

11-1-2017

Wage Theft: Pilfering Paychecks, One Lunch at a Time

James LeVault

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

James D. Levault, Note, Wage Theft: Pilfering Paychecks, One Lunch at a Time, 38 N. Ill. U. L. Rev. 165 (2017).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

Wage Theft: Pilfering Paychecks, One Lunch at a Time

JAMES D. LEVAULT¹

The United States Department of Labor, Wage and Hour Division is charged with enforcing the payment of minimum wage and overtime to employees. A common problem occurs when an employee performs work during their unpaid lunch. According to DOL regulations, an employee is entitled to payment for time worked whether they were requested to work or if the employer was completely unaware that work was being performed by the employee. Two tests are used to determine whether an employee should be paid for the work performed. The first test is the completely relieved of duty test and the second test is the predominant benefit test. The judicial circuits are split onto which test to use. This Note analyzes both of these tests and recommends the courts forgo the predominant benefit test and adopt the completely relieved of duty test for uniform enforcement across all jurisdictions.

I. HISTORY OF THE UNITED STATES DEPARTMENT OF LABOR	168
A. <i>The Fair Labor Standards Act of 1938</i>	171
II. ESTABLISHMENT OF HOURS WORKED REQUIREMENTS	173
III. MEAL PERIODS AND THE TESTS	174
IV. CIRCUIT SPLIT	176
A. <i>Second Circuit</i>	177
B. <i>Third Circuit</i>	177
C. <i>Fourth Circuit</i>	178
D. <i>Fifth Circuit</i>	178

1. Juris Doctor Candidate, May 2018, and Editor-in-Chief of the *Northern Illinois University Law Review*, Volume 38. I would like to dedicate this article to my amazing family. First to my wife Kelsey, who is the most amazing person I know and has always given me endless support and love (you may have more published articles than I do, but I'm coming for you!). Next my parents, grandparents and in-laws, who no matter how crazy of an idea I may have (like leaving a great job to go to law school) have never second-guessed my decisions and have always supported me and encouraged me to be the best I can be. Additionally, my brothers and sisters: you guys are amazing and thank you for always supporting me and covering for me when I cannot be around. Professor Taylor, thank you for helping me come up with the sweet title. Last, but certainly not least, I would like to thank the entire *Northern Illinois Law Review* for their dedication and support throughout this entire journey.

E.	<i>Seventh Circuit</i>	179
F.	<i>Eighth Circuit</i>	179
G.	<i>Ninth Circuit</i>	180
H.	<i>Eleventh Circuit</i>	181
V.	CASE STUDIES	181
VI.	CONCLUSION AND RECOMMENDATIONS	189

From an enforcement standpoint, the Wage and Hour Division of the Department of Labor is tasked with enforcing these regulations. The Fair Labor Standards Act of 1938 is the regulation that sets the maximum hours worked for covered employees.² Overall, the regulation seems straightforward and is not too complicated to understand; however, the circuits are split on what test to use when analyzing whether or not the employee should be compensated. The Second, Third, Fourth, Fifth, Seventh and Eighth Circuits adopt what has been termed the “predominant benefit test” for determining if employee time is compensable.³ However, in the Ninth and Eleventh Circuits, the test that is applied is whether the employee has been completely relieved of all duties during their meal breaks.⁴ The problem has thus become a lack of clarity amongst the circuits on what is a *bona fide meal period*. My argument is that adherence to the administrative guidance that has been outlined in the Code of Federal Regulations, which states that an “employee must be completely relieved from duty,”⁵ is in order. This adherence would result in a bright-line test to be applied when determining a *bona fide meal period*.

In this Note, I will further examine and evaluate the tests that are utilized in the various circuits, and compare those tests to the stance that the Wage and Hour Division makes in regards to hours worked. I will look at reports and opinion letters written by the administrators from the Wage and

2. Fair Labor Standards Act of 1938, 29 U.S.C.S. §§201-19 (LEXIS through Pub. L. No. 115-84) (Section 207 of the Fair Labor Standards Act sets the maximum hours for employees at forty hours per week).

3. See, e.g., *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015); *Mitchell v. JCG Indus.*, 745 F.3d 837 (7th Cir. 2014); *Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269 (5th Cir. 2000); *Roy v. County of Lexington, South Carolina*, 141 F.3d 533 (4th Cir. 1998); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58 (2d Cir. 1997); *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531 (8th Cir. 1993).

4. See, e.g., *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525 (9th Cir. 2013), *rev’d*, 135 S. Ct. 513 (2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473 (11th Cir. 1990); *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84 (9th Cir. 1975); *Britain v. Clark County, No. 2:12-cv-1240-JAD-NJK*, 2015 U.S. Dist. LEXIS 42205 (D. Nev. Mar. 31, 2015); *Chao v. Tyson Foods, Inc.* 568 F. Supp. 2d 1300 (N.D. Ala. 2008).

5. 29 C.F.R. § 785.19 (2011) (recognized as invalid by *Havrilla v. United States*, 125 Fed.Cl. 454 (2016)).

Hour Division, and compare what the Department of Labor says with how courts are reasoning on this issue. I will then conclude with my analysis as to why the circuits should forgo the predominant benefit analysis and adopt the completely relieved of duty test to create one uniform test that allows: (1) investigators to have a bright-line rule for enforcement, (2) employers to have a complete understanding of what is expected of them, and (3) employees to know when they should expect to be compensated for their meal periods.

To set the parameters for this analysis, it is imperative to take a look at a few of the preeminent cases that utilize both tests that will be further outlined in this Note. In *Chao v. Tyson Foods, Inc.*, the court found that “the completely relieved from duty standard applies to § 785.19 claims in this circuit, regardless of how other circuits have interpreted the regulation. Therefore, any argument posited by either party to this action that the Eleventh Circuit applies the predominant benefit test to meal period claims under § 785.19 is inapposite.”⁶ The Fifth Circuit in *Naylor v. Securiguard, Inc.* utilized the predominant benefits analysis when reviewing whether security guards should be compensated for time spent during the meal period driving away from where they were working.⁷ In *Naylor*, “[t]he district court applied the predominant benefit test in concluding that the guards predominately benefited from the meal break despite being required to spend a significant amount of time driving away from their duty station.”⁸

Like the court in *Naylor*, the court in *Babcock v. Butler County* utilized the predominant benefits analysis when deciding whether corrections officers were entitled to overtime compensation for their uncompensated meal period.⁹ The *Babcock* court stated “the predominant benefit test is uncontroversial in the case before us—neither party disputes that it is the appropriate standard. Accordingly, we join our sister Circuits in adopting the predominant benefit test.”¹⁰

The circuits that utilize the completely relieved of duty standard that was used in *Chao v. Tyson Foods*, pull their test and analysis from *Kohlheim v. Glynn County*.¹¹ “The standard for determining whether a meal period is a ‘bona fide meal period’ in the Eleventh Circuit is set forth in *Kohlheim v. Glynn County, Ga. . . .*”¹² In *Kohlheim*, the court, quoting 29 C.F.R. § 785.19(a), stated that “[i]n order to be considered a bona fide meal period . . . the regulations require complete relief from duty: ‘The employee

6. *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1329 n.4 (N.D. Ala. 2008).

7. *Naylor v. Securiguard, Inc.*, 801 F.3d 501 (5th Cir. 2015).

8. *Id.* at 506.

9. *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015).

10. *Id.* at 156.

11. *Chao*, 568 F. Supp. 2d at 1306.

12. *Id.*

is not relieved if he is required to perform any duties, whether active or inactive, while eating.”¹³ The court went on to say that “the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal.”¹⁴ Both of these tests are addressed further in this Note but having a brief understanding before delving in is paramount to fully understand the rationale used when employing these tests.

