that those afterhours activities and communications did not indicate how long a given task took and it also did not show whether he was working during any other part of that given workday. ECF No. 249 at 69-71, 80-82. The jury also heard from Defendants' witnesses, who testified that Plaintiff's compensation was based in small part on his own work, and in larger part on the work of his subordinate insurance agents. *See, e.g.* ECF No. 249 134, 148, 160, 167-187, 205-207. The jury heard that before filing the present case, Plaintiff "adamantly disagreed that [agency managers] were misclassified," that he told other agency managers in a work meeting that they did not want to be employees, "that everybody knew they were independent contractors; that he had been an employee with another firm, in pharmaceutical sales, and ... 'You do not want to be an employee.'" ECF No. 249 at 176; ECF No. 250 at 212.

This evidence demonstrates a legally sufficient evidentiary basis for the jury to find that Plaintiff did not provide actual or constructive notice of overtime being worked. The jury did its job, weighed all the evidence, made credibility determinations, and reached a verdict. The Court is persuaded that sufficient evidence supports that verdict.

## III. PLAINTIFF IS NOT ENTITLED TO A NEW TRIAL UNDER RULE 59(a).

### A. Rule 59 Legal Standard.

Rule 59 provides that a new trial may be granted on all or part of the issues on which there has been a trial by jury for "any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Notwithstanding the broad sweep of Rule 59, "courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Metaswitch Networks Ltd. v. Genband US LLC*, No. 2:14-CV-00744-JRG, 2017 WL 3704760, at *2 (E.D. Tex. Aug. 28, 2017). "A new trial may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 612–13 (5th Cir. 1985); *see also Laxton v. Gap Inc.*, 333 F.3d 572, 586 (5th Cir. 2003) ("A new trial is warranted if the evidence is against the great, and not merely the greater, weight of the evidence."). Additionally, "[u]nless justice requires otherwise, no error in admitting or excluding evidence— or any other error by the court or a party—is ground for granting a new trial.... the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61.

B. Argument and Analysis.

Plaintiff argues that a new trial is warranted under Rule 59(a) on two grounds: (a) "the verdict is against the clear weight of the evidence;" and (b) "substantial errors occurred in the giving or refusal of jury instructions." ECF No. 224 at 25. Neither argument meets the standard for a new trial.

As to Plaintiff's first argument, he incorporates the same evidence from his Rule 50(b) arguments above and summarily holds that "the judgment cannot stand and a judgment for Merritt should be rendered or a new trial granted." *Id*. at 25. Given the significant overlap between Rule 50(b)'s "sufficient evidence" standard and Rule 59(a)'s "weight of the evidence" standard, Plaintiffs arguments fail for the same reasons the Court articulated above. *Wantou v. Wal-*

*Mart Stores Texas, LLC,* 2020 WL 4664739, at *14 (E.D. Tex. Mar. 12, 2020) ("Though the new trial and JMOL standards are distinct, Walmart repurposes its JMOL arguments to seek a new trial. The Court rejected each JMOL argument above, and for the same reasons, the jury's findings are not against the great weight of the evidence.") (internal citation omitted). The jury's finding is not against the great weight of the evidence for the same reasons discussed above.

As to Plaintiff's argument on the jury charge, Plaintiff makes three claims: (1) the charge improperly instructed the jury that Plaintiff had a duty to notify Defendants that he was working overtime, (2) the charge did not inform the jury of Defendants' duty to track hours under the FLSA, and (3) the charge did not specify the number of hours of overtime the Court had previously determined Plaintiff to have worked as a matter of law. ECF No. 224 at 26-28. Plaintiff's arguments are again grounded in an erroneous view of the caselaw on notice.

Plaintiff repeats the arguments made in his Rule 50(b) section and claims the charge is improper because "an employee owes no duty to notify the employer he's working overtime." ECF No. 224 at 26. As this Court held above, this proposition is contrary to both this Circuit's caselaw, as well as its Pattern Jury Instructions. The jury instructions in this case were modeled after and adhered closely to those pattern instructions. *Compare* ECF No. 206 at 7-8 *with* Pattern Civ. Jury Instr. 5th Cir. 11.24 (2020), at 280, 284. Those instructions stated the law on notice for an FLSA case, which is derived from this Circuit's caselaw. Jury instructions "must: (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable." *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018). Modeling a charge off of pattern jury instructions that correctly state the law is not erroneous. *See United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009) ("It is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law."). Plaintiff is incorrect on the law and Plaintiff has the burden to notify his employer of overtime being worked.

Plaintiff next argues that the charge should have informed the jury that Defendants violated their record keeping requirements under the FLSA. ECF No. 224 at 27. Plaintiff again refers back to its Rule 50(b) argument and claims that "[b]ecause the jury was not told that Farm Bureau was required to track Merritt's hours, it couldn't apply this logic to arrive at the inescapable conclusion that Farm Bureau *should have known* Merritt worked overtime some weeks because it was *required* to know how many hours he worked each week." *Id*. (emphasis in original). This argument is rooted, however, in Plaintiff's misplaced contention that Defendant's violation of the record-keeping requirement eliminates Plaintiff's need to prove that Defendant had actual or constructive notice of overtime hours being worked—a contention with which this constructive knowledge, it's: Could they have known if they had looked. We know it would have been easy for them to look."). Thus, regardless of the language in the charge, Plaintiff was permitted to make the arguments it wanted at various points during the trial. As such, Plaintiff was not prejudiced by its lack of inclusion in the final charge. See *U.S. v. Phea*, 755 F.3d 255, 266 (5th Cir. 2014) ("specific jury instructions are to be judged not in isolation, but must be considered in the context of the instructions as a whole *and the trial record*.") (internal quotation omitted) (emphasis added). Plaintiff's final argument on the jury charge—that it "failed to acknowledge the significance of the over 800 hours of overtime the Court previously determined [Plaintiff] worked" and was told that finding had no bearing on the notice issue—meets the same fate. ECF No. 224 at 28. It too is based on the incorrect premise that a showing of hours worked necessarily implies Defendant was on notice of overtime being worked. But the jury heard evidence that Plaintiff worked overtime. The Court informed the jury that that Plaintiff worked overtime during the period between November 27, 2017, and August 31, 2019, and Plaintiff testified that he worked an average 52-58 hours a week. ECF No. 235 at 28. The jury was armed with all the facts necessary to make a simple calculation of Plaintiff's total overtime hours. Plaintiff's concern that the charge said "these determinations [of hours worked] should have no bearing on whether or not the Defendants had notice that Plaintiff was working overtime" is a rehash of Plaintiff's earlier assertions on the law with which the Court disagreed. As the Court previously stated, the issue of notice is separate and apart from Defendant's timekeeping duty or hours Plaintiff worked. The Court finds the charge contained a "substantially correct statement of law." *Kanida*, 363 F.3d at 578. Plaintiff "was in no way precluded from producing evidence that" supported his position nor was he prejudiced. *United States v. Cain*, 440 F.3d 672, 674-75 (5th Cir. 2006). Accordingly, the charge was not deficient.

