"A Fair Day's Pay for a Fair Day's Work": Why Congress Should Amend the Fair Labor Standards Act to Include an Actual Time Test for Retroactive Damages

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ABSTRACT: In 1938, Congress passed the Fair Labor Standards Act ("FLSA") with the support of President Franklin D. Roosevelt, who said every worker deserved "a fair day's pay for a fair day's work."[1] *In an Eighth Circuit case decided in 2012, the court addressed an important and persistent ambiguity in the FLSA regarding calculating compensable time, but failed to clarify the issue. The question that has split the federal circuits is whether a "reasonable time" test or an "actual time" test is the appropriate calculation method for compensable time when a plaintiff successfully sues for unpaid wages in violation of the FLSA. One likely reason neither Congress nor the Supreme Court has yet resolved the issue is that disagreement over the calculation method for damages is usually not the primary impetus for a FLSA case. Courts are more concerned with making the proper decision for the preliminary issue: whether the alleged activities for which the employees were not paid are compensable. Nonetheless, the appropriate test for retroactive damages is an important issue and one that Congress can easily resolve. To resolve this circuit split, this Note proposes changes to the FLSA that would incorporate the actual time test as the appropriate calculation method to use for retroactive damages. This Note suggests that Congress should codify the actual time test because it is the more logical of the two tests under current law, because it will result in more desirable practical implications for the modern working world, and because it is supported by public policy.*

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1. Message From Franklin D. Roosevelt to the Congress (May 24, 1937), *The President Recommends Legislation Establishing Minimum Wages and Hours*, *in* 1937 THE PUBLIC PAPER AND ADDRESSES OF FRANKLIN D. ROOSEVELT 209, 210 (1941).

I. INTRODUCTION

Imagine that you are an elderly, hourly factory worker who is a member of a class action lawsuit against your corporate employer to recover unpaid wages for activities you thought were compensable. Now imagine after months or even years of litigation that you are successful and the court holds that your employer owes all employees in the class action suit retroactive damages for those unpaid wages. Finally, imagine that, because your employer did not keep accurate time records, you do not receive back pay for the actual amount of time it took you to perform the work. Instead, you only receive a reasonable amount of back pay based on the time it took the majority of much younger workers to complete the same work tasks.

Uncertainty over how to determine the correct amount of retroactive damages or back pay for activities deemed to be compensable time is just one issue that has permeated the vast amounts of litigation surrounding the Fair Labor Standards Act ("FLSA") since its implementation. Each time the Supreme Court attempted to clarify "compensable time," additional ambiguities surfaced. After the last Supreme Court decision interpreting the FLSA, *IBP, Inc. v. Alvarez*,[2] there remain unanswered questions including the issues in the scenario above. What happens after a court determines that an employer owes back pay to many of its employees for FLSA overtime violations? How should courts calculate that back pay? Should employers pay for all the time employees were actually working or should they pay for the amount of time that would have been reasonable for the employee to complete the particular activity?

Although the issue of *how* to calculate the amount of retroactive damages employers owe to employees for wages and overtime is not the primary issue addressed in FLSA cases, it remains a question in each and every case requiring back pay and therefore merits examination. Part II of this Note discusses Congress's enactment of the FLSA and courts' attempts to clarify the numerous ambiguities relating to "compensable time" provisions through case law and statutory interpretation. Part III outlines the current circuit split regarding the appropriate test courts should use to calculate compensable time. Finally, Part IV outlines the legal, practical, and policy reasons why courts should use an actual time test and recommends that the best way to resolve the circuit split is with a congressional amendment to the FLSA.

II. HISTORY AND INTERPRETATION OF THE FAIR LABOR STANDARDS ACT

In litigation surrounding FLSA provisions, the Supreme Court has consistently interpreted the statute to ensure that employers are treating

2. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

their workers fairly.[3] With the underlying principle of fairness at the forefront, the Court has continued to broaden the definition of compensable time in order to guarantee that the main purpose of the FLSA—to ensure that employees get paid for all time worked—is fulfilled.[4] However, as with many complicated federal statutes, important questions and ambiguities remain unresolved.

A. HISTORY AND OVERVIEW

Congress enacted the FLSA[5] during the Great Depression in 1938 to protect workers' rights and address concerns about employees' living and working conditions.[6] President Franklin D. Roosevelt supported the bill, saying that America "should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work."[7] The FLSA went into effect on October 24, 1938.[8]

Though the federal government's power to regulate minimum wage and overtime pay may seem like an obvious concept today, the federal government has not always had this power. Before Congress enacted the FLSA, the Supreme Court viewed federal and state regulation of maximum hours and minimum wage as unconstitutional.[9] Today, the United States Department of Labor ("DOL") enforces the FLSA, which impacts approximately 130 million workers, including part-time and full-time

3. *See, e.g.*, Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597–98 (1944) ("But these provisions . . . of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil . . . . To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act.").

4. *See id.* at 592 (noting that the FLSA is "a statute that is intended to secure to [nonexempt workers] the fruits of their toil and exertion.").

5. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

6. Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1252–53 (2009); Harris Pogust & Andrew Sciolla, *Making Up for Lost Time*, TRIAL, Aug. 2010, at 28, 29.

7. Message from Franklin D. Roosevelt to Congress, *supra* note 1, at 210; *see also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP. LAB., http://www.dol.gov/oasam/programs/history/flsa1938.htm#3.