I. HISTORY OF THE UNITED STATES DEPARTMENT OF LABOR

It can be argued that even the creation of the Department of Labor was the result of a conflict between those that were pro-employer and those that were pro-employee.¹⁵ This same conflict arises when looking at the two tests that will be discussed in this Note.¹⁶ Before assessing the strengths and weaknesses of the two tests that are utilized by both the Department of Labor and the courts, a thorough understanding of the historical context that gave rise to the Department of Labor is imperative. The creation and development of the Department of Labor provides a brief glimpse into the rationale that is used to justify both tests used for assessing whether a meal period is compensable. From the tumultuous beginning, to the passage of the Fair Labor Standards Act, the Department of Labor was never really without conflict; however, through these times one thing remained the driving force, and that was protecting the American worker.¹⁷

The Department of Labor, as we know it today, traces its roots back to the late 1860s when labor unions were making a strong push to elect Congressmen to develop an agency that would help protect the working class.¹⁸ In 1884, President Chester A. Arthur signed a bill that created the Bureau of Labor.¹⁹ The Bureau of Labor was successful in its early stages.; however, its supporters wanted more; they wanted it to be an independent department with the head being a cabinet member.²⁰ This led to President Cleveland in 1888 signing a bill that established the Department of Labor, but without

13. Kohlheim v. Glynn County, Georgia, 915 F.2d 1473, 1477 (11th Cir. 1990).

14. *Id.*

15. JONATHAN GROSSMAN, *THE DEPARTMENT OF LABOR* 3 (1973).

16. Dean R. Singewald II, *The Third Circuit Adopts Predominant Benefit Test for Meal Periods, Leaving the Ninth Circuit As The Sole Holdout*, [WWW.WAGEHOURBLOG.COM](http://www.wagehourblog.com), (December 8, 2015), <http://www.wagehourblog.com/2015/12/articles/flsa-coverage/the-third-circuit-adopts-predominant-benefit-test-for-meal-periods-leaving-the-ninth-circuit-as-the-sole-holdout/> [https://perma.cc/P34Y-8ZSY].

17. GROSSMAN, *supra* note 16, at 3.

18. *Id.*

19. *Id.* at 5.

20. *Id.* at 7.

the Cabinet level representation.²¹ However, this new Department of Labor was not what the proponents of a labor department had sought, since it was not a cabinet level position, what the unions were seeking was “a voice in the Cabinet that would champion labor causes.”²²

Then in 1903, “[t]he bill for a Department of Commerce incorporating the Labor Department won the support of the Republican majority in Congress. President Theodore Roosevelt agreed because he believed that the interest of workers and employers could thus be harmonized.”²³ However, this only lasted until 1913, when the labor leaders demanded an independent voice for labor in the cabinet.²⁴ On March 4, 1913, President Taft reluctantly signed into law the bill that established the Department of Labor as an independent agency; the head of which would be a cabinet level position.²⁵ “President Wilson, in selecting the first Secretary of Labor, made good on his campaign promise to be friendly to labor. He chose a workingman, a union leader, and a congressman who had been instrumental in creating the Department of Labor—William Bauchop Wilson.”²⁶

“The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”²⁷ In addition, those words, “are the cornerstone upon which the Department [was] . . . built.”²⁸ The creation of the Department of Labor was viewed as a major step forward for those workers who had struggled since the Civil War.²⁹ The newly created Department of Labor was a necessity to ensure that wage earners were properly protected, and as Secretary Wilson stated “[i]n his first annual report . . . a philosophy echoed in various forms by many Secretaries since . . . the Department was created ‘in the interest of the wage earners’, but it must be administered in fairness to labor, business and the public at large.”³⁰

21. *Id.*

22. GROSSMAN, *supra* note 16, at 9.

23. *Id.* at 9.

24. *Id.* at 9.

25. *Id.* at 10. President Taft did not see a need for a department of labor; however, after the bill passed Congress and President Taft lost his reelection bid to Woodrow Wilson, who supported the newly passed bill, Taft knew that a veto would have most likely been a futile gesture and decided to sign it into law on his last day in office. *Id.*

26. GROSSMAN, *supra* note 16, at 11.

27. 29 U.S.C.A. § 551 (Westlaw through Pub. L. No. 115-84).

28. GROSSMAN, *supra* note 16, at 3.

29. *Id.*

30. Judson MacLaury, *Chapter 1: Start-up of the Department and World War I, 1913-1921*, DEPARTMENT OF LABOR, <https://www.dol.gov/general/aboutdol/history/dolchp01> [<https://perma.cc/K7L6-F9NK>].

Enter the Depression, a time in which up to 12 million people were unemployed.³¹ William N. Doak, who was appointed Secretary of Labor by President Herbert Hoover after the resignation of Secretary of Labor Davis, was put in a position in which he had to combat a failing job market and unemployment ranging from 5 million workers when he took over office to “at least 12 million” at its peak.³² “One out of every four workers could not find a job.”³³ Secretary Doak at this time “introduced the five-day work week for Department of Labor employees” and also “suggested a six-hour day . . . to spread out the work” for employees to help mitigate the effects of the Depression.³⁴ Both Secretary Davis and Secretary Doak were put in difficult positions because of the Depression, and “[a]s a result of the Administration’s failure to foresee and adequately counteract the Depression, later critics looked upon Doak as one of the worst Secretaries of Labor and considered . . . Davis, not much better.”³⁵

The Depression ushered in a new administration led by Franklin D. Roosevelt, who was elected President in 1932.³⁶ At the time of his election, “it seemed impossible that economic conditions could get worse . . . [however] [b]y March, 1933, when Roosevelt took office, conditions were worse.”³⁷ The new figures showed between 13 million and 18 million unemployed.³⁸ In his first inauguration address, Roosevelt “assured the nation that he would put people to work.”³⁹ This led to Roosevelt’s “war against unemployment” and an unlikely choice for the Secretary of Labor, Frances Perkins.⁴⁰ Secretary Perkins had come from a “blue-blooded New England family . . . [was] president of her class at Mount Holyoke College . . . [and] had received training in social work at Hull House in Chicago.”⁴¹ Secretary Perkins was hesitant to become Secretary of Labor because she did not feel that she was a “bona fide labor person,”⁴² but Roosevelt insisted and “wanted to break precedent by appointing the first woman Cabinet member in American history.”⁴³

The history of the United States Department of Labor would be incomplete without addressing what Frances Perkins meant to the growing

31. GROSSMAN, *supra* note 16, at 29.

32. *Id.* at 29.

33. *Id.*

34. *Id.* at 30.

35. *Id.*

36. GROSSMAN, *supra* note 16, at 31.

37. *Id.*

38. *Id.*

39. *Id.* at 32.

40. *Id.*

41. GROSSMAN, *supra* note 16, at 32.

42. *Id.*

43. *Id.*

agency. When President Roosevelt approached and offered Perkins the position of Secretary of Labor in 1933, Perkins ensured that Roosevelt understood what her goals would be before she accepted the position.⁴⁴ She wanted “to direct federal aid to the states for unemployment relief, public works, work hour limitations, minimum wage laws, child labor laws, unemployment insurance, social security, and revitalized public employment insurance.”⁴⁵ Most of these ideas that Perkins had were incorporated into the New Deal.⁴⁶ “Secretary Perkins was the star of the dramatic events leading to the enactment of the Fair Labor Standards Act of 1938.”⁴⁷ Perkins had already “warned [Roosevelt] that if she accepted, she would want to put a floor under wages, set up a ceiling over hours of work, and abolish child labor. She made the achievement of these ends a major goal of the Department of Labor.”⁴⁸

A. *The Fair Labor Standards Act of 1938*

“Prior to passing the Fair Labor Standards Act (FLSA) in 1938, Congress attempted to establish fair minimum and overtime wage standards with little success.”⁴⁹ As the language from the statute creating the Department of Labor indicated, and the language used by the first Secretary of Labor, the wage earners were the primary beneficiaries of the Department.⁵⁰ Labor standards during the Depression had collapsed.⁵¹ “While millions had been looking for work, other men, women, and children had been working long hours for pitifully low wages. Sweatshops had been the order of the day in many industries.”⁵² Secretary Perkins and President Roosevelt were dedicated to improving the conditions that workers faced but “opposition to labor standards at that time . . . [were] fierce.”⁵³

44. Dionisia M. Xenos, *Remembering Frances Perkins: This Lifetime Advocate of Workers' Rights Helped Pioneer Today's Workplace Safety and Health Programs*, OSHA.GOV, <https://www.osha.gov/Publications/JSHQ/fall2002html/perkins.htm> [<https://perma.cc/VDD5-THAD>].