## IV. PLAINTIFF IS NOT ENTITLED TO A VACATED JUDGMENT UNDER RULE 59(e).

### A. Rule 59(e) Legal Standard.

A Rule 59(e) motion "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.,* 367 F.3d 473, 478-79 (5th Cir. 2004). It is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id*. It "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co*., 875 F.2d 468, 473 (5th Cir. 1989). Rule 59(e)'s remedy is "extraordinary" and "should be used sparingly." Templet, 367 F.3d at 479.

### B. Argument and Analysis.

Plaintiff's final argument is that the Court should vacate the judgment under Rule 59(e) based on "[t]he same facts and law" it presented in its earlier arguments. The Court has already found that no errors of law occurred. Furthermore, Rule 59(e) is not the appropriate vehicle for vacating a final judgment, which is what Plaintiff seeks here. *See Wease v. Ocwen Loan Servicing, LLC*, 2020 WL 1891310, at *2 (N.D. Tex. Apr. 16, 2020) ("Rule 59(e) contemplates altering a final judgment from "x" to "y," not vacating a final judgment for a new determination like Rule 59(a)."). Plaintiff's request to vacate the judgment pursuant to Rule 59(e) is therefore improper and denied.

## V. CONCLUSION

It is, therefore, ORDERED AND ADJUDGED that Plaintiff's Motion for Judgment as a Matter of Law (ECF No. 220) is DENIED as MOOT in light of the later-filed identical motion. *See* ECF No. 224.

It is further ORDERED AND ADJUDGED that Plaintiff's Rule 50 Motion For Judgment as a Matter of Law and Alternative Rule 59 Motion to Vacate and Grant New Trial (ECF No. 224) is DENIED.

SIGNED this 11th day of October, 2024.

/s/ Derek T. Gilliland
DEREK T. GILLILAND
UNITED STATES MAGISTRATE JUDGE

# APPENDIX E

Relevant Statutory Provisions
*29 U.S.C. § 203; 29 U.S.C. § 207*

29 U.S.C.A. § 203

§ 203. Definitions

Effective: March 23, 2018
Currentness

As used in this chapter—

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

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

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

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

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

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

(A) any individual employed by the Government of the United States—

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

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

* * *

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

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

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

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m)(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to-¬

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall

not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency

situations where life, property, or the environment is at risk.

CREDIT(S)

(June 25, 1938, c. 676, § 3, 52 Stat. 1060; 1946 Reorg. Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 3, 63 Stat. 911; Pub.L. 87-30, § 2, May 5, 1961, 75 Stat. 65; Pub.L. 89-601, Title I, §§ 101 to 103, Title II, § 215(a), Sept. 23, 1966, 80 Stat. 830-832, 837; Pub.L. 92-318, Title IX, § 906(b)(2), (3), June 23, 1972, 86 Stat. 375; Pub.L. 93-259, §§ 6(a), 13(e), Apr. 8, 1974, 88 Stat. 58, 64; Pub.L. 95-151, §§ 3(a), (b), 9(a) to (c), Nov. 1, 1977, 91 Stat. 1249, 1251; Pub.L. 99-150, §§ 4(a), 5, Nov. 13, 1985, 99 Stat. 790; Pub.L. 101-157, §§ 3(a), (d), 5, Nov. 17, 1989, 103 Stat. 938, 939, 941; Pub.L. 104-1, Title II, § 203(d), Jan. 23, 1995, 109 Stat. 10; Pub.L. 104-188, [Title II], § 2105(b), Aug. 20, 1996, 110 Stat. 1929; Pub.L. 105-221, § 2, Aug. 7, 1998, 112 Stat. 1248; Pub.L. 106-151, § 1, Dec. 9, 1999, 113 Stat. 1731; Pub.L. 109-435, Title VI, § 604(f), Dec. 20, 2006, 120 Stat. 3242; Pub.L. 113-235, Div. H, Title I, § 1301(b), Dec. 16, 2014, 128 Stat. 2537; Pub.L. 115-141, Div. S, Title XII, § 1201(a), Mar. 23, 2018, 132 Stat. 1148.)

VALIDITY

<The United States Supreme Court held certain provisions of the Fair Labor Standards Amendments of 1974 (section 6(a)(6) and (d)(1) of Pub.L. 93-259; see sections 203(x) and 216(b) of this title, respectively), purporting to authorize private actions against states in state courts without their consent, an unconstitutional abrogation of state sovereign immunity. Alden v. Maine, U.S.Me.1999, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636. >

Notes of Decisions (3174)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. pts. 401, 516 to 520, 531 to 541, 570, 578 to 580, 776, 785, 786, 789, 790, 795; U.S. DOL Wage & Hour Div., Administrator Interpretations Letter—FLSA, www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa; U.S. DOL Wage & Hour Div., Field Assistance Bulletins, www.dol.gov/agencies/whd/field-assistance-bulletins.

O'CONNOR'S ANNOTATIONS

*Generally*

*Alden v. Maine*, 527 U.S. 706, 712 (1999). Held: Article I of the U.S. Constitution does not give Congress the power to abrogate states' sovereign immunity from private suits brought in state or federal court by state EEs for FLSA violations. *See also Nuñez v. Indiana Dept. of Child Servs.*, 817 F.3d 1042, 1043 (7th Cir.2016); *Beaulieu v. Vermont*, 807 F.3d 478, 483-84 (2d Cir.2015); *Michigan Corr. Org. v. Michigan Dept. of Corr.*, 774 F.3d 895, 901 (6th Cir.2014); *Martin v. Wood*, 772 F.3d 192, 194-95 (4th Cir.2014).

*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). "[W]e perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to [municipal mass-transit system], that is destructive of state sovereignty or violative of any constitutional provision. [Municipal mass-transit system] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *See also Franklin v. City of Kettering*, 246 F.3d 531, 533 n.1 (6th Cir.2001) (Congress amended FLSA in response to Garcia to address situations unique to public-sector employment).

*Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519-20 (1950). See annotation under 41 U.S.C. §6502.