8. Grossman, *supra* note 7.

9. *See, e.g.*, Morehead v. N.Y. *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936), *overruled in part by* Olsen v. Neb. *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941) (holding that regulation of minimum wage laws was outside the bounds of federal or state power); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923), *overruled in part by* W. Coast Co. v. Parrish, 300 U.S. 379 (1937) (striking down a D.C. minimum wage law as unconstitutional); *see also* Danuta Bembenstia Panich & Christopher C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, 58 FED. LAW. 14, 14 (2011) (stating that the laws were held unconstitutional as violations of the employer's and employee's right to freedom of contract).

employees in both the public and private sector.[10] The FLSA covers all employees engaged in interstate commerce or in the production of goods for interstate commerce.[11] In addition, the FLSA covers employees of businesses with annual gross sales over $500,000.[12]

Congress has amended the FLSA several times, but the two main provisions for nonexempt employees[13] remain unchanged.[14] The first requires employers to pay a specified minimum wage to employees for any hours worked in a forty-hour workweek.[15] The second requires employers to pay their employees overtime compensation for time worked above the forty-hour workweek "at a rate not less than one and one-half times the regular rate" of pay.[16]

In addition, the FLSA provides nonexempt employees[17] with a private cause of action to recover all unpaid wages, liquidated damages equal to the unpaid wages, and attorney's fees due to violations of the minimum wage

10. Steven M. Gutierrez & Joseph Neguse, *Emerging Technologies and the FLSA*, 39 COLO. LAW. 49, 49 (2010).

11. *See Engagement in Interstate Commerce*, U.S. DEP'T LAB., http://www.dol.gov/elaws/esa/flsa/scope/ee2.asp (last visited Jan. 21, 2014).

12. *Wage and Hour Division*, U.S. DEP'T LAB., www.dol.gov/whd/regs/compliance/hrg.htm (last visited Jan. 21, 2014). The FLSA is enforced by the Department of Labor's Wage and Hour Division (WHD). *Wages*, U.S. DEP'T LAB., http://www.dol.gov/dol/topic/wages/index.htm#.UHHzVfnuUwE (last visited Sept. 12, 2013).

13. The FLSA does not cover all employees in all jobs. It lists a number of exceptions for employees that are not governed by the overtime pay provisions, the minimum wage provisions, and the child provisions. Some of these exceptions include: employees such as casual babysitters who are exempt from the minimum wage and overtime provisions, and farmworkers who are exempt from overtime pay only. U.S. DEP'T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 6 (2011), *available at* http://www.dol.gov/whd/regs/compliance/wh1282.pdf. This Note is only applicable to those nonexempt employees who *are* governed by the FLSA. For a comprehensive list of exempted parties, see 29 U.S.C. § 213 (2006). For example, the FLSA does not cover "any [person] employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

14. Panich & Murray, *supra* note 9, at 14 (stating the main provisions of the FLSA remain the same after numerous amendments and expansions). The FLSA also establishes child labor standards. 29 U.S.C. § 212.

15. 29 U.S.C. § 206. The current minimum wage, which has been in effect since July 24, 2009, is $7.25 per hour. U.S. DEP'T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS Act 13 (2011), *available at* www.doi.gov/whd/regs/compliance/wh1282.pdf. The DOL defines "workweek" as a period of 168 hours during seven consecutive 24-hour periods. Generally for the purposes of the FLSA, each workweek stands alone, which means employers cannot average two separate workweeks. *Wages*, U.S. DEP'T LAB., http://www.dol.gov/dol/topic/wages/index.htm#.UHHzVfnuUwE (last visited Jan. 21, 2014).

16. 29 U.S.C. § 207(a)(1). The overtime provision does not apply to certain types of businesses and work such as executive employees. *See Wages: Overtime Pay*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/wages/overtimepay.htm (last visited Sept. 13, 2013) (follow "FairPay Fact Sheets By Exemption" hyperlink for additional details on employees exempted from the overtime provisions).

17. *See supra* note 13 for an explanation of nonexempt employees.

and overtime provisions.[18] Common employee allegations include claims that they were not paid for all of the hours they worked, that they "worked off the clock" and are entitled to compensation for overtime, or that the employers calculated the overtime rate incorrectly and they are entitled to additional back pay.[19] Frequently, "similarly situated" employees argue alleged FLSA violations as class action lawsuits rather than suing under the FLSA as individual plaintiffs.[20] The employee bears the burden of proving that he performed the work.[21] Although the FLSA has put in place a structure for resolving employer–employee disputes, this dispute settlement structure is a main source of litigation due to its many unresolved questions.

B. "COMPENSABLE TIME" AMBIGUITY

The FLSA's textual ambiguities have spurred litigation between employers and employees since its enactment, especially regarding the meaning of "compensable time." In recent years, the number of reported FLSA violations and lawsuits has been on the rise, and this number is likely to increase if the Court or Congress does not address and resolve some commonly cited ambiguities.[22] Although the Court has decided several cases regarding what activities constitute compensable time, ambiguity surrounding the term continues to generate litigation. In order to correctly abide by the minimum wage and overtime provisions, and correctly calculate employee wages, employers must know which work-time activities are compensable and which are not. Since the 1940s, the Supreme Court and Congress have attempted to clarify that issue.

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18. 29 U.S.C. § 216(b); *see* Panich & Murray, *supra* note 9, at 14–15.

19. Michele R. Fisher & Matthew W. Lampe, *Fair Labor Standards Act Basics and Wage-Hour Update (January 11, 2012)*, *in* UNDERSTANDING EMPLOYMENT LAW 2012, 155 (2012).

20. *Id.* at 172; *see also* 29 U.S.C. 216(b) (requiring plaintiffs in class actions to be "similarly situated"). The threshold for a class action under the FLSA is lower than that required for a traditional class action. *See* Christopher M. Pardo, *The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery*, 10 J. BUS. & SEC. L. 1, 7 (2009).

21. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. §§ 251–62 (2006), *as recognized in* IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

22. U.S. DEP'T OF LABOR, 2008 STATISTICS FACT SHEET 2 (2008), *available at* www.dol.gov/whd/statistics/2008FiscalYear.pdf ("In fiscal year 2008, more than 197,000 employees received a total of $140.2 million in minimum wage and overtime back wages as a result of Fair Labor Standards Act (FLSA) violations."). Over $123 million of that amount was back pay for overtime violations. *Id.* In 2010 alone, 6081 FLSA cases were commenced in U.S. federal district courts and this number increased to 7008 in 2011. U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2010 AND 2011, 3 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf.