45. *Id.*

46. *Id.*

47. GROSSMAN, *supra* note 16, at 45.

48. *Id.* at 45-46.

49. JOSEPH E. KALET, *PRIMER ON FLSA & OTHER WAGE & HOUR LAWS 2-3* (3d ed. 1994).

50. Judson MacLaury, *Chapter 3: The Department in the New Deal and World War II, 1933-1945*, DEPARTMENT OF LABOR, <https://www.dol.gov/general/aboutdol/history/dolchp03> [<https://perma.cc/M84K-2UX8>]; *see also* 29 U.S.C. § 551 (2012).

51. GROSSMAN, *supra* note 16, at 46.

52. *Id.*

53. *Id.*

Starting in 1937, wage and hour legislation was proposed to apply to all workers, and it was proposed that a federal agency be created to enforce those standards.⁵⁴ President Roosevelt strongly supported the legislation, and there was a “dedicated effort of some labor leaders on behalf of the bill, some elements of the labor movement actively fought the bill, while others held the measure hostage to their specific demands.”⁵⁵ Additionally, “[l]abor opponents were not alone. . . . The business community was largely opposed to it, and Southern Democrats often were linked with Republicans in their opposition.”⁵⁶ The FLSA did eventually pass, despite all of the opposition, “and President Roosevelt commented . . . that ‘I do think that next to the Social Security Act [the FLSA] is the most important Act that has been passed in the last two to three years.’”⁵⁷

“The FLSA regulates employment practices in the area of minimum wage, overtime pay, equal pay, recordkeeping, and child labor.”⁵⁸ The Act originally established a minimum wage of 25 cents per hour, as well as setting a maximum workweek of 40 hours.⁵⁹ President Roosevelt was a supporter of the FLSA and was quoted as saying “[w]e are seeking . . . only legislation to end starvation wages and intolerable hours.”⁶⁰ The passage of FLSA was seen as a major victory for President Roosevelt and Secretary Perkins.⁶¹ The FLSA “was a precedent-making achievement in its time. It covered an estimated 12.5 million workers who were either engaged in interstate commerce or producing goods for interstate commerce. It immediately raised the pay of 300,000 workers and shortened work hours for a million more.”⁶²

President Roosevelt, and many others, found justification for the Act because of all the problems that wage earners were facing, even after the creation of the Department of Labor. Before the passage of the FLSA, many states had attempted to enact various restrictions on the number of hours that women and children were able to work.⁶³ Additionally, during the New

54. *Id.* at 34.

55. Howard D. Samuel, *Trouble Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32, 36.

56. *Id.*

57. *Id.* (citing FRANKLIN D. ROOSEVELT, PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938, 404 (Macmillan Co. 1941) (1938)).

58. KALET, *supra* note 50, at 3.

59. MacLaury, *supra* note 51.

60. FRANKLIN D. ROOSEVELT, PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938, 6 (Macmillan Co. 1941) (1938).

61. Samuel, *supra* note 56, at 32.

62. GROSSMAN, *supra* note 16, at 47-48.

63. Samuel, *supra* note 56.

Deal era, labor standards had become a major issue, especially with the electorate in the 1936 presidential election.⁶⁴

The FLSA also ushered in another major addition to the area of labor law. In addition to setting the minimum wage and maximum hours worked, it created an enforcement agency for these regulations, the Wage and Hour Division.⁶⁵ President Roosevelt viewed Wage and Hour legislation as a major problem that was before Congress for action. According to Roosevelt, “[i]t . . . [was] an essential part of economic recovery. [And] [i]t . . . [had] the support of an overwhelming majority of . . . [the] people in every walk of life.”⁶⁶ According to the Wage and Hour Division’s website, the mission of the Wage and Hour Division “is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation’s workforce.”⁶⁷ The language that encompasses the mission statement is strikingly similar to the language used with the passage of the Act that created the Department of Labor.⁶⁸ By creating the Wage and Hour Division, the FLSA ensured that the regulation would have an enforcement arm that would be comprised of investigators and administrators, tasked with maintaining proper working conditions for wage earners. “The Wage and Hour Division . . . administers and enforces the FLSA with respect to private employment, state and local government employment, and [certain] federal employees.”⁶⁹

II. ESTABLISHMENT OF HOURS WORKED REQUIREMENTS

Under the FLSA, an employer is required to pay all his employees who are covered by the Act a regular hourly rate of pay, which is at least equal to the statutory minimum, and in addition to this, to pay each covered employee one and one-half times his regular rate of pay for all hours which he works in excess of forty hours during the workweek.⁷⁰ “The two basic factual issues involved in every wage and hour case are: 1) the regular rate of pay; and 2) the number of hours worked.”⁷¹ Work has been defined as

64. *Id.* at 34.

65. U.S. DEP’T OF LAB., *Wage & Hour Div. Hist.*, <https://www.dol.gov/whd/about/history/whdhist.htm> [<https://perma.cc/HLF2-ATW2>].

66. FRANKLIN D. ROOSEVELT, *PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938, 6-7* (Macmillan Co. 1941) (1938).

67. U.S. DEP’T OF LAB., *Wage & Hour Div. Mission Statement*, <https://www.dol.gov/whd/about/mission/whdmiss.htm> [<https://perma.cc/68VX-F2WL>].

68. *See* KALET, *supra* note 50.

69. U.S. DEP’T OF LAB., *Handy Reference Guide to the Fair Labor Standards Act*, (Sept. 2016), <https://www.dol.gov/whd/regs/compliance/wh1282.pdf> [<https://perma.cc/3B5M-H8HW>].

70. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2012).

71. *Culkin v. Glenn L. Martin Neb. Co.*, 97 F. Supp. 661 (D. Neb. 1951).

meaning “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued primarily for the benefit of the employer and his business.”⁷² “The definition of ‘hours worked’ has not been limited to encompass only those situations in which an employee is engaged in affirmative action.”⁷³ While the FLSA does not define ‘work,’ the Supreme Court has construed it to mean “physical or mental exertion [whether burdensome or not] controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”⁷⁴ The test for whether an employee is ‘working,’ and thus presumably entitled to compensation, is whether the time is spent primarily for the benefit of the employer or for the benefit of the employee.⁷⁵ “Hours worked is the time for which an employee is entitled to compensation under the FLSA. Compensation is required for the time an employee is required to be on duty . . . or suffered or permitted to work, whether or not the employee is requested to do so.”⁷⁶

III. MEAL PERIODS AND THE TESTS

Under 29 C.F.R. §785.19(a)

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks, these are simply rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals, ordinarily 30 minutes or more is long enough for a bona fide meal period but a shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.⁷⁷

72. 29 C.F.R. § 785.7 (2011) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).

73. *Culkin*, 97 F. Supp. at 672.