*Amaya v. Power Design, Inc.*, 833 F.3d 440, 443 (4th Cir.2016). "The [Davis-Bacon Act (DBA)] and [Contract Work Hours and Safety Standards Act (CWHSSA)] apply to federal (or federally funded or assisted) construction contracts and subcontracts, though they regulate different aspects of the employment relationship. [¶] Caselaw suggests that neither statute provides a private right of action. *At 444*: [U]nlike the DBA and CWHSSA, the FLSA clearly provides a right of action; employees may sue in state or federal court for unpaid minimum wages and overtime compensation, plus liquidated damages. *At 445*: [W]e discern no conflict in the reach of the three statutes before us. Rather, we are satisfied that Congress intended the FLSA to apply broadly notwithstanding any overlap with other labor statutes."

*Agriculture*

*Bayside Enters. v. NLRB*, 429 U.S. 298, 300-01 (1977). See annotation under 29 U.S.C. §152, *Employee*.

*Ramos-Barrientos v. Bland*, 661 F.3d 587, 590 (11th Cir.2011). "The main issue [in] this appeal is whether an employer that hires migrant farm workers through the H-2A visa program is entitled to wage credits under the [FLSA] for housing and meals that federal law required the employer to provide the workers. *At 595*: [S]ection 203(m) establishes a rebuttable presumption that an employer may receive a wage credit for the cost of housing, and ... this presumption is rebutted when the provision of housing is 'primarily for the benefit or convenience of the employer[ ]'.... *At*

*597*: The cost of housing that [ER] provided to [EEs] hired through the H-2A program was a mandatory business expense, and [ER] cannot 'shift part of [its] business expense to the employees[ ]'.... *At 598*: Courts have allowed wage credits for housing that agricultural employers have provided to their employees, but these decisions did not involve the provision of free housing required by law." *See also* 29 C.F.R. §531.3(d)(1).

*Employment Relationship*

*Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947). "As in the [NLRA] and the Social Security Act, there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the [FLSA]. Provisions which have some bearing appear in the margin. The definition of 'employ' is broad. ... We have decided that it is not so broad as to include those 'who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.' *At 730*: [T]he determination of the [employer-employee] relationship ... depend[s] on ... the circumstances of the whole activity." *See also Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 32-33 (1961); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir.2007); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-76 (2d Cir.2003).

*Spears v. Bay Inn & Suites Foley, LLC*, 105 F.4th 1315, 1319 (11th Cir.2024). "Whether an individual fits th[e] definition [of 'employer' under §203(d),] turns not on technical or isolated factors but rather on the circumstances of the whole activity. [¶] [Ds] argue that [supervisor] cannot be an employer under the [FLSA] because he is a wage-earning employee and not an owner of the limited liability company that owned the hotels where [EE] worked. But ownership is not dispositive for individual liability under the Act.

Although owners and corporate officers are more susceptible to personal liability because they are more likely to exercise operational control, the broad definition of an employer under the Act does not limit individual liability to officers and owners. We must consider the circumstances of the whole activity. [¶] To be an employer under the Act, a supervisor must either be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee. That involvement includes control over significant aspects of the company's day-to-day functions, including compensation of employees or other matters in relation to an employee. Involvement in the day-to-day operations of a company can include regular visits to the company's facilities, the power to determine employee salaries, involvement in the business operations of the company, or control over the company's purse strings. A supervisor's control must be substantial and related to the company's obligations under the Act." (Internal quotes omitted.)

*Lambro v. U.S.*, 90 F.4th 1375, 1378-79 (Fed.Cir.2024). "[W]e are asked to decide whether [P], who concededly had no employment relationship with the federal government under any congressional authorization outside the FLSA, can nevertheless be a federal employee under the FLSA itself and thus entitled to its protections. ... We hold that the FLSA does authorize the recognition—solely for application of the FLSA's own provisions—of an employment relationship between the federal government and those federal government workers who satisfy the FLSA's definitions, notably its definitions of 'employee' and 'employ,' under the standards long adopted by the courts."

*Austin v. Glynn Cty.*, 80 F.4th 1342, 1346 (11th Cir.2023). Under §203(d), "a sheriff acting in his individual capacity has 'no control over [the plaintiff's] employment and does not qualify as [the plaintiff's] employer.'"

*Clews v. County of Schuylkill*, 12 F.4th 353, 356 (3d Cir.2021). "Employees of state and local governments are typically protected by federal employment laws such as the [FLSA]. But not so for the personal staff of elected officials. Determining who is a member of an official's personal staff can be a fact-intensive and often murky inquiry. In this case of first impression ..., we distill two themes for analyzing the personal staff exception that flow from the FLSA.... *At 362*: Putting all this together, for an employee to be a member of an elected official's personal staff, (1) the official must work closely with the employee in a sensitive position of trust and confidence, and (2) the official exercises personal control over the employee's hiring, promotion, work conditions, discipline, and termination." *See also Teneyuca v. Bexar Cty.*, 767 F.2d 148, 151-52 (5th Cir.1985) (listing factors to be considered when determining whether complainant falls within "personal staff" exception to Title VII).

*Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir.2016). "This Court has identified eight factors to be considered in determining whether an entity qualifies as an employer under the FLSA 'suffer or permit to work' standard: (1) '[t]he nature and degree of control of the workers'; (2) '[t]he degree of supervision, direct or indirect, of the work'; (3) '[t]he power to determine the pay rates or the methods of payment of the workers'; (4) '[t]he right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers'; (5) '[p]reparation of payroll and the payment of wages'; (6) 'ownership of facilities where work occurred'; (7) 'performance of a specialty job integral to the business'; and (8) 'investment in equipment and facilities.' [¶] When applying the ... factors, courts should heed five overarching principles. First, in joint employer cases, rather than fixating on whether the worker is relatively more dependent on one putative employer than the other, the court should separately focus on the worker's relationships with each putative employer. Second, no one factor is dispositive. Third, the eight factors are useful because they indicate economic dependence. This means that the weight given to each factor will depend upon the extent to which it is probative of the worker's economic dependence on the putative employer under the circumstances. Fourth, there is no mathematical formula for determining the existence of a joint employment relationship. Evidence germane to the issue of economic dependence should be analyzed holistically and qualitatively. Fifth, the common law principles of employment have no bearing on the 'suffer or permit to work' analysis. [¶] The ultimate question, when applying these ... factors to determine joint employer status under the FLSA 'suffer or permit to work' standard, is whether, as a matter of 'economic reality,' the hired individual is 'economically dependent' upon the hiring entity." *See also In re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir.2012). *But see Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 137 (4th Cir.2017) (joint-ER test should not focus on relationship between EE and ER or economic dependence; new test should focus on relationship between ERs).

*Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 535 (2d Cir.2015). "[W]hen is an unpaid intern entitled to compensation as an employee under the FLSA?.... *At 536-37*: [T]he proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.... [¶] In the context of unpaid internships [at for-profit employers], we think a non-exhaustive set of considerations should include: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa. (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions. (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit. (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning. (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. [¶] Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage. In addition, the factors we specify are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases." *See also Klick v. Cenikor Found.*, 94 F.4th 362, 372 (5th Cir.2024) (endorsing primary-beneficiary test to determine whether drug rehabilitation patients are EEs under FLSA); *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139, 1147 (9th Cir.2017) (adopting Glatt's primary-beneficiary test to determine whether students are EEs under FLSA); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1211-12 (11th Cir.2015) (same). *But see Nesbitt v. FCNH, Inc.*, 908 F.3d 643, 646-47 & n.3 (10th Cir.2018) (declining to apply primary-beneficiary test and instead applying pre-Glatt six-factor test to determine whether vocational-training students were EEs); *Berger v. NCAA*, 843 F.3d 285, 290-91 (7th Cir.2016) (declining to apply multifactor test such as Glatt's to analyze economic reality when test fails to capture true nature of employment relationship, such as relationship between student-athletes and universities).

*Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 148 (3d Cir.2014). "Under the FLSA, multiple persons or entities can be responsible for a single employee's wages as 'joint employers' in certain situations. One such scenario occurs where both employers 'exert significant control' over the employee ... 'by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.' Under these circumstances, each joint employer may be held jointly and severally liable for the FLSA violations of the other, in addition to direct liability for its own violations. *At 149*: As with the existence of an employer-employee relationship in the first instance, however, the determination depends on 'all the facts in the particular case.'" *See also Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1175-76 (11th Cir.2012).

*Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir.2013). "To determine whether an individual falls into the category of covered 'employee' or exempted 'independent contractor,' courts look to the 'economic reality' of the relationship between the alleged employee and alleged employer and whether that relationship demonstrates dependence. [¶] Courts have applied various multifactor tests to guide the 'economic reality' inquiry. ... While these factors serve as guides, the overarching focus of the inquiry is economic dependence.... Ultimately, in considering economic dependence, the court focuses on whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'" *See also Acosta v. Jani-King*, 905 F.3d 1156, 1159-60 (10th Cir.2018); *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 241 (4th Cir.2016); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir.2015); *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir.2014).

*Shaliehsabou v. Hebrew Home*, 363 F.3d 299, 307 (4th Cir.2004). "[T]he ministerial exception to the FLSA applies only where the employer is a religious institution and the employee's primary duties are ministerial in nature. The exception does not apply to the religious employees of secular employers or to the secular employees of religious employers. *At 310*: [W]e conclude that a religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." See also annotations under 42 U.S.C. §2000e-1, Ministerial Exception.

*Engaged in Commerce*

*Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959). "Congress, by excluding from the [FLSA's] coverage employees whose activities merely affect commerce, indicated its intent not to make the scope of the [FLSA] coextensive with its power to regulate commerce. However, within the tests of coverage fashioned by Congress, the [FLSA] has been construed liberally to apply to the furthest reaches consistent with congressional direction. [T]he policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'" (Internal quotes omitted.)

*Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). "The question whether an employee is engaged 'in commerce' within the meaning of the [FLSA] is determined by practical considerations, not by technical conceptions. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." *See also Sobrinio v. Medical Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir.2007) (no de minimis requirement; EE must prove that FLSA applies).

*Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1298-99 (11th Cir.2011). "In order to be eligible for FLSA overtime, ... an employee must first demonstrate that he is 'covered' by the FLSA. There are two possible types of FLSA coverage. First, an employee may claim 'individual coverage' if he regularly and 'directly participat[es] in the actual movement of persons or things in interstate commerce.' Second, an employee is subject to enterprise coverage if he is 'employed in an enterprise engaged in commerce or in the production of goods for commerce,' ... where commerce means 'trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof,' ... and an 'enterprise' is the activities performed by a person or persons who are (1) engaged in 'related activities,' (2) under 'unified operation or common control,' and (3) have a 'common business purpose'.... [¶] Alternatively, enterprise coverage is available to any employee of an enterprise 'engaged in the operation of a hospital [or] an institution primarily engaged in the care of ... the aged ... who [also] reside on the premises of such institution.' An employee may be subject to either type, or both types, of FLSA coverage."

*Enterprise*

*Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 298 (1985). "[O]rdinary commercial businesses should not be exempted from the [FLSA] simply because they happened to be owned by religious or other nonprofit organizations. *At 306*: [Nonprofit's] commercial activities, undertaken with a 'common business purpose,' are not beyond the reach of the [FLSA] because of [nonprofit's] religious character, and its associates are 'employees' within the meaning of the [FLSA] because they work in contemplation of compensation."

*Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518 (1973). There are "three main elements of the statutory definition of 'enterprise': related activities, unified operation or common control, and common business purpose. ... For purposes of determining whether it is an 'enterprise' under the [FLSA], it is irrelevant that the relationship between the respondent and the owners is one of agency; that separate bank accounts are maintained for each building; and that the risk of loss and the chance of gain on capital investment belong to the owners, not the respondent. All that is required under the statutory definition is that the respondent's own activities be related and under common control or unified operation, as they plainly are." *See also Chao v. A-One Med. Servs.*, 346 F.3d 908, 915-16 (9th Cir.2003); *Reich v. Bay, Inc.*, 23 F.3d 110, 114-16 (5th Cir.1994).

*Asalde v. First Class Parking Sys.*, 898 F.3d 1136, 1138 (11th Cir.2018). "The 'handling clause' [in §203(s)(1)(A)(i)] provides that an entity is subject to 'enterprise' coverage under the FLSA if it has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate or international commerce by any person. *At 1139*: We set out the following test for determining whether an item constitutes a 'material' under the FLSA: First, whether an item counts as 'materials' depends on whether the item is serving as a material in context. To count as 'materials,' an item must be a tool or other article necessary for doing or making something. Second, for an item to count as 'materials' it must have a significant connection with the employer's commercial activity; the business may not just somehow internally and incidentally consume the item." (Internal quotes omitted.)

*Hours Worked*

*Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 226 (2014). "Simply put, [§203(o)] provides that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining [and can be excluded from compensable work time by the express terms of or by custom or practice under a bona fide CBA]. *At 228*: We see no basis for the proposition that the [statutorily] unmodified term 'clothes' somehow omits protective clothing. *At 232*: The object of §203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation." *See also Jackson v. Old EPT, LLC*, 834 F.3d 872, 875-76 (8th Cir.2016); *Rosano v. Township of Teaneck*, 754 F.3d 177, 194-95 (3d Cir.2014); *Mitchell v. JCG Indus.*, 745 F.3d 837, 840 (7th Cir.2014); *Allen v. McWane, Inc.*, 593 F.3d 449, 457 (5th Cir.2010).

*Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1249 (10th Cir.2016). "[I]f collective bargaining results in providing some compensation for unmeasured work time, such compensation does not convert any additional otherwise-noncompensable activities into work time. Therefore, walk time after donning and before doffing that would otherwise be noncompensable does not become compensable just because the [CBA] provides plug time for some donning or doffing."

*Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir.2010). "This appeal presents the question whether §203(o) preempts state law that lacks an equivalent exception." Held: No.

*Tipped Employees*

*Steele v. Leasing Enters.*, 826 F.3d 237, 244 (5th Cir.2016). "[A]n employer may offset credit card tips for credit card issuer fees and still satisfy the requirements of §203(m). *At 245*: While it is unnecessary to opine whether any costs, other than the fees charged directly by a credit card company, associated with collecting credit card tips can ever be deducted by an employer, we conclude that an employer only has a legal right to deduct those costs that are required to make such a collection."

*Montano v. Montrose Rest. Assocs.*, 800 F.3d 186, 193 (5th Cir.2015). "[I]n determining whether an employee customarily and regularly receives tips, a court—or a factfinder—must consider the extent of an employee's customer interaction. [¶] The central difference between employees who are traditionally tipped and those who are not is that the former work primarily in the front of the house where they are seen by and interact with customers, while the latter work primarily or exclusively in the back of the house."

*Fast v. Applebee's Int'l*, 638 F.3d 872, 880 (8th Cir.2011). "We believe that the DOL's interpretation contained in [its] Handbook—... that employees who spend 'substantial time' (defined as more than 20%) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of [29 C.F.R. §531.56(e)]." *See also Marsh v. J. Alexander's LLC*, 905 F.3d 610, 629-30 (9th Cir.2018); *Schaefer v. Walker Bros. Enters.*, 829 F.3d 551, 554-55 (7th Cir.2016).

*Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 582-83 (9th Cir.2010). "[EE] received a wage that was far greater than the federally prescribed minimum, plus a substantial portion of her tips. Naturally, she would prefer to receive all of her tips, but the FLSA does not create such an entitlement where no tip credit is taken. [¶] [N]othing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken...."

Editor's note: In response to *Cumbie*, the DOL implemented 29 C.F.R. § 531.52 in 2011, stating that tips can be pooled only among "customarily tipped" employees, even when no tip credit is taken. Based on the regulation, the Ninth Circuit abrogated *Cumbie* to the extent that *Cumbie* indicated that the FLSA prevented the DOL from restricting tip pooling when the employer does not take a tip credit. *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1090 (9th Cir.2016). The DOL issued a nonenforcement policy for the regulation on July 20, 2017, and it is now proposing to rescind parts of the regulations that prohibit tip-sharing where employers pay minimum wage and do not take a tip credit. S*ee Tip Regulations Under the FLSA*, 82 Fed. Reg. 57395, Dec. 5, 2017; U.S. DOL Wage & Hour Div., *Field Assistance Bulletin No. 2018-3*, Apr. 6, 2018. In March 2018, Congress amended 29 U.S.C. § 203(m) to clarify that managers and supervisors may not keep employees' tips but did not address tip pooling among other nonmanagerial or nonsupervisory employees who are not customarily tipped.

*Reich v. Chez Robert, Inc.*, 28 F.3d 401, 403 (3d Cir.1994). FLSA §3(m), now 29 U.S.C. §203(m), "allows an employer to reduce a tipped employee's wage below the statutory minimum by an amount to be made up in tips, but only if the employer informs the tipped employee that her wage is being decreased under §3(m)'s tip-credit provision. If the employer cannot show that it has informed employees that tips are being credited against their wages, then no tip credit can be taken and the employer is liable for the full minimum-wage.... *At 404*: When the employer has not notified employees that their wages are being reduced pursuant to the [FLSA's] tip-credit provision, the district court may not equitably reduce liability for back wages to account for tips actually received."

*Volunteers*

*Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 763 (6th Cir.2018). "[T]o be considered an employee within the meaning of the FLSA, a worker must first expect to receive compensation. *At 766*: We agree that a volunteer's expectation of compensation is a threshold inquiry that must be satisfied before we assess the economic realities of the working relationship. The Supreme Court held as much in [Walling v.] Portland Terminal [Co., 330 U.S. 148 (1947),] when it defined a volunteer as a 'person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.' The [Tony & Susan] Alamo [Found. v. Secretary of Labor, 471 U.S. 290 (1985),] Court reiterated this test, making clear that when a religious organization undertakes a commercial endeavor, its workers are only covered under the FLSA if they 'engage in those activities in expectation of compensation.'" See also Acosta v. Paragon Contractors Corp., 884 F.3d 1225, 1231-32 (10th Cir.2018) (person who is pressured or coerced to work is not volunteer).

29 U.S.C.A. § 207

§ 207. Maximum hours

Effective: December 29, 2022
Currentness

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

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

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

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation

for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

* * *

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of

consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee

* * *

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in

performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is-¬

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Repealed. Pub.L. 117-328, Div. KK, § 102(a)(1), Dec. 29, 2022, 136 Stat. 6093

CREDIT(S)

(June 25, 1938, c. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, c. 461, 55 Stat. 756; July 20, 1949, c. 352, § 1, 63 Stat. 446; Oct. 26, 1949, c. 736, § 7, 63 Stat. 912; Pub.L. 87-30, § 6, May 5, 1961, 75 Stat. 69; Pub.L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401 to 403, Sept. 23, 1966, 80 Stat. 835, 837, 841, 842; Pub.L. 93-259, §§ 6(c)(1), 7(b)(2), 9(a), 12(b), 19, 21(a), Apr. 8, 1974, 88 Stat. 60, 62, 64, 66, 68; Pub.L. 99-150, §§ 2(a), 3(a) to (c)(1), Nov. 13, 1985, 99 Stat. 787, 789; Pub.L. 101-157, § 7, Nov. 17, 1989, 103 Stat. 944; Pub.L. 104-26, § 2, Sept. 6, 1995, 109 Stat. 264; Pub.L. 106-202, § 2(a), (b), May 18, 2000, 114 Stat. 308; Pub.L. 111-148, Title IV, § 4207, Mar. 23, 2010, 124 Stat. 577; Pub.L. 117-328, Div. KK, § 102(a)(1), Dec. 29, 2022, 136 Stat. 6093.)