1. Early Supreme Court Cases

Initially, the FLSA did not define "work" or "workweek."[23] The early cases addressed this ambiguity by defining "work" and "workweek" broadly.[24] In the 1944 case *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, the Supreme Court provided guidance for employers as to when the maximum hour requirements would apply to their employees and when the employers needed to pay overtime by establishing a three-part definition of "work."[25] The Court held that "work" was "physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[26] Applying that definition to the facts of the case, the Court held that underground travel time from the portal of the iron ore mines to the working area was compensable.[27] The Court looked to the "remedial and humanitarian" purpose of the FLSA and congressional intent, which indicated Congress's desire to guarantee compensation for all hours actually worked—regular or overtime.[28]

Although establishing a definition of work was a first step in clarifying the compensable time ambiguity, it led to a whole host of new questions regarding what activities actually constituted work. In response, the Court addressed the ambiguity and broadened the *Tennessee Coal* definition of "work" in 1944 when it held that "exertion" was not a requirement for an activity to constitute "work."[29] In 1945, the Court reiterated the three-part definition of work set forth in *Tennessee Coal* in another case that addressed whether underground travel time to and from the portal of a mine was compensable.[30] In concluding that the underground travel time was compensable and the mineworkers were entitled to back pay, the Court relied on the congressional intent behind the FLSA.[31] Congress intended to

23. IBP, Inc. v. Alvarez, 546 U.S. 21, 25 (2005) (discussing the enactment of the FLSA and early cases resolving statutory ambiguities).

24. *Id.* at 25.

25. *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

26. *Id.* at 598.

27. *Id.*

28. *Id.* at 597. The Court specifically noted that existing contracts and customs allowing an employer to claim all of an employee's time without compensating the employee for that time were immaterial under the FLSA because the FLSA was not intended to perpetuate these unfair practices, but rather was intended to provide a "uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Id.* at 602.

29. Armour & Co. v. Wantock, 323 U.S. 126, 132–34 (1944) (noting that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen").

30. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 164–66 (1945) (distinguishing miners "forced to travel in underground mines in order to earn their livelihood" from "the ordinary traveler or the ordinary workman on his way to work").

31. *Id.* at 167.

ensure that employers were compensating employees for the full time they worked, not only part of it.[32] Therefore, the Court held that employers could not use any prior policy or rely on any past practices where employees were not compensated for *all* time actually worked to deprive employees of their FLSA rights to wages.[33]

2. Subsequent Supreme Court Interpretation and Statutory Expansion of "Compensable Time"

Only two years elapsed before the Supreme Court addressed another FLSA "compensable time" ambiguity, further clarifying the term to provide additional guidance for employers. In 1946, in *Anderson v. Mt. Clemens Pottery Co.,* the Court decided whether a pottery factory had incorrectly determined compensable time where it failed to account for all the time the production employees actually worked.[34] In *Anderson*, employees arrived at the facility, changed into their work uniforms, clocked in, and then walked long distances to reach their respective workstations in the eight-acre pottery plant.[35] Once at their stations, employees prepared to begin work.[36] The method the employer used to calculate wages did not include the time the employees spent preparing for the shifts or the time spent walking to workstations.[37] This method of calculating wages potentially shortened an employee's compensable time by up to fifty-six minutes each day.[38]

The Court held that because the employees proved it was "necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours," that time should be compensated as part of the

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32. *See* U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., OPINION LETTER FAIR LABOR STANDARDS ACT (Jan. 15, 2001) ("[I]n order to comply with the FLSA and its implementing regulations . . . a company must record and pay for each employee's *actual* hours of work. . . ." (emphasis added)).

33. *Jewell Ridge Coal Corp.*, 325 U.S. at 167. ("Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.") (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944)) (internal quotation marks omitted).

34. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 684 (1946).

35. *Id.* at 682–83.

36. *Id.* at 683.

37. *Id.* at 683–84.

38. *Id.* at 684. Specifically, the employees complained that the employer calculated their compensable time based on less time than the time cards punched by the clocks. *Id.* The Court stated that "an employee who punches in at 6:46 a.m., punches out at 12:14 p.m., punches in again at 12:46 p.m. and finally punches out at 4:14 p.m. is credited with having worked the 8 hours between 7 a.m. and 12 noon and between 1 p.m. and 4 p.m.—a total of fifty-six minutes less than the time recorded by the time clocks." *Id.* at 683–84. The employer justified deducting this time from the compensable time because it allowed each employee an interval of fourteen minutes before the scheduled starting time of the shift to punch in, walk to the production floor, and prepare for the start of their work day. *Id.* at 682–83.

workweek.[39] Therefore, time spent walking to the production line and performing preliminary activities—"such as putting on aprons . . . [and] turning on switches for lights and machinery"—constituted work under the FLSA.[40]

Thus, *Anderson* enlarged the FLSA compensable workweek to include "all time during which an employee [was] necessarily required to be on the employer's premises, on duty or at a prescribed workplace."[41] However, the Court made clear that, although these preliminary activities were compensable, there was still a possibility that employers would not have to compensate the employees for these activities when the time spent performing them was *de minimis*.[42] The *de minimis* rule acknowledges that the workweek has to be "computed in light of the realities of the industrial world" and therefore that an employer is not required to pay an employee for all activities that only take a few extra seconds or minutes to perform.[43] The reality of the working world and the purpose of the FLSA do not justify arguing over these "[s]plit-second absurdities."[44] The *Anderson* Court remanded the case to the district court to determine the correct amount of back pay taking into account the *de minimis* rule.[45]

After *Anderson*, labor unions across the country attempted to recover unpaid wages for previously noncompensable time.[46] As a response to the litigation surge, in 1947 Congress amended the FLSA by passing the Portal-to-Portal Act ("PPA").[47] The PPA helped employers avoid the financial consequences of providing retroactive payment of wages to employees for previously noncompensable activities that became compensable under *Anderson*.[48] The PPA eliminated retrospective employer liability and limited

39. *Id.* at 690–91.

40. *Id.* at 692–93.

41. *Id.* at 690–91.

42. *Id.* at 692.

43. *Id.*

44. *Id.*

45. *Id.* at 694 "The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue." *Id.*

46. *See* Panich & Murray, *supra* note 9, at 15 (addressing the potential of the *Anderson* decision to set off a "litigation firestorm" and leading to the financial ruin of employers as well as creating economic uncertainty). "Workers had filed 727 portal suits in federal courts during the last six months of 1946, but in January 1947 alone an additional 1,186 were recorded." Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 133 (1991).

47. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006 & Supp. V 2011), *amended by* Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262 (2006).

48. *Id.*; *see* Panich & Murray, *supra* note 9, at 15 (discussing the potential disastrous effects of leaving the FLSA as the Court interpreted it in *Anderson* and allowing the floodgates of litigation for retroactive wages to open).

prospective liability of employers for *Anderson*'s compensable activities.[49] The PPA clarified and narrowed the FLSA's coverage by exempting activities considered "preliminary or postliminary" to the "principal activity" from compensable time activities.[50] Congress, representing the interests of industry, passed the PPA in response to looming financial ruin for numerous large companies if forced to pay retroactive wages.[51] Shortly thereafter, the DOL promulgated an interpretive regulation on the effect of the PPA known as the continuous workday rule.[52] This rule stated that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted."[53] The continuous workday rule clarified the limited scope of the PPA and reiterated that the PPA does not affect the computation of an employee's hours during the "workday" or the period from "whistle to whistle."[54]

3. Further Clarification of "Compensable Time"

The PPA, while clarifying some aspects of the FLSA and the definition of compensable time, created additional ambiguities and left existing ambiguities unresolved. Like the FLSA, the PPA failed to define "work."[55] Less than ten years after the PPA's passage, the Supreme Court had to address the compensable time ambiguity yet again. In *Steiner v. Mitchell*[56] and *King Packing Co.*,[57] the Supreme Court was faced with defining "principal activity."[58] It was necessary for the Court to clarify this term because the PPA

49. 29 U.S.C. § 251.

50. *Id.* §§ 251–256. Preliminary activities are activities done before an employee begins his or her principal work activity. *See FLSA Hours Worked Advisor: Preliminary and Postliminary Activities*, U.S. DEP'T LAB., http://www.dol.gov/elaws/esa/flsa/hoursworked/screenEE28.asp (last visited Jan. 21, 2014). Postliminary activities are activities done after an employee ends his or her principal work activities. *Id.* For a discussion of "principal" activities, see *infra* Part II.B.3.

51. For Congressional findings of the PPA and explanation of the policy reasons for amending the FLSA, see 29 U.S.C. § 251. President Truman even addressed Congress voicing his approval and reasoning for the PPA. *See* Harry S. Truman, Special Message to the Congress upon Signing the Portal-to-Portal Act (Jan. 13, 1951), *available at* http://trumanlibrary.org/publicpapers/viewpapers.php?pid=2152.

52. 29 C.F.R. § 790.6 (1947).

53. *Id.*

54. *Id.* (internal quotation marks omitted).

55. Portal-to-Portal Act, 29 U.S.C. §§ 251–262 (2006); *see* IBP, Inc. v. Alvarez, 546 U.S. 21, 26 (2005).

56. Steiner v. Mitchell, 350 U.S. 247 (1956) (resolving the ambiguity over what activities were properly considered "principal activities" under the PPA).

57. Mitchell v. King Packing Co., 350 U.S. 260 (1956). *Steiner* and *King Packing Co.* were decided on the same day.

58. *Steiner*, 350 U.S. at 252–53. Determining what constituted a "principal activity" was important because under the PPA, principal activities designated the outer bounds of the

and continuous workday rule only gave employers guidance for compensating employees on hours *during* the workday, but did not specify what activities specifically constituted the beginning and end of the workday.[59] The *Steiner* Court also specifically noted that the case was important because interpretation of the PPA was vital to the effective administration of the FLSA and because there was a conflict between different circuits on the issue.[60]

The *Steiner* Court described the issue in that case as follows:

> The precise question is whether workers in a battery plant must be paid as a part of their "principal" activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employer to provide . . . .[61]

The *Steiner* Court affirmed the ruling of the Sixth Circuit Court of Appeals and concluded that under the FLSA, activities are compensable if they "are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1) [of the PPA]."[62] Practically, this meant that activities such as changing clothes and showering could be compensable if the court found they were "integral and indispensable" to a principal activity.[63] The Court found the activities in *Steiner* to be compensable and noted "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees."[64]

Mitchell also raised the issue of whether work activities performed before or after direct or productive labor for which the employees are primarily

working day. Without knowing exactly when a workday begins and when it ends, employers cannot fairly compensate employees for all time worked.

59. *See supra* notes 50–54 and accompanying text.

60. *Steiner*, 350 U.S. at 248–49.

61. *Id.* at 248.

62. *Id.* at 256. The Court affirmed the trial court's decision that the four reasons an activity was considered "principal" included: (1) if the activity was "made necessary by the nature of the work performed"; (2) if the activities fulfilled "mutual obligations" between employer and employee; (3) if the activities "directly benefit[ed]" the employers "in the operation of their business"; and (4) if the activities were "so closely related to other duties performed by [the] employees as to be an integral part" of those duties. *Id.* at 252. Activities excluded from Section 4(a)(1) of the PPA that are not compensable include "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1) (2006).

63. *Steiner*, 350 U.S. at 252–53.

64. *Id.* at 256.

paid are compensable.[65] The Court had to determine whether knifemen who worked in a meat slaughtering and packing facility that sharpened their knives before or after doing their actual work should be compensated for that time.[66] Looking at the integral and indispensible definition from *Steiner*, the Court concluded that "the knife-sharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed."[67] Therefore, the Court held that the workers must be compensated for knife sharpening in order to comply with the FLSA as amended by the PPA and as construed by the decision in *Steiner*.[68]

C. THE SUPREME COURT'S LATEST INTERPRETATION: IBP, INC. V. ALVAREZ

The previously pervasive FLSA litigation lay dormant for nearly fifty years after *Steiner* until 2005, when the Supreme Court once again attempted to clarify the definition of "compensable time" under the FLSA in light of the PPA and *Steiner*.[69] The issue before the Court in *IBP, Inc. v. Alvarez* was whether the FLSA required employers to pay employees for the time the employees spent walking from the work changing area to the production area.[70] The Court applied the continuous workday rule[71] and noted that walking time before or after the workday, as defined by the first and last principal activity, was not compensable.[72] However, the Court held that walking time during the workday was compensable and clarified that "any

65. Mitchell v. King Packing Co., 350 U.S. 260, 260 (1956).

66. *Id.* at 261–62.