74. 29 C.F.R. § 785.7 (2011) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).

75. *See Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *see also Reich v. S. New Eng. Telecomms. Corp.*, 892 F. Supp. 389, 399 (D. Conn. 1995).

76. SUSAN SCHECHTER, *FAIR LABOR STANDARDS ACT EXPLAINED: A WAGE AND HOUR GUIDEBOOK* 159 (Ronald Miller, et al. eds., 1997).

78. *See* 29 C.F.R. § 785.19(a) (2011).

“Time spent predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the provisions of the Fair Labor Standards Act.”⁷⁸ All of a “lunch period” is not to be excluded in computing the compensable hours of work if the employees are on call or required to engage in duties during a part of the lunch period.⁷⁹

The two tests that are adopted by the courts are the *Predominant Benefits Test* and the *Completely Relieved of Duty Test*. “Time spent predominantly for the employer’s benefit during a period, although designated as a lunch period . . . nevertheless constitutes working time compensable under the FLSA.”⁸⁰ This outlines the first test that courts look at, the “predominant benefit test.” This test “assesses whether the employee’s meal time is spent primarily for the employer’s benefit. . . . The second, the ‘completely relieved from duty’ standard, focuses on whether an employee is actually completely free of any work-related tasks.”⁸¹ The predominant benefit test asks whether the employee is primarily engaged in work-related duties during meal periods.⁸² “The majority of the courts of appeals have adopted this test.”⁸³ The courts have refrained from giving a literal reading of the regulation that requires that an employee is completely relieved from duty during a bona fide meal period.⁸⁴ An “employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.”⁸⁵ The courts instead look at the entirety of the:

circumstances to determine . . . to whom the benefit of the meal period inures. Most courts derive this approach from United States Supreme Court precedent holding that “[w]hether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”⁸⁶

78. Roy v. County of Lexington, South Carolina, 141 F.3d 533 (4th Cir. 1998).

79. See 29 C.F.R. § 785.19(a) (2011).

80. Ruffin v. MotorCity Casino, 775 F.3d 807, 811 (6th Cir. 2015) (quoting F.W. Stock & Sons, Inc. v. Thompson, 194 F.2d 493, 496-97 (6th Cir. 1952)).

81. Reich v. S. New Eng. Telecomms. Corp., 892 F. Supp. 389, 398 (D. Conn. 1995).

82. Babcock v. Butler County, 806 F.3d 153, 156 (3d Cir. 2015).

83. *Id.*

84. *Id.*

85. *Id.* (citing 29 C.F.R. § 785.19(a) (2011)).

86. *Id.* (quoting Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944)).

As a result, “the predominant benefit test is a fact-intensive inquiry.”⁸⁷ Various courts take various approaches when looking at the predominant benefits test; some look to “whether the employee is free to leave the premises . . . [while] [o]thers emphasize the number of interruptions to which the employees are subject.”⁸⁸ According to the Eleventh Circuit, “the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal.”⁸⁹

As for the second test, the Department of Labor considers a meal bona fide if the employee is “completely relieved from duty” during the meal period.⁹⁰ To be “completely relieved of duty,” employees must be allowed to take their meals in an uninterrupted manner and be provided sufficient time to eat.⁹¹ Such employees are “completely relieved of duty” even if, during their meal time, they are restricted to a small lunchroom or prohibited from making phone calls or smoking.⁹² However, if a worker is required or permitted to perform any duties, whether active or inactive, during the time designated for eating, the worker is “not relieved.”⁹³

IV. CIRCUIT SPLIT

Currently, the Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits have adopted the predominant benefit test for determining if employee time is compensable; while the Ninth and Eleventh Circuits apply the test of whether the employee is completely relieved of all duties during their meal periods.⁹⁴ The Supreme Court in *Armour & Co. v. Wantock* addressed the

87. *Babcock*, 806 F.3d at 157.

88. *Id.*; *See also* *Mitchell v. JCG Indus.*, 745 F.3d 837 (7th Cir. 2014); *Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269 (5th Cir. 2000); *Roy v. County of Lexington, South Carolina*, 141 F.3d 533 (4th Cir. 1998); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58 (2d Cir. 1997); *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531 (8th Cir. 1993).

89. *Id.* (quoting *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473 (11th Cir. 1990)).

90. 29 C.F.R. § 785.19 (2011).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g., Mitchell v. JCG Indus.*, 745 F.3d 837 (7th Cir. 2014); *Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269 (5th Cir. 2000); *Roy v. County of Lexington, South Carolina*, 141 F.3d 533 (4th Cir. 1998); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58 (2d Cir. 1997); *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531 (8th Cir. 1993); *cf. Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525 (9th Cir. 2013), *rev’d*, 135 S. Ct. 513 (2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473 (11th Cir. 1990); *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84 (9th Cir. 1975); *Britain v. Clark County*, Case No.: 2:12-cv-1240-JAD-NJK, 2015 U.S.

predominant benefits analysis by saying “[w]hether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”⁹⁵ The Court again addressed this issue in *Skidmore v. Swift & Co.*, using the holding in the *Armour* case, basically holding that no legal formula can be laid down to resolve cases when the facts are so varied.⁹⁶ The *Armour* case and the *Skidmore* case both paved the way for what is now known as the “predominant benefit test.”

A. *Second Circuit*

The Second Circuit, in *Reich v. Southern New England Telecommunications Corp.*, utilized the framework set forth in both *Armour* and *Skidmore* in looking at whether the activities performed by the employees were “predominantly for the benefit of the employer.”⁹⁷ In *Reich*, the court declined to adopt the literal reading of § 785.19, stating that “as with other interpretive regulations issued by the Secretary under the FLSA, [it] does not have the force of law.”⁹⁸ The court went further and stated that “§ 785.19, as literally construed, failed to persuade us primarily because the completely-removed-from-duty standard is inconsistent with controlling Supreme Court precedent defining ‘work.’”⁹⁹

B. *Third Circuit*

The Third Circuit is the most recent circuit to adopt the predominant benefit test.¹⁰⁰ “The Third Circuit Court of Appeals recently joined the chorus of Circuits adopting the pro-employer ‘predominant benefit test’ when weighing the compensability of meal periods under the Fair Labor Standards Act.”¹⁰¹ The Third Circuit noted that the predominant benefit test has been adopted by the majority of the court of appeals.¹⁰²

Dist. LEXIS 42205 (D. Nev. Mar. 31, 2015); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300 (N.D. Ala 2008).

95. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

96. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944).

97. *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997).

98. *Id.*

99. *Id.* at 65; *See Henson*, 6 F.3d at 536.

100. *See Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015).

101. Singewald, *supra* note 17.

102. *Babcock*, 806 F.3d at 156.