Notes of Decisions (2516)

O'CONNOR'S CROSS REFERENCES

See also 29 C.F.R. pts. 541 to 578, 775 to 778, 782, 785, 793 to 795.

O'CONNOR'S ANNOTATIONS

*Generally*

*Perry v. City of N.Y.*,78 F.4th 502, 512 (2d Cir.2023). "An employer violates the FLSA when it does not pay overtime wages for work it 'suffers or permits,' that is, work it requires, knows about, or should have known about. Whether the employer also knows that the employee will not be paid is irrelevant to FLSA liability. Employers may, of course, require employees to report overtime work, and an employee's failure to do so will in many circumstances allow the employer to disclaim the knowledge that triggers FLSA obligations. But an employer that nonetheless requires, knows about, or should know about work must compensate the worker, regardless of whether pay is requested and regardless of whether the employer knows the worker will not be paid." *See also White v. Baptist Mem'l Health Care Corp.*, *Generally*, under this code section.

*Corbin v. Time Warner Entm't-Advance/Newhouse Prtshp.*, 821 F.3d 1069, 1081 (9th Cir.2016). "[W]e have explained that as a 'general rule, employees cannot recover for otherwise compensable time if it is de minimis,' pointing out that the 'de minimis rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes.' [¶] To determine if otherwise compensable time is properly classified as de minimis, ... we established a three-prong test, instructing courts to 'consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.'" *See also Secretary, U.S. DOL v. East Penn Mfg. Co.*, 123 F.4th 643, 647-48 (3d Cir.2024) (ER has burden of proving de minimis defense).

*Bailey v. TitleMax*, 776 F.3d 797, 801 (11th Cir.2015). "An unpaid-overtime claim has two elements: (1) an employee worked unpaid overtime, and (2) the employer knew or should have known of the overtime work. Knowledge may be imputed to the employer when its supervisors or management 'encourage[ ] artificially low reporting.' *At 805*: Where ... an employer knew or had reason to know that its employee underreported his hours, it cannot invoke equitable defenses based on that underreporting to bar the employee's FLSA claim." *See also Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388-89 (6th Cir.2016) (ER has constructive knowledge of unpaid overtime when ER should have discovered it through exercise of reasonable diligence); *Kellar v. Summit Seating Inc.*, 29 U.S.C. §254 (same).

*Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 241-42 (3d Cir.2014). "The level of detail necessary to plead [an] FLSA overtime claim poses a ... difficult question—one that has 'divided courts around the country.' Some courts have required plaintiffs to allege approximately the number of hours worked for which wages were not received. Other courts have adopted a more lenient approach, holding that, '[w]hile Defendants might appreciate having Plaintiffs' estimate of the overtime hours worked at [the pleading stage],' [an] FLSA complaint will survive dismissal so long as it alleges that the employee worked more than 40 hours in a week and did not receive overtime compensation. [¶] We agree with the middle-ground approach ... that 'in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege [forty] hours of work in a given workweek as well as some uncompensated time in excess of the [forty] hours.'" *See also Herrera v. Comme des Garcons, Ltd.*, 84 F.4th 110, 115 (2d Cir.2023); *Landers v. Quality Comms.*, 771 F.3d 638, 644-45 (9th Cir.2015).

*Black v. SettlePou, P.C.*, 732 F.3d 492, 496-97 (5th Cir.2013). "After the trier of fact has found that a misclassified employee is due overtime pay, the court must determine as a matter of law whether to apply the standard method of calculating the amount of overtime pay using the 1% times the regular rate of pay multiplier found in the FLSA, or to apply the [fluctuating-workweek (FWW)] multiplier of only % of the regular rate of pay. The decision of when and how to apply the FWW's half-time formula in misclassification cases has divided the federal courts. This division has been focused on whether the FWW formula as expressed in 29 C.F.R. §778.114 may be applied retroactively in misclassification cases. *At 498*: [T]his Court [has] decided that §778.114 cannot be used to support a retroactive damages award in misclassification cases. Instead, we rely on the Supreme Court's precedent in [*Overnight Motor Transp. Co. v.*]*Missel*[, 316 U.S. 572 (1942),] and this Court's own precedent ... as the appropriate basis for using the FWW method to calculate the overtime premiums due to the employee in misclassification cases. The FWW method of calculating overtime premiums in a misclassification case is appropriate when the employer and the employee have agreed that the employee will be paid a fixed weekly wage to work fluctuating hours." *Compare Desmond v. PNGI Charles Town Gaming*, L.L.C., 630 F.3d 351, 355-57 (4th Cir.2011) (approving reliance on Missel as basis for using FWW formula), *and Urnikis-Negro v. American Family Prop. Servs.*, 616 F.3d 665, 666 (7th Cir.2010) (relying on Missel as basis for using FWW formula; §778.114 is not applicable to misclassification cases), *with Clements v. Serco, Inc.,* 530 F.3d 1224, 1230 (10th Cir.2008) (relying on §778.114 as basis for using FWW formula), *and Valerio v. Putnam Assocs.*, 173 F.3d 35, 39-40 (1st Cir.1999) (same).

*White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 876 (6th Cir.2012). "Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process. When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA." *See also Hertz v. Woodbury Cty.*, 566 F.3d 775, 782 (8th Cir.2009) (access to records indicating that EEs are working overtime does not establish constructive knowledge; ER has no duty to search through records unless it has reason to believe that hours are being underreported); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir.1995) (same).

*Abshire v. Redland Energy Servs.*, 695 F.3d 792, 794 (8th Cir.2012). "[A]n employer does not violate the FLSA merely because, under a consistently-designated workweek, its employees earn fewer hours of overtime than they would if the workweek was more favorably aligned with their work schedules. *At 796*: We reject [EEs'] contention that an employer's permanent change in the designated workweek violates §207(a)(1) unless it is justified by a 'legitimate business purpose.' So long as the change is intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are irrelevant." *See also* 29 C.F.R. §778.105; *Johnson v. Heckmann Water Res. (CVR), Inc.*, 758 F.3d 627, 632-33 (5th Cir.2014).

*Compensatory Time Off*

*Christensen v. Harris Cty.*, 529 U.S. 576, 583-84 (2000). "[V]iewed in the context of the overall statutory scheme, §207(o)(5) is better read not as setting forth the exclusive method by which compensatory time can be used, but as setting up a safeguard to ensure that an employee will receive timely compensation for working overtime. Section 207(o)(5) guarantees that, at the very minimum, an employee will get to use his compensatory time ... unless doing so would disrupt the employer's operations. *At 585*: [Section] 207(o)(5) ... imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to *require* employees to use compensatory time." *See also Beck v. City of Cleveland*, 390 F.3d 912, 926 (6th Cir.2004) (EEs' compensatory leave requests must be granted unless ER offers "clear and affirmative evidence" of undue disruption); *Houston Police Officers' Un. v. City of Houston*, 330 F.3d 298, 304 (5th Cir.2003) (comp time must be permitted within reasonable period after EE makes request).