67. *Id.* at 263.

68. *Id.*

69. IBP, Inc. v. Alvarez, 546 U.S. 21, 24 (2005). *IBP, Inc. v. Alvarez* involved two cases that were consolidated for appeal. *Id.*

70. The Court classified the time at issue in "postdonning" and "predoffing" walking time. *Id.* at 30–31 (deciding specifically whether employees of a meat processing plant who brought the class action suit under the FLSA for unpaid wages should be compensated for the time it took to don protective clothes and safety gear on the employer's premises before beginning the productive labor). Donning and doffing are the terms used to describe the putting on and taking off personal protective equipment and clothing in the manufacturing industry. It is common, if not universal, that employees are required by federal and state law—as well as company policy—to wear certain clothing and equipment for sanitary and safety reasons. *See, e.g.*, Perez v. Mountaire Farms, Inc., 650 F.3d 350, 361 (4th Cir. 2011) (stating that employees have to put on their protective gear before starting any work on the production floor as required by the company's policy as well as United States Department of Agriculture regulations and Occupational Safety and Health Administration regulations); Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 912 (9th Cir. 2004) (stating that if a law requires employees to change clothes on the premises (don or doff) that time may be compensable).

71. *Alvarez*, 546 U.S. at 29 ("These regulations have remained in effect since 1947, see 12 Fed. Reg. 7658 (1947), and no party disputes the validity of the continuous workday rule."). *See supra* text accompanying notes 54–56.

72. *Alvarez*, 546 U.S. at 34.

activity that is integral and indispensable to a principal activity is itself a principal activity."[73]

Despite this clarification of principal activity or activities, *Alvarez* failed to address *how* to calculate the compensable time for the given activities after a successful FLSA lawsuit, and there is no uniform approach for courts to use after deciding that certain activities are or are not compensable.[74] The lack of a defined back pay standard might not be an issue if all courts agreed on how to calculate the compensable time, but currently the federal circuit courts are split on the issue. The split means that courts all over the nation are treating nonexempt employees differently and thus not effectuating the FLSA's purpose.

III. THE CIRCUIT SPLIT OVER COMPENSABLE TIME CALCULATION

Currently, circuit courts are split over how to calculate retroactive damages for unpaid wages and overtime wages in the wake of a successful FLSA lawsuit. Two tests have emerged. Several circuits believe employees should be compensated based on the *reasonable* time it would take them to perform a work activity,[75] while other circuits look at the *actual* time it would take an employee to perform that particular work activity.[76] Even though the appropriate method of calculating retroactive damages is usually not the primary aim in a FLSA lawsuit, one thing is clear: this compensation quandary will arise in every successful FLSA suit. Lower courts acknowledge that the Supreme Court has failed to provide guidance on what test to use.[77] The unclear state of the law on the issue of compensation has led to the present circuit split.

A. *REASONABLE TIME TEST*

The Eighth,[78] Ninth,[79] and Tenth Circuits[80] have applied the reasonable time test to determine the amount of money employers owe their employees

73. *Id.* at 37 (interpreting § 4(a) of the PPA) (internal quotation marks omitted).

74. *See infra* Part IV.B.2 discussing the policy implications of implementing the actual time test and the reasonable time test.

75. *See, e.g.*, Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012) (holding that the district court's jury instruction to use the reasonable time standard to calculate back pay was not plain error).

76. *See, e.g.*, Brock v. City of Cincinnati, 236 F.3d 793, 803 (6th Cir. 2001) (holding that reasonableness is only appropriate in evaluating agreements concerning work to be performed and is not appropriate in determining the amount of actual work employees performed).

77. *See, e.g.*, *Lopez*, 690 F.3d at 878.

78. *Id.* (applying the reasonable time standard because the standard to overturn a jury instruction not preserved for appeal is plain error and, under the current law, it was not clear that the reasonable time test was clear error).

79. Alvarez v. IBP, Inc., 339 F.3d 894, 914 (9th Cir. 2003) (affirming the district court's reasonable time calculation for each activity).

in back pay. All three cases involve complaints by employees working in meatpacking facilities.[81] In each case, the employees claimed the employer violated the FLSA by failing to pay them for all compensable work activities.[82] The employees argued the employers should have been paying them for the time it takes to complete certain activities at the beginning and end of the workday, such as changing into their uniforms and transporting their equipment.[83]

The Tenth Circuit was the first to address this issue in 1994 and adopted the reasonable time test in *Reich v. IBP, Inc.*[84] In *Reich*, employees of a meatpacking plant brought a class action suit against IBP, claiming the company failed to compensate employees for "picking up, putting on, taking off, cleaning, and dropping off or storing the various safety and sanitary equipment before and after their regular work shifts" in violation of the FLSA.[85] IBP argued that the tasks were not compensable because they were "preliminary" and "postliminary" activities under the PPA.[86] The district court concluded that the activities were compensable, and because "there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place," the reasonable time test was the appropriate method to calculate the amount of back pay IBP owed to the employees.[87]

The district court found that when employees arrived at work some would immediately get their protective equipment while others would go to the restroom or cafeteria and then to their lockers to get dressed or visa versa.[88] The court's choice to apply the reasonable time test was largely based on the need to account for employee differences in personal routines that occurred at the beginning and end of the shift. The various personal routines resulted in considerable difference among employees in the amount of time it took to perform each activity.[89] Rather than paying the employees for the actual time it takes, no matter how roundabout their routine may be, the court stated that instead the employees would be paid

80. Reich v. IBP, Inc. 38 F.3d 1123, 1127 (10th Cir. 1994) ("We believe reasonable time is an appropriate measure in this case.").

81. *Lopez*, 690 F.3d at 873; *Alvarez*, 339 F.3d at 897; *Reich*, 38 F.3d at 1124.

82. *Lopez*, 690 F.3d at 872–73; *Alvarez*, 339 F.3d at 900; *Reich*, 38 F.3d at 1124.