C. *Fourth Circuit*

The Fourth Circuit noted that the FLSA does not define work, however, the Supreme Court concluded that within the definition of work is any mental or physical exertion that is either controlled or required by the employer, and that the employer and his business are the primary beneficiaries of that work.¹⁰³ Again relying on the decision in *Armour*, the Court held that work includes standby or waiting time. So, in the Fourth Circuit, “[t]he critical question . . . is ‘whether time is spent predominantly for the employer’s benefit or for the employee’s.’”¹⁰⁴ The Fourth Circuit takes a somewhat unusual approach in an attempt to find some congruency between the two tests.¹⁰⁵ Here, the Fourth Circuit states that “[i]n issuing this regulation [29 C.F.R. § 785.19 (a) (1997)], the Secretary cited the Sixth Circuit’s decision in *Stock* with its ‘predominantly for the employer’s benefit’ standard as illustrative of the regulatory ‘completely relieved from duty’ requirement.”¹⁰⁶ The Fourth Circuit then summarizes their conclusion by saying “although § 785.19 (a) can be read to require that an employer may only exclude meal periods from compensation if it permits an employee to cease all duties of any kind during such periods, the Secretary did not seemingly intend such a broad construction.”¹⁰⁷

D. *Fifth Circuit*

In *Hartsell v. Dr. Pepper Bottling Co. of Texas*, the Fifth Circuit held that “[t]he predominant benefits test’ is applied to determine who primarily benefits from the period.”¹⁰⁸ The court went further to say that using this test is a question of fact and that it should be determined by the district court.¹⁰⁹ Additionally, the Fifth Circuit in *Bernard v. IBP, Inc.*, stated that “[t]he critical question is whether the meal period is predominantly or primarily for the benefit of the employer or for the benefit of the employee. The employer bears the burden to show that meal time qualifies for this exception from compensation.”¹¹⁰ In *Alvarez v. City of El Paso*, in a per curiam opinion the Fifth Circuit Court of Appeals relied on the standard that had been used in *Bernard* and stated that “[i]n resolving this question,

103. *Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 544 (4th Cir. 1998).

104. *Id.* (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)).

105. *Roy*, 141 F.3d at 544.

106. *Id.* (quoting *F.W. Stock & Sons, Inc. v. Thompson*, 194 F.2d 493, 496 (6th Cir. 1952)).

107. *Roy*, 141 F.3d at 544.

108. *Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269, 274 (5th Cir. 2000).

109. *Id.*

110. *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264-65 (5th Cir. 1998).

we must decide whether the employee can use the time during lunch for his or her own purposes.”¹¹¹

E. Seventh Circuit

In *Leahy v. City of Chicago*, the Seventh Circuit stated that they “have adopted the ‘predominant benefit’ test for determining whether meal periods constituted compensable work time under the FLSA.”¹¹² However, the Seventh Circuit has taken a bit of a different view on the predominant benefit test and stated in *Mitchell v. JCG Industries*, that “[t]he predominance test is related to the *de minimis* doctrine.”¹¹³ Again, like the majority of the other circuits, the Seventh Circuit takes the stance that ordinarily a meal period would not be time worked under the FLSA.¹¹⁴ The court further states that “[u]nder this test, a meal period is not work time if ‘the employee’s time is not spent predominantly for the benefit of the employer.’”¹¹⁵ Overall, the Seventh Circuit has followed closely with a number of the other circuits in holding that the test to be used for determining whether an employee should be compensated for work during a meal break is the predominant benefits test.

F. Eighth Circuit

In *Henson v. Pulaski County Sheriff Department*, the Eighth Circuit concluded that the appropriate test to be used for determining whether an employee should be compensated for meal periods under the FLSA was the predominantly for the benefit of the employer test.¹¹⁶ The court went on to say that “[e]stablished in the earliest Supreme Court cases interpreting the FLSA, this standard [predominant benefits test] comports with the Supreme Court’s admonition to use a practical, realistic approach under the unique circumstances of each case when deciding whether certain activities constitute compensable work.”¹¹⁷ The Eighth Circuit relied on the holdings from both *Armour* and *Skidmore* to come to their determination that the predominant benefits test was the appropriate test to be applied.¹¹⁸ The *Henson* court also noted that the predominant benefits standard had been both im-

111. *Alvarez v. City of El Paso*, No. 01-50232, 2002 U.S. App. LEXIS 28606, at *2 (5th Cir. Feb. 14, 2002) (citing *Bernard*, 154 F.3d at 266).

112. *Leahy v. City of Chicago*, 96 F.3d 228, 235 n.2 (7th Cir. 1996).

113. *Mitchell v. JCG Indus.*, 745 F.3d 837, 844 (7th Cir. 2014).

114. *Barefield v. Village of Winnetka*, 81 F.3d 704, 711 (7th Cir. 1996).

115. *Id.* at 710 (citing *Alexander v. City of Chicago*, 994 F.2d 333, 337 (7th Cir. 1993)) (quoting *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1155 (10th Cir. 1992)).

116. *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531, 534 (8th Cir. 1993).

117. *Id.*

118. *Id.*

plicitly and expressly applied in various situations when determining whether activities equate to work under the FLSA.¹¹⁹ Additionally, it is noted in *Henson* that the adoption of the predominantly for the benefit of the employer standard has taken place in a majority of circuits that have reviewed what the scope of work means under the FLSA.¹²⁰ The *Henson* court concludes “that the Wage and Hour Division’s meal period compensability standard lacks persuasive force.”¹²¹ Additionally, the court notes that “[t]he regulation is inconsistent with the Supreme Court’s longstanding interpretation of the Act and would mandate the application of a rigid rule in the face of the Supreme Court’s direction that courts take a practical approach based on the unique facts of each case.”¹²²

G. Ninth Circuit

In *Brennan v. Elmer’s Disposal Service, Inc.*, the Ninth Circuit stated that “[a]n employee cannot be docked for lunch breaks during which he is required to continue with *any* duties related to his work.”¹²³ In *Busk v. Integrity Staffing Solutions, Inc.*, the court, quoting *Brennan*, held that the “FLSA does not require compensation for an employee’s lunch period, but an ‘employee cannot be docked for lunch breaks during which he is required to continue with *any* duties related to his work.’”¹²⁴ The *Busk* court also, quoting 29 C.F.R. § 785.19, stated that “[a]n ‘employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.’”¹²⁵ In *Alvarez v. IBP, Inc.*, the Ninth Circuit stated that “[i]t is axiomatic, under the FLSA, that employers must pay employees for all ‘hours worked.’”¹²⁶ The Ninth Circuit in *Britain v. Clark County* also held that an employee must be compensated if they are required to continue with any of the duties that are related to their work.¹²⁷

119. *Id.*

120. *Id.*

121. *Henson*, 6 F.3d at 535.

122. *Id.*

123. *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975) (emphasis added).

124. *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 531 (9th Cir. 2013) (quoting *Brennan*, 510 F.2d at 88) (emphasis added).

125. *Busk*, 713 F.3d at 532.

126. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003).

127. *Britain v. Clark County*, No. 2:12-cv-1240-JAD-NJK, 2015 U.S. Dist. LEXIS 42205, *9 (D. Nev. Mar. 31, 2015).

H. Eleventh Circuit

In *Kohlheim v. Glynn County*, the court stated that “[i]n order to be considered a bona fide meal period . . . the regulations required complete relief from duty[.]”¹²⁸ The *Kohlheim* Court goes further to say that “the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal.”¹²⁹ In *Chao v. Tyson Foods, Inc.*, the court seems to waiver a bit from the *Kohlheim* Court.¹³⁰ However, the court stated that in order to satisfy the standard of a bona fide meal period, “the employer must establish that an employee is ‘completely relieved from duty.’”¹³¹ The court went further to state that “[t]o be completely relieved from duty, employees cannot be subject to ‘significant affirmative responsibilities’ during the meal period.”¹³² Both *Kohlheim* and *Tyson Foods* highlight how the Eleventh Circuit is still using the completely relieved of duty test, even though other circuits seem to believe that the Eleventh Circuit has moved towards the predominant benefit test that is used by the majority of the circuits.¹³³

Understanding how the courts view the distinctions between the cases provides an interesting analysis on what factors to consider when determining whether to compensate an employee for a meal period or not. For the most part, the circuits all agree that the analysis should be fact-driven, but where they differ is on what test to utilize. The majority of the circuits apply the predominant benefits test which is contrary to what the Department of Labor applies. It is important to have a grasp on how the circuits have decided these issues before making a final assessment on why the “completely relieved of duty” test is the appropriate test to apply.