*Moreau v. Klevenhagen*, 508 U.S. 22, 24 (1993). "The question ... is whether a public employer in a State that prohibits public sector collective bargaining may take advantage of [§207(o)(2)(A), allowing employers to provide comp time instead of overtime pay] when its employees have designated a union representative. *At 31*: Subclause (ii) authorizes individual comp time agreements only 'in the case of employees not covered by subclause (i).' Our task ... is to identify the class of 'employees' covered by subclause (i). *At 35*: [E]mployees are 'covered' by subclause (i) when they designate a representative who lawfully may bargain collectively on their behalf.... [¶] [EEs] in this case did not have a representative authorized by law to enter into an agreement with [ER] providing for use of comp time under subclause (i). Accordingly, they were 'not covered by subclause (i),' and subclause (ii) authorized ... individual agreements...."

*Extra Payments*

*Smiley v. E.I. DuPont De Nemours & Co.*, 839 F.3d 325, 327 (3d Cir.2016). "[ER] contended that it could offset compensation it gave [EEs] for meal breaks during their shift—for which [ER] was not required to provide compensation under the FLSA—against ... required overtime. *At 332*: Nothing in the FLSA authorizes the type of offsetting ... where an employer seeks to credit compensation that it included in calculating an employee's regular rate of pay against its overtime liability. Rather, the statute only provides for an offset of an employer's overtime liability using other compensation excluded from the regular rate pursuant to §207(e)(5)-(7) and paid to an employee at a premium rate."

*Haro v. City of L.A.*, 745 F.3d 1249, 1259-60 (9th Cir.2014). "Under ... §207(h)(2), an employer may credit overtime payments already made to employees against overtime payments owed to them under the FLSA. [¶] While §207(h) does not state whether credits must be determined on a workweek basis, it must still be read within the context of the overtime due under §207(a), which is calculated on a workweek basis. Under this reading, compensation already paid for work done within one workweek should not be transferrable and offset against overtime due in another workweek." *See also Herman v. Fabri-Ctrs.*, 308 F.3d 580, 592 (6th Cir.2002); *Howard v. City of Springfield*, 274 F.3d 1141, 1148-49 (7th Cir.2001). *But see Kohlheim v. Glynn Cty*., 915 F.2d 1473, 1481 (11th Cir.1990) (ER is entitled to set off all previously paid overtime against compensation found due at trial).

*Gap Time*

*Conner v. Cleveland Cty.*, 22 F.4th 412, 421 (4th Cir.2022). See annotation under 29 U.S.C. §206, *Gap Time.*

*Irregular Hours*

*Jones v. Producers Serv.*, 95 F.4th 445, 452 (6th Cir.2024). "[F]or purposes of ... §207(f), an employee's job duties 'necessitate' irregular hours when the inherent nature of the employee's work—i.e., the inalienable qualities of his industry, profession, or specific position—place the employee's hours beyond either his or his employer's power to control or predict."

*Mealtime*

*Gelber v. Akal Sec., Inc.*, 14 F.4th 1279, 1282-83 (11th Cir.2021). "[C]ourts of appeals [are] divide[d] over the burden-of-proof question in meal-break cases. Although this Court has addressed meal periods under the FLSA, we have never squarely decided who bears the burden of proof. [W]e hold that a burden-shifting scheme applies in meal-break cases and that, once an employee satisfies his burden by showing that his logged work hours are generally compensable, the employer bears the burden of proving that the carved-out meal periods were bona fide." *Compare Naylor v. Securiguard, Inc.*, 801 F.3d 501, 508 & n.7 (5th Cir.2015) (ER bears burden to show that mealtimes are noncompensable), *with Hertz v. Woodbury Cty.*, 566 F.3d 775, 783-84 (8th Cir.2009) (EE bears burden to show that mealtimes are compensable).

*Ruffin v. MotorCity Casino*, 775 F.3d 807, 811-12 (6th Cir.2015). "[A]s long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA. [¶] Although substantial duties need not be more than waiting for something to happen, or readiness to serve, ... it is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. *At 813*: A second factor to consider is whether the employer's business regularly interrupts the employee's meal period. The frequency of such interruptions is important because the question is not whether the employees' meals were interrupted but whether the degree of interruption caused them to spend their meal periods primarily for the employer's benefit. [¶] A final factor we consider is the employee's inability to leave the employer's property during meal breaks." (Internal quotes omitted.) *See also Babcock v. Butler Cty.*, 806 F.3d 153, 156-57 (3d Cir.2015) (most courts decline to read 29 C.F.R. §785.19(a) literally as requiring that EE be completely relieved of duty during meal period); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 873 (6th Cir.2012) (a claim for non-payment of work during an established mealtime is analytically similar to an unpaid overtime claim).

*Public-Safety Exemption*

*Calvao v. Town of Framingham*, 599 F.3d 10, 14-15 (1st Cir.2010). "Before a public employer may qualify for the limited public safety exemption [in §207(k)], two things must be true: (1) the employees at issue must be engaged in fire protection or law enforcement within the meaning of the statute and (2) the employer must have established a qualifying work period. In turn, the qualifying work period must be at least seven but not more than 28 consecutive days. Overtime need not be paid unless the number of hours worked exceeds ratios, different for police than for fire employees that are set forth in [DOL] regulations. [¶] Assuming these conditions are satisfied, 'the employer can simply start paying its employees under §207(k).' Further, the employer may opt to pay its employees more than §207(k) mandates without forfeiting the benefits of the exemption. Public employers bear the burden of proving they met §207(k)'s requirements by clear and affirmative evidence. *At 16*: The text [of §207(k)] contains no requirement of notice to the affected employee." *See also Rosano v. Township of Teaneck*, 754

F.3d 177, 185-86 (3d Cir.2014) (ER need not express its intent to qualify for or operate under the exemption); *Haro v. City of L.A.*, 745 F.3d 1249, 1256 (9th Cir.2014) (ER must prove that EEs fit "plainly and unmistakably" within exemption).