83. *Lopez*, 690 F.3d at 879; *Alvarez*, 339 F.3d at 900; *Reich*, 38 F.3d at 1125.

84. *Reich*, 38 F.3d at 1127.

85. *Id.* at 1125.

86. *Id.*

87. *Id.* at 1127 (citing Reich v. IBP, Inc., 820 F. Supp. 1315, 1328–29 (D. Kan. 1993)).

88. *Id.* (citing *Reich*, 820 F. Supp. at 1321).

89. *Id.* (citing *Reich*, 820 F. Supp. at 1321 (noting the different routines upon arrival including activities such as picking up personal protective equipment, using the restroom, going to the cafeteria, returning to the locker room, and walking to the work station)).

for the reasonable time it takes, which does not include "wait and walk time."[90]

The Ninth Circuit was the next to address this issue and adopted the reasonable time test in the 2003 case *Alvarez v. IBP, Inc.*[91] In *Alvarez*, meat-packing plant employees brought a class action lawsuit claiming that IBP failed to pay them for the time it took "to change into required specialized protective clothing and safety gear,"[92] and for other waiting and walking time that IBP required the employees to be at work.[93] The Ninth Circuit held that the district court did not abuse its discretion in the damage calculation by applying a reasonable time test instead of an actual time test.[94] The court reasoned that determining compensable time by reference to a reasonable amount of time instead of the actual amount of time required by each activity was an acceptable means of calculation because it "avoid[ed] countless individual plaintiff-specific quagmires."[95] The court reasoned further that the reasonable time test is well suited for the "relatively uniform tasks performed by plaintiffs."[96]

The issue most recently resurfaced in *Lopez v. Tyson Foods, Inc.*, an Eighth Circuit case decided in 2012. In *Lopez*, 225 hourly employees who worked at a meat-processing facility brought a class action lawsuit against Tyson Foods for unpaid wages under the FLSA.[97] The employees claimed Tyson did not provide overtime pay for donning and doffing at the beginning and end of the day.[98] The employees also claimed Tyson did not pay for the time it takes employees to transport items from the locker room to the production floor.[99] Tyson claimed the employees were fairly compensated because, even though they did not record the actual time it took the employees to perform these specific tasks, Tyson paid each employee for the twenty to twenty-five minutes these activities took.[100]

On appeal, the employees argued that the district court erred when it administered a jury instruction that "[w]hen activities occur pre-shift or post-shift, only the time *reasonably* spent is compensable."[101] The Eighth Circuit held that, because the employees had not preserved the argument for

90. *Id.*
91. Alvarez v. IBP, Inc., 339 F.3d 894, 914–15 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).
92. *Id.* at 897.
93. *Id.* at 902.
94. *Id.* at 915.
95. *Id.* at 914–15.
96. *Id.* at 915.
97. Lopez v. Tyson Foods, Inc., 690 F.3d 869, 872–73 (8th Cir. 2012).
98. *Id.* at 873. For an explanation of the terms "donning" and "doffing," see *supra* note 70.
99. *Lopez*, 690 F.3d at 873.
100. *Id.*
101. *Id.* at 879 (emphasis added).

appeal, the court could only review the instructions for plain error.[102] The court then stated that the district court's instructions were not clear error.[103] Although the Eighth Circuit did not formally adopt the reasonable time test over the actual time test, it condoned the calculation method and acknowledged that calculating back pay using the reasonable time test was not plain error because it did not violate any existing precedent.[104]

B. ACTUAL TIME TEST

The Second, Fourth, and Sixth Circuits have applied the actual time test in cases involving similar claims brought by hourly employees for unpaid wages in violation of the FLSA.[105] The Sixth Circuit in *Brock v. City of Cincinnati* and the Second Circuit in *Holzapfel v. Town of Newburgh, N.Y.* both attempted to clarify compensable working time for police officers in canine units who performed a variety of off-duty home care tasks for the dogs.[106] In each case the police officers alleged they were inadequately compensated for overtime work performed at home.[107] In each case, the court held that the actual time test was the more appropriate calculation of back pay owed to the police officers because, given the FLSA, it was not the court's place to consider the reasonableness of the officers work: rather, the court had a duty to measure the actual time the officers spent working.[108]

The Second Circuit first addressed the issue in 1998 in *Holzapfel*.[109] In *Holzapfel*, a canine-unit police officer alleged he received only two hours of overtime pay each week even though he spent roughly forty-five off-duty hours per week caring for the police dog.[110] As instructed, the officer had turned in weekly overtime hours in advance instead of calculating the exact time he spent off-duty working with the dog.[111] The Second Circuit held that the district court erred by instructing the jury that the amount of

102. *Id.* at 876.

103. *Id.* at 878.

104. *Id.*

105. Perez v. Mountaire Farms, Inc., 650 F.3d 350, 372 (4th Cir. 2011) (using a back pay compensation method that "provides a more accurate representation of the amount of time that employees working at the plant actually spend" in each activity); Brock v. City of Cincinnati, 236 F.3d 793, 802–03 (6th Cir. 2001) ("[T]he court must not consider any agreement the parties may have reached but instead measure, if possible, how much time the officers spent on exertions Cincinnati either required or suffered."); Holzapfel v. Town of Newburgh, NY, 145 F.3d 516, 526–28 (2d Cir. 1998) ("A 'reasonableness' standard is inappropriate in deciding how many overtime hours for which [an employee] should be compensated.").

106. *Brock*, 236 F.3d at 795–96; *Holzapfel*, 145 F.3d at 519–20.

107. *Brock*, 236 F.3d at 795; *Holzapfel*, 145 F.3d at 519.

108. *Brock*, 236 F.3d at 802–04; *Holzapfel*, 145 F.3d at 526–28.

109. *Holzapfel*, 145 F.3d at 516.

110. *Id.* at 519.