V. CASE STUDIES

The case studies in this Note will focus primarily on the circuits that utilize the “completely relieved of duty” test as guided by the Code of Federal Regulations. Each case discussed *infra* will provide a brief snapshot of the courts in the Ninth and Eleventh Circuits view the facts and properly use the administrative guidance issued by the enforcement mechanism of the Department of Labor. These cases are important because they provide

128. *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473, 1477 (11th Cir. 1990).

129. *Id.*

130. *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1329 n.4 (N.D. Ala 2008).

131. *Id.* at 1306.

132. *Id.*

133. *Babcock v. Butler County*, 806 F.3d 153, 156 (3d Cir. 2015).

real examples of how the “completely relieved of duty” test works, and how it was designed to work.

In *Brennan v. Elmer’s Disposal Service, Inc.*, the Ninth Circuit Court of Appeals upheld the district court’s ruling that utilized the completely relieved of duty test, as outlined by 29 C.F.R. § 785.19.¹³⁴ In *Brennan*, the Secretary of Labor, on behalf of the Department of Labor, filed an action against the defendant, Elmer’s Disposal Service, for violations of the Fair Labor Standards Act’s overtime provisions.¹³⁵ There were a number of issues and claims raised in this case; however, for the purposes of this Note, attention will be focused on the allegation made against Elmer’s Disposal Service (“Elmer’s”) that employees were deducted a one-half hour meal break every day, when they were not completely relieved of their duties.¹³⁶ The trial court in *Brennan* “found that because employees were encouraged by the wage plan to work through their allotted lunch periods, and because most of them did work through, the deductions made from the salaries of all employees for a one-half hour lunch break each day were improper.”¹³⁷ The Ninth Circuit affirmed the lower court’s holding that “[a]n employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work.”¹³⁸ With this holding in *Brennan*, the court followed the administrative guidance as directed by the Code of Federal Regulations.¹³⁹ This strict adherence to the regulations is important because it provides a clear understanding of what the implication of performing any duties related to work during an unpaid lunch. Even though *Brennan* was decided in 1975, the same rationale utilized by the court rings true today.

Gessele v. Jack in the Box, Inc. is another example of how the Ninth Circuit precedent of following the language of the 29 C.F.R. § 785.19 is utilized.¹⁴⁰ In *Gessele*, a class action suit was filed against Jack in the Box for violations of the overtime and minimum wage provisions of the Fair Labor Standards Act.¹⁴¹ The employees of this class alleged that, among other things, Jack in the Box failed to pay for break periods.¹⁴² This failure to pay, as the employees stated, was a direct result of employees being called back to work while on their unpaid break in order to assist the others employees when the store got busy.¹⁴³ Here, more specifically, the

134. *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84 (9th Cir. 1975).

135. *Id.* at 85.

136. *Id.*

137. *Id.* at 86.

138. *Id.* at 88 (citing *Biggs v. Joshua Hendy Corp.*, 183 F.2d 515 (9th Cir. 1950)).

139. *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84 (9th Cir. 1975).

140. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941 (D. Or. Jan. 28, 2013).

141. *Id.* at *1.

142. *Id.* at *14.

143. *Id.* at *23.

“[p]laintiffs allege that Jack in the Box trains its managers that the needs of the restaurant come first and to bring employees back from breaks early to help out during a rush period.”¹⁴⁴

In this case, it is undisputed that Jack in the Box has a company policy that generally provides employees that work a six hour or more shift, an unpaid break of thirty minutes.¹⁴⁵ Additionally, according to Jack in the Box, when an employee does not receive the full thirty minutes, then that period is to be deemed a “rest period” and should be included in calculation of the hours worked.¹⁴⁶ However, the employees in this class claim that, in addition to managers cutting breaks short, the “line between paid and unpaid breaks . . . [was] 20 minutes, rather than 30 minutes as stated in the policy . . . and [Jack in the Box] programmed its computers not to pay employees for any break longer than 20 minutes.”¹⁴⁷ What was disputed in this case was whether or not the employees were deducted for meal periods when they should not have been deducted.¹⁴⁸

The timekeeping systems that were utilized by Jack in the Box created additional problems when calculating whether a meal break was compensated or not compensated.¹⁴⁹ One of the systems, Jack’s Timekeeping , automatically deducted any meal period, regardless of the total time.¹⁵⁰ Employees were required to indicate the type of break they were taking, which is what told the system whether to deduct the break or not; however, the system would not allow an employee to clock back in from their meal break before thirty minutes had elapsed without an override by a manager.¹⁵¹ Overall, the timekeeping systems that were utilized by Jack in the Box required managers to approve or not approve certain types of breaks; this type of system is just asking for problems, and as indicated in *Gessele*, problems were plentiful.¹⁵²

Now, as mentioned at the beginning of the *Gessele* case, there were a number of issues presented to the court.¹⁵³ For the purposes of this Note, the other issues are not relevant, but, what is relevant is the analysis the court uses when discussing the meal periods. In regard to the meal period automatic deductions, the court notes that “standing alone, ‘automatic meal de-

144. *Id.* at *23-24.

145. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941, at *23 (D. Or. Jan. 28, 2013).

146. *Id.*

147. *Id.* at *23-24.

148. *Id.*

149. *Id.* at *25.

150. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941, at *26 (D. Or. Jan. 28, 2013).

151. *Id.* at *25-26.

152. *Id.* at *27.

153. *Id.* at *14.

duction policies are not *per se* illegal' under the FLSA."¹⁵⁴ Further, the court noted that "it is the failure to compensate an employee who worked with the employer's knowledge through an unpaid meal break—whether the employee reported the additional time or not—that potentially violates the FLSA."¹⁵⁵ What the court is stating here is that an employer is allowed to have a timekeeping system that automatically adjusts an employee's time to reflect a meal period, so long as there is a mechanism to readjust that system if the employee actually performs work, especially if the employer has knowledge of the performance of the work.¹⁵⁶

The court in *Gessele* is setting up the next step in the analysis of whether an employee should be compensated for performing work during their unpaid break. In *Gessele*, the court notes that "[t]he parties disagree as to the appropriate test for determining whether a meal period is *bona fide*. *Jack in the Box* cites cases which generally apply the 'predominate benefit test' which examines whether an employee's activities while on break are for the benefit of the employer or the employee."¹⁵⁷ However, the "[p]laintiffs contend that the Ninth Circuit has adopted the 'completely relieved from duty standard' which requires that '[a]n employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work.'"¹⁵⁸

The court clearly indicated the contention between the two parties, but this contention runs far deeper than just the parties to this case; this contention is the same type of contention that is faced throughout all jurisdictions, due primarily to the lack of clarity on what test to apply when assessing unpaid meal breaks. In *Gessele*, the court punts on what test to utilize and focuses on how both tests required independent inquiries.¹⁵⁹ The court states that "[r]egardless of which standard the Ninth Circuit would apply, both standards require individualized determinations for each unpaid break between 20 and 30 minutes."¹⁶⁰

Similar to *Gessele*, the Ninth Circuit in *Alvarez v. IBP, Inc.*, addressed a situation in which employees were deducted for time worked during an

154. *Id.* at *66 (quoting *Wolman v. Catholic Health Sys. of Long Island, Inc.*, 853 F. Supp. 2d 290, 301 (E.D.N.Y. 2012)).

155. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941, at *66 (D. Or. Jan. 28, 2013) (quoting *Wolman*, 853 F. Supp. 2d at 301).

156. *Id.*

157. *Id.* at *67-68.

158. *Id.* (quoting *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975)).

159. *Id.* at *69.

160. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941, at *69 (9th Cir. Jan. 28, 2013).

unpaid break.¹⁶¹ As the court in *Alvarez* noted, “[t]he central dispute . . . is whether IBP . . . should be required to compensate its employees for the time it takes to change into required specialized protective clothing and safety gear.”¹⁶² IBP was a producer of pork, beef, and other related products.¹⁶³ President Theodore Roosevelt in 1906 secured the passage of the Meat Inspection Act, which provided for increased regulations in the meat packing industry; both for the workers—statistically the meat packing industry is a very dangerous job—and the products being produced.¹⁶⁴ Because of these increased regulations, employees in the meat packing industry are typically required to wear added protective materials.¹⁶⁵

The IBP facility in this case was a meat processing facility that both slaughtered and processed carcasses.¹⁶⁶ The putting on and taking off—donning and doffing in the legalese—of these protective items became a point of dispute beginning in 1998.¹⁶⁷ At this time, “[l]ong-running litigation between IBP and the . . . [U.S. Department of Labor] in the 1990s spurred much of IBP’s shift-time reduction.”¹⁶⁸ One of the problems with the litigation between the two parties was that it focused a great deal on the pre- and post- shift times.¹⁶⁹ However, what was lost in this litigation was the time spent by employees donning and doffing during their meal

161. *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003). It should be noted that in both *Gessele* and *Alvarez*, an employer is allowed under the FLSA and 29 C.F.R. §785 to deduct time from what would normally be, for example, a thirty-minute unpaid lunch if the employee actually performs work during that time. In both of these cases, the employer is not violating the FLSA if they only deduct twenty minutes from the employee for the break. 29 C.F.R. § 785 does not require an employee to receive a break of thirty minutes. What is required from the regulation is that if an employee receives a break of *less than* twenty minutes, that employee must be compensated for that time, but 29 C.F.R. § 785 also states that if the employee works during the time being deducted then they should be paid. For example, if an employee normally takes a thirty-minute lunch, but goes back to work after twenty minutes then the employer can deduct that twenty minutes—so long as it was a bona fide meal period—but they would need to begin compensating that employee once they return to work; in this example, the ten minutes remaining in the normal thirty-minute lunch must be compensated.

162. *Id.* at 897.

163. *Id.*

164. *Id.* at 898.

165. *Alvarez*, 339 F.3d at 916 n.2 (noting that “all employees must wear a sanitary outer garment that is provided and washed each night by IBP; all employees must wear some form of a plastic hardhat, a hair net, and ear plugs, and all employees . . . must wear a face shield or safety goggles; all employees must wear some sort of glove” just to name some of the items employees were required to wear as part of their employment with IBP).

166. *Id.* at 898.

167. *Id.* at 899.

168. *Id.*

169. *Id.*

break.¹⁷⁰ “As a rule, employee . . . meal-break time begins as soon as the last piece of meat passes on the production line, and, as a rule, employees must be completely prepared to resume work as soon as the break period ends.”¹⁷¹ Further, employees were required to remove all “outer garments, protective gear, gloves, scabbards, and chains [T]he operation of IBP’s mandatory donning and doffing rules necessarily impinges . . . [the employees’] unpaid thirty minute meal break time.”¹⁷²

The principal inquiry that the court in *Alvarez* focused on was whether the donning and doffing was considered hours worked under the FLSA.¹⁷³ Traditionally, the donning and doffing of items is analyzed when determining both pre-shift and post-shift activities; however, when applicable—as is here when the employees receive an unpaid meal period and are required to remove items and subsequently replace the items after the meal period—employers are required to compensate the employee.¹⁷⁴ The *Alvarez* Court, after determining that the donning and doffing of these items constituted hours worked, looked at a Washington Administrative Code claim that was part of the complaint.¹⁷⁵ This administrative code requires an employee receive more time than the FLSA; however, the analysis in determining what should be compensable time and what should not be compensable time is the same as the FLSA.¹⁷⁶ In comparing the Washington state claim with the FLSA, the court cites to *Brennan v. Elmer’s Disposal Service, Inc.*, “[a]n employee cannot be docked for lunch breaks during when he is required to continue with any duties related to his work.”¹⁷⁷ Continuing to analyze the facts of this case to the state claim, the court continues to utilize the principles outlined by the U.S. Department of Labor; “[n]o intrusions on this thirty-minute period are condoned or even acknowledged . . . [and] [u]nder *Wash. Admin. Code* § 296-126-092, plaintiffs are owed compensation for the full thirty-minute period where IBP has intruded upon or infringed the mandatory thirty-minute term to any extent.”¹⁷⁸

In *Alvarez*, the court does not explicitly state which test they are using to determine if the meat packing employees are due compensation for the time spent during their lunch donning and doffing of the protective materi-

170. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 899 (9th Cir. 2003).

171. *Id.*

172. *Id.*

173. *Id.* at 902.

174. *Id.*; see also *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (noting that when an activity is an integral part of the principal activity it is considered work).

175. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 913 (9th Cir. 2003).

176. *Id.*

177. *Id.* (quoting *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975)).

178. *Id.* at 914.

als required by IBP.¹⁷⁹ However, the language that is used by the court indicates the deference that is being given to previous decisions, specifically the *Brennan* decision from 1975. Again, the Ninth Circuit is looking to see if the employee is performing *any* work activities during a period of time in which they are not being compensated. Since the donning and doffing was determined to be work under the regulation, the court held that it, the doffing and subsequent donning during lunch, was compensable time worked.¹⁸⁰ In addition, the fact that the employees were the primary beneficiaries of the safety procedures indicates that the court was not relying on the predominate benefit test, since they determined that the employees should be compensated.¹⁸¹

IBP found itself in the center of another class action suit filed by a group of employees in one of their meat packing facilities.¹⁸² The facts of this case were very similar to the facts in *Alvarez*. Again, as in *Alvarez*, the employees sought compensation for the time that they were required to spend donning and doffing equipment in order to use both the restroom and the cafeteria during their meal break.¹⁸³ Because of the holding in *Alvarez*, IBP changed their policy to try and ensure that the doffing and donning of the equipment during the meal periods would not be considered hours worked.¹⁸⁴ The new policy stated, “that production workers are no longer prohibited from wearing frocks and other equipment into the cafeteria during the meal period, so long as the frocks and gloves are not excessively soiled[.]”¹⁸⁵

Plaintiffs in *Chavez* “argue[d] that meal break donning and doffing is compensable, despite these policy changes, for three reasons.”¹⁸⁶ The first reason is because, like the old policy, IBP “imposes a duty on employees to use the restroom during their paid rest breaks and meal breaks.”¹⁸⁷ Next, “Plaintiffs assert that . . . [IBP’s] cafeteria policy instructs employees to don

179. *Id.*

180. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914 (9th Cir. 2003).

181. *Id.*

182. *See Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *3 (E.D. Wash. May 16, 2005).

183. *Id.* at *35-36. The court in *Chavez*, summarized the finding in *Alvarez* and stated that the *Alvarez* “Court found that because employees were required by company policy to doff equipment before entering the cafeteria or restroom, and because employees were required to use the restroom during break-times, the donning and doffing of protective gear to use the restroom constituted work.” *Id.*

184. *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *37 (E.D. Wash. May 16, 2005).

185. *Id.*

186. *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *39 (E.D. Wash. May 16, 2005).