*Regular Rate*

*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). "The keystone of [FLSA] §7(a) [now 29 U.S.C. §207(a)] is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance. [¶] As long as the minimum hourly rates established by [FLSA] §6 [now 29 U.S.C. §206] are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. 'But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.'" *See also* 29 C.F.R. §778.108 (regular rate cannot be left to declaration by parties, but must be drawn from employment contract); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) (regular rate cannot be derived in unrealistic and artificial manner); *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 799 (9th Cir.2010) (ER may alter "regular rate" of pay to give EEs a requested alternative work schedule, as long as new rate equals or exceeds FLSA's minimum rate).

*Secretary, U.S. DOL v. Bristol Excavating, Inc.*, 935 F.3d 122, 127 (3d Cir.2019). "This case presents a matter of first impression: whether, within the meaning of the [FLSA,] an employer must treat bonuses provided by third parties as ‘remuneration for employment’ when calculating employees’ overtime rate of pay. *At 128*: ‘[R]emuneration for employment’ is not defined in the overtime provisions or elsewhere in the [FLSA]. [¶] The District Court, agreeing with the position of the [DOL], concluded that the incentive bonuses at issue here must be included in the regular rate of pay because they are remuneration for employment and do not qualify for any of the statutory exemptions. We disagree that all incentive bonuses provided by third parties are necessarily ‘remuneration for employment’ under the [FLSA] and therefore properly included in the regular rate of pay when calculating overtime pay. Instead, we hold that incentive bonuses provided by third parties may or may not be remuneration for employment, depending on the understanding of the employer and employee.”

*Baouch v. Werner Enters*., 908 F.3d 1107, 1116 (8th Cir.2018). “Per diem payments that vary with the amount of work performed are part of the regular rate.”

*Flores v. City of San Gabriel*, 824 F.3d 890, 898 (9th Cir.2016). “[ER] argues that this final phrase [in §207(e)(2)]—’other similar payments to an employee which are not made as compensation for his hours of employment’—permits exclusion of any payments that do not depend on when or how much work the employee performs. *At 899*: [T]he question of whether a particular payment falls within the ‘other similar payments’ clause does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work. *At 900*: [W]e focus our inquiry on whether a given payment is properly characterized as compensation, regardless of whether the payment is specifically tied to the hours an employee works, when determining whether that payment falls under §207(e)(2)'s 'other similar payments' clause." Held: Value of cash payments in lieu of healthcare benefits may not be excluded under §207(e)(2) and must be included in calculation of regular rate of pay. *See also Featsent v. City of Youngstown*, 70 F.3d 900, 904 (6th Cir.1995) ("other similar payments" includes compensation for services even when not directly attributable to hours worked); *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578 (7th Cir.1995) ("similar" refers to other payments that do not depend at all on when or how much work is performed); *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456, 1461-62 (3d Cir.1988) ("other similar payments" exception encompasses payments not tied to hours of compensation; focus is on whether payment is compensation for hours worked or service rendered).

*Chavez v. City of Albuquerque*, 630 F.3d 1300, 1308 (10th Cir.2011). Attendance "'[b]onuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay.' *At 1309-10*: We ... hold that sick leave buy-back payments must be included in the regular rate. We further hold that vacation [buy-back payments] are not part of the regular rate. ... Buying back sick days rewards an employee for consistent and as-scheduled attendance, which are the aspects of good attendance that provide additional value to an employer. Thus, sick leave buy-backs are compensation for additional service or value received by the employer, and are analogous to attendance bonuses. In contrast, payments for non-use of vacation days are analogous to holiday work premiums or bonuses for working particular undesirable days." *See also Acton v. City of Columbia*, 436 F.3d 969, 976 (8th Cir.2006). But see Featsent v. City of Youngstown, 70 F.3d 900, 905 (6th Cir.1995) (awards for nonuse of sick leave are unrelated to compensation for services and may be excluded from regular rate of pay).

*Retail or Service Establishment*

*Taylor v. HD & Assocs.*, 45 F.4th 833, 839 (5th Cir.2022). "Whether a payment is a commission for the purposes of [the bona fide commission] exception [under §207(i)] is a question of law that relies on how a payment works in practice, rather than what it is called. Neither the text of the FLSA nor this Court has defined 'commission.' Other courts have described a commission as having distinct features and we adopt their definition: (1) whether the commission is a percentage or proportion of the ultimate price passed on to the consumer; (2) whether the commission is decoupled from actual time worked, so that there is an incentive for the employee to work more efficiently and effectively; (3) the type of work is such that its peculiar nature does not lend itself to a standard eight-hour work day; and (4) whether the commission system offends the purposes of the FLSA. No factor appears dispositive in the case law, but the first two seem to carry the most weight." (Internal quotes omitted.)

*Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506 (7th Cir.2007). "[T]he question is what 'commissions on goods or services' [under §207(i)(2)] means. *At 508*: The essence of a commission is that it bases compensation on sales, for example a percentage of the sales price.... Although [the] income [of an employee on commission] is likely to be influenced by the number of hours a week that he works, the relation is unlikely to be a regular one. In one week business may be slow; he may make no sales and thus have no income for that week. The next week business may pick up and by working overtime that week he may be able to make up the income he lost because of slack business the previous week. Over a year his hours of work may be similar to those of regular hourly employees. So if he had to be paid overtime, his annual income would be higher than theirs even though he hadn't worked more hours over the course of the year than they had. [T]his [is] the rationale for the commission exemption from the FLSA's overtime provision."

*Wage Agreements*

*149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203-04 (1947), *modified on other grounds*, 331 U.S. 795 (1947). "It was not the purpose of Congress in enacting the [FLSA] to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement. ... A wage plan is not rendered invalid simply because, instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom."

*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690 (1946). "[T]ime clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked." *See also U.S. DOL v. Cole Enters.*, 62 F.3d 775, 779 (6th Cir.1995).

Editor's note: *Anderson* has been superseded on other grounds by the Portal-to-Portal Act of 1947.

*Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945). "It is evident that all the incentive workers receive a guaranteed basic hourly pay as a minimum. As to those who receive no regular additional payments during their non-overtime hours the respondent complies fully with [FLSA] §7(a) [now 29 U.S.C. §207(a)] by paying them one and one-half times the basic hourly rate for all overtime hours. But the vast majority of the employees do receive regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay. *At 432*: In this instance 98.5% of the incentive employees receive incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses are a normal and regular part of their income. Once the parties agree that these employees should receive such piece work wages, those wages automatically enter into the computation of the regular rate for purposes of §7(a) regardless of any contract provision to the contrary. Moreover, where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with §7(a)." *See also Allen v. Board of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1313 (11th Cir.2007) (FLSA does not require that EEs perform different types of work in order for ERs to lawfully pay them different rates).

*Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167-68 (1945). "'Congress intended ... to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the [FLSA]. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage

* * *