111. *Id.* at 520.

compensable time was limited by whether or not the activities were "*reasonably necessary* to fulfill [the employees] duties."[112] The Second Circuit based its calculation decision on the fact that the qualification of "reasonably necessary" is not part of the FLSA definition of "work."[113] In addition, the court noted that the reasonable time test was not a workable standard because employees' individual differences and traits precluded an easy determination of "reasonable time."[114] Instead, the Second Circuit remanded the case so the lower court could use the actual time test to determine the proper number of compensable work hours that the officer performed.[115]

In 2001, the Sixth Circuit was the next to address the split over the appropriate calculation method.[116] In *Brock*, twelve canine-unit policemen claimed they each devoted one hour per day, and at times much more than that, to their police dogs while off-duty.[117] The policemen alleged this was compensable work time and argued that they did not receive adequate overtime compensation for these activities.[118] The district court held it was inappropriate to use a reasonableness standard to calculate retrospective overtime hours.[119] The district court argued that under the FLSA what qualifies as compensable work is determined by activities controlled or required by the employer and that reasonableness has no place in that determination.[120] The district court noted that the city had the authority to limit officers' overtime hours with their dogs, but the city failed to do so.[121] If the city were to only pay the officers for a certain number of hours, it had the ability to set out that expectation for the officers beforehand.[122] Therefore, the time spent was part of the officers' work and was compensable.[123]

In affirming the district court's reasoning, the Sixth Circuit further clarified that the reasonableness standard is appropriate only when evaluating agreements that were already in place regarding work and

112. *Id.* at 520, 522–24.

113. *Id.* at 523; *see also* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (defining "work" as "physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"), *superseded by statute*, Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262 (2006), *as recognized in* IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

114. *See Holzapfel*, 145 F.3d at 526.

115. *Id.* at 528.

116. *See* Brock v. City of Cincinnati, 236 F.3d at 793 (6th Cir. 2001).

117. *Id.* at 795–96.

118. *Id.* at 795.

119. *Id.* at 798.

120. *Id.*

121. *Id.* at 798–99.

122. *Id.* at 798.

123. *Id.*

compensation.[124] The Sixth Circuit also stated that "[c]ourts should not inquire into the reasonableness of the amount of work employees actually performed or determine what would have been a reasonable amount of work for an employer to seek and an employee to perform."[125] Instead, based on the FLSA definitions and interpretations, courts should measure as closely as possible the actual time "the officers spent on exertions [the employer] either required or suffered."[126] The city had specifically instructed the officers to perform dog-care activities at home "to the extent the officers saw fit to maintain healthy, well-trained police dogs."[127] The court then decided that the appropriate calculation was the actual time test, and held that courts must measure the *exact time* employees spent on activities at home considered "work" under the FLSA.[128]

Most recently, in 2011, the Fourth Circuit adopted the actual time test in *Perez v. Mountaire Farms, Inc.*[129] In *Perez*, employees of one of Mountaire's poultry-packing plants brought a class action suit against Mountaire for failure to pay for the time the employees spent donning and doffing protective gear and walking and sanitizing at the beginning and end of their shifts.[130] The court held that the donning and doffing were "principal activities that mark[ed] the beginning and the end of the workday" and therefore, in order to adhere to the FLSA's continuous workday rule, employers must compensate employees for the time it takes them to complete those activities.[131] The court calculated the compensable time using the results of a study the employees' expert witness performed, which revealed that each employee took a total mean time of 20.013 minutes daily for donning and doffing.[132] Because Mountaire did not have records for the

124. *Id.* at 802.

125. *Id.* at 803.

126. *Id.*

127. *Id.*

128. *Id.*

129. Perez v. Mountaire Farms, Inc., 650 F.3d 350, 374–75 (4th Cir. 2011) (concluding that employees are entitled to compensation based on the expert witness calculation that most closely adheres to the actual time standard and rejecting Mountaire's argument that there are too many administrative difficulties involved with calculating the actual time required for donning and doffing at the beginning and end of the employees' shifts).

130. *Id.* at 360–61.

131. *Id.* at 368.

132. *Id.* at 362. Mountaire also retained an expert witness to conduct a study on the amount of time it took the employees to don and doff the relevant protective. *Id.* Unlike the employees' expert witness—who, in an attempt to determine a time closest to the actual time, filmed randomly selected employees under actual working conditions and then calculated a total mean time based on the data—Mountaire's expert witness conducted his study in a conference room with purposefully selected employees where he timed the participants donning and doffing protective gear. He then calculated for walking time based on the non-randomly selected employees' average walking time multiplied by an average distance that he observed employees typically walked from the donning and doffing area to the production

actual time spent by each employee in completing these particular activities, the court adopted the reasoning of the "summation of mean[s]" study because it provided the more "accurate representation of the amount of time that employees working at the plant actually spend donning and doffing."[133] In a concurring opinion supporting the application of an actual time test, Judge Wilkinson specifically referenced Congress's intent and the FLSA's humanitarian purpose of "protect[ing] those whose lives and families depend upon a decent wage."[134] Based on a strict adherence to the text and intent of the FLSA, the Second, Fourth, and Sixth Circuits have all rejected the reasonableness test and instead advocated for an actual time test.

IV. CONGRESS SHOULD CODIFY THE ACTUAL TIME TEST

The circuit split on this issue has been prevalent and problematic since the 1980s.[135] It is important that Congress or the Supreme Court resolve the split so that courts can apply the FLSA evenhandedly across the country and uphold its purpose.[136] The lack of uniformity currently is problematic because it leaves open the question whether courts are actually effectuating the FLSA's purpose. Equally troublesome, the lack of uniformity may cause employees to forego a FLSA lawsuit if they are unsure of the amount of monetary damages the court will award. The most efficient way to resolve the circuit split is to have Congress amend the FLSA and insert the actual time test as the required standard that courts must use when determining the

floor. *Id.* The result of Mountaire's expert witness's study was that the total compensable time was approximately half of that recorded in the employee's expert witness study. *Id.*

133. *Id.* at 372. The court specifically rejected Mountaire's argument that the court should adhere more closely to their expert witness's study and that compensable time should be calculated by "adding together the minimum amounts of time expended by the best-performing employee in completing each activity." *Id.* The court's reasoning was based on the fact that Mountaire's calculation did not account for human nature or the fact that the employees had varying degrees of performance, efficiency, and agility due to their age, as well as other factors. *Id.*

134. *Id.* at 378 (Wilkinson, J., concurring) (citation omitted). Additionally, Judge Wilkinson pointed out that "the case law in this area," specifically regarding the *de minimis* test, "is itself a mush albeit one that redeemably recognizes the need to compensate workers fairly for work performed without driving companies crazy with microscopic litigation." *Id.* at 381.

135. *See, e.g.*, Amos v. United States, 13 Cl. Ct. 442 (1987) (applying a reasonable time standard to determine the amount of overtime pay foreman employees at a correctional facility should receive for walking to and from the control room where they picked up their necessary equipment). For a discussion of more recent cases addressing the circuit split, see also *supra* Part III.

136. For additional information regarding employees who are exempt from the overtime provisions and possibly the minimum wage provisions of the FLSA, see Office of the Assistant Sec'y for Policy, *Fair Labor Standards Act Advisor: Exemptions*, U.S. DEP'T OF LABOR, http://www.dol.gov/elaws/esa/flsa/screen75.asp (last visited Jan. 21, 2014).

appropriate amount of retroactive damages for unpaid wages or overtime.[137] This solution will be significantly more effective than resolution by the Supreme Court for two reasons. First, how to calculate compensable time is usually never the primary issue of a case, but is rather an ancillary issue that accompanies each successful FLSA violation allegation leading to back pay.[138] Second, because back pay calculations are normally a secondary issue, it is unclear whether the test adopted by the Court would be part of the case holding, becoming common law, or dicta, allowing other federal courts to disregard the suggestion and continue to apply the reasonable time test. Congress should therefore amend the FLSA to incorporate the actual time test, as opposed to the reasonable time test, because: (1) there is stronger legal support for the actual time test; and (2) implementation of the actual time test will result in better practical implications for the modern workplace.[139]

A. THERE IS STRONGER LEGAL SUPPORT FOR THE ACTUAL TIME TEST

The Supreme Court has not formally adopted or rejected either the actual time test or the reasonable time test,[140] and the text of the FLSA does not weigh for or against either of the two tests.[141] Even though there is no explicit textual support for either of the two tests, the actual time test is the

137. Specifically, Congress should insert the actual time test as a provision in 29 U.S.C. § 216(b) (2006). Because this is the penalty section that gives employees a private right of action to damages against their employer for FLSA violations, it would be a natural place to insert the appropriate method for calculation of those damages if the court finds the employer liable for back pay to the employees.

138. *See supra* Part III. The primary issue for each of the cases discussed in the circuit split was an allegation of unpaid wages due under the FLSA.

139. For arguments in support of the actual time test and arguments against the use of the reasonable time test, see Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs–Appellants, Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012) (No. 11-2344), 2011 WL 5357150. Although these arguments are particular to the *Lopez* case, they are applicable in a broad sense and form the basis for the analysis for this Note. *See* Plaintiffs–Appellants' Principal Brief at *54–58, *Lopez*, 690 F.3d 869 (No. 11-2344), 2011 WL 5154877, at *54–58 ("Wages must be based on records of actual hours spent rather than estimates of 'average' or 'reasonable' hours." (emphasis omitted)). The brief argues, "[t]he very purpose of the continuous workday rule adopted by the Supreme Court and the Department of Labor is to preclude employers from picking apart the compensable workday by paying only for those tasks or events that it deems to have been 'reasonably' or 'efficiently' performed. Reasonableness or inefficiency are *disciplinary matters* directed to an offending employee, not a basis for deciding what is compensable for employees as a whole as a matter of law." Plaintiffs–Appellants' Principal Brief, *supra*, at *57; *see also* Plaintiffs–Appellants' Reply Brief at *22–26, *Lopez*, 690 F.3d 869 (No. 11-2344), 2012 WL 725735, at *22–26 (arguing that a reasonable time test and Tyson's argument to pay employees only for the "minimum time necessary" are not consistent with the FLSA).

140. *See Lopez.*, 690 F.3d at 878 ("Neither side identifies precedent from the Supreme Court or this court adopting or rejecting 'actual' or 'reasonable' time as the proper standard.").

141. There is no direct reference to the actual time test or the reasonable time test in the FLSA. *See* Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

preferable method because: (1) it is the most logical interpretation of existing precedent; and (2) it better effectuates the FLSA's purposes.

1. The Actual Time Test Is the Most Logical Interpretation of Existing Precedent

The Supreme Court most recently addressed the scope of this issue in 2005 in *IBP, Inc. v. Alvarez*.[142] The Court's reasoning strongly supports adopting an actual time test over a reasonable time test.[143] In *Alvarez*, the Court rejected many of the employer's (IBP's) arguments that the employees' activities were not compensable and instead interpreted prior case law and DOL regulations in favor of compensating the employees.[144] The Court's reasoning hinged on the continuous workday rule.[145] *Alvarez* is most logically read to support the actual time test because, like the continuous workday rule, the actual time test compensates employees for *all* hours worked during the workday, regardless of whether the amount of time the employees spent working was "reasonable."[146] The Court in *Alvarez* did not consider the compensability of travel time during the continuous workday in terms of its reasonableness.[147] Moreover, the Court entered the holding without analyzing "whether those employees took roundabout journeys or stopped off en route for purely personal reasons."[148] The Court reasoned that based on the continuous workday rule, employers must pay employees for all activities they perform during the workday regardless of how long the employees took to perform the activities and regardless of whether the employees were performing productive work the entire time.[149]

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142. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005); *see supra* Part II.C.

143. *Alvarez*, 546 U.S. at 29–34 (discussing prior decisions and DOL regulations leading to the holding that effectuates the continuous workday rule).

144. *Id.*; s*ee supra* Part II.C.

145. *See Alvarez*, 546 U.S. at 35–37; 29 C.F.R. § 790.6(b) (2012). For information on the continuous workday rule, see *supra* Part II.B.2. The Court cited two DOL Regulations that explained that the PPA has no bearing on travel time during the workday from one place to another and that donning and doffing may also define the outer limits of the workday. *Alvarez*, 546 U.S. at 35–36 (citing 29 C.F.R. § 790.7(c) (2