187. *Id.*

and doff their equipment before entering the cafeteria if, in the employee's opinion, equipment is excessively soiled¹⁸⁸. . . .” And, “[f]inally, Plaintiffs argue that workers are unable to obtain the full benefit of resting when wearing heavy metal equipment. Plaintiffs argue that this encroachment on workers' break-time is significant because, while wearing equipment, workers are not completely relieved from the pressures of duty[.]”¹⁸⁹ To counter the claims of Plaintiffs, IBP asserts that since the employees may use the restroom while engaged in production time, and since they are now allowed to wear their equipment into the cafeteria—so long as equipment “is not excessively soiled,”—they now have a personal choice as to whether they want to don and doff the equipment.¹⁹⁰

The *Chavez* Court cites to 29 C.F.R. § 785.19 and states that “[e]mployers providing unpaid meal breaks must ‘completely reliev[e]’ employees ‘from duty for the purposes of eating regular meals’ for a period of 30 minutes or more.”¹⁹¹ Going further, the court states that “[t]he employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.”¹⁹² In discussing the requirements for analyzing work performed during a meal period, the court states that “[a]n employee's compensable duties include any work that employers ‘permit.’”¹⁹³ When assessing whether an employer “permits” an employee to work, the court relies on 29 C.F.R. § 785.11, which “provides that ‘[w]ork not requested but suffered or permitted is work time’ and where the ‘employer knows or has reason to believe that [the employee] is continuing to work,’ the ‘time is working time.’”¹⁹⁴

In regard to the donning and doffing during meal periods, the *Chavez* Court, similarly to the *Alvarez* Court, held that when the donning and doffing reduced the uninterrupted time that the employee receives for their meal period below thirty minutes, then the entirety of the break is compensable.¹⁹⁵ The court in *Chavez* was much more direct than the court in *Alvarez* when indicating the test they used when determining whether an employee should be compensated for work performed during their unpaid meal period.¹⁹⁶ The fact that the court relied directly on 29 C.F.R. § 785.19 indicated

188. *Id.*

189. *Id.*

190. *Id.* at *40.

191. *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *40 (E.D. Wash. May 16, 2005).

192. *Id.* at *40-41 (quoting 29 C.F.R. § 785.19(a) (2011)).

193. *Id.* at *41.

194. *Id.* (quoting 29 C.F.R. § 785.11 (2011)).

195. *Id.* at *42-43.

196. *See Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *40 (E.D. Wash. May 16, 2005); *cf Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003).

that they were looking to the completely relieved of duty test in lieu of the predominant benefit test.

VI. CONCLUSION AND RECOMMENDATIONS

The Field Operations Handbook (hereinafter FOH), the handbook given to brand new investigators for the U.S. Department of Labor, states that “[m]eal periods of less than 30 minutes during which the employee is completely relieved for purposes of eating a meal may be bona fide- and thus not hours worked- when certain special conditions are present. . . .”¹⁹⁷ The language the FOH is referencing is 29 C.F.R. § 785.19. Investigators in the field utilize a multitude of resources when conducting an investigation. Among the items that investigators pull from are: the FOH, the Code of Federal Regulations, administrator interpretations, field bulletins, and the FLSA, just to name a few. One place that investigators seldom pull information from is actual court cases. Therein lies one of the problems with courts inputting their own spin on how investigators enforce the provisions of the FLSA; the FLSA is law, while 29 C.F.R. § 785.19 is merely a regulation. The regulation, unfortunately does not have much teeth, and as a result the courts have been free to do as they wish when interpreting what the regulation says.

When it comes to the two tests that are utilized by the circuits, the Supreme Court has not issued a ruling; however, those in the predominant benefits camp tend to rely on the language used by the Supreme Court in *Armour & Co., v. Wantock*, stating that “[w]hether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”¹⁹⁸ When you take that statement from *Armour* and couple it with the statement from *Skidmore v. Swift & Co.*, you get an idea of what the Court’s are looking for: “[w]e consider that the rulings, interpretations and opinions of the Administrator under this Act [FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience . . . to which courts . . . may properly resort for guidance.”¹⁹⁹ The *Skidmore* Court, in discussing the *Armour* case, stated “[t]he courts . . . weighed the evidence in the particular case in the light of the Administrator’s rulings and reached a result consistent therewith. . . . Each case must stand on its own facts.”²⁰⁰ This language, when combining both cases, indicate that the Court is directing the courts to utilize a predominant benefits test, when in reality the context in

197. WAGE AND HOUR DIV., DEP’T. OF LABOR, FIELD OPERATIONS HANDBOOK 31b23 (Aug. 31, 2017), <https://www.dol.gov/whd/foh/> [<https://perma.cc/AVL2-JCPG>].

198. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

199. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

200. *Id.*

which they are discussing the test is more complex than whether an employee is to be compensated for work performed during a meal break.

The FLSA requires that an employee be paid a minimum wage and overtime.²⁰¹ Violations of the FLSA result from a number of scenarios. Minimum wage violations occur typically when a minimum wage employee—like an employee of say, Jack in the Box—is not paid for all their hours worked.²⁰² When you add up the wages paid to that minimum wage employee for the hours the employer alleges they worked and divide that by the actual hours worked by the employee, the chance of a minimum wage violation is relatively strong. An overtime violation is a little more complex, but the guise is similar. When an employee—like an employee in a meat packaging plant—is not paid for all their hours worked, and the employer is claiming the employees are working at least 40 hours per week, an overtime violation will occur when those employees are not paid for all their hours worked.²⁰³ As mentioned above, the FLSA is law and is binding on employers and the courts. The problem with the FLSA is that in order to enforce the various provisions, investigators have to rely on 29 C.F.R. § 785 when assessing hours worked, which, as indicated in *Skidmore*, is not binding.²⁰⁴

So, from an enforcement standpoint investigators are relying on non-binding regulations that the court may decide to uphold, or may decide to strike down depending on the facts of the case and the jurisdictional bounds.²⁰⁵ This makes the job of an investigator extremely difficult because a smart employer is going to know, depending on the circuit, what they can get away with when it comes to compensating employees. A bright-line rule is the best way to solve this problem. For far too long, circuits relied on a test, that is nowhere to be found in any of the rules or regulations that are issued by the Wage and Hour Division. A bright-line rule would also enable both employees and employers to have a firm understanding of the requirements. “Work not requested but suffered or permitted is work time.”²⁰⁶ Now add in the language from 29 C.F.R. § 785.19 in which a bona fide meal period exists when an employee is completely relieved from all duties.²⁰⁷ Taken together, these two regulations clearly indicate that the best

201. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2012).

202. *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2013 U.S. Dist. LEXIS 51941 (9th Cir. Jan. 28, 2013).

203. *See, e.g., Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714 (E.D. Wash. May 16, 2005); *see also Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003).

204. *Skidmore*, 323 U.S. at 140.

205. *Id.*

206. 29 C.F.R. § 785.11 (2011).

207. 29 C.F.R. § 785.19 (2011); *see also* United States Department of Labor Administrator Opinion Letter, FLSA2004-22 (Nov. 22, 2004).

test to use is the completely relieved of duty test, and using this test will indicate to an employer that if an employee is allowed to work through their lunch and is not completely relieved of their duties then they should be compensated.

Minimum wage and overtime violations are unfortunately extremely common, in fact according to Department of Labor statistics, more than 1.3 million workers have been helped by the Wage and Hour Division (WHD) in the last five years with more than \$1.2 billion recovered in back wages in that same time frame.²⁰⁸ “In fiscal year 2016, WHD found more than \$266 million in back wages for more than 280,000 workers. . . .”²⁰⁹ As you can see, wage theft is a rampant problem throughout the United States. A portion of that can be attributed to greed on the part of the employer; however, the vast majority is simply because employers and employees alike are unsure how to navigate the treacherous waters that exist because of the lack of clarity in what regulations to follow and what regulations not to follow. Establishing a bright-line test will solve this dilemma regarding uncompensated meal periods, better protect employee’s wages, and protect employers from big class action lawsuits.

208. *Wage and Hour Division: Our Mission is Clear*, UNITED STATES DEPARTMENT OF LABOR, www.dol.gov/whd/data [<https://perma.cc/3M9Y-PG9L>].

209. UNITED STATES DEPARTMENT OF LABOR, *supra* note 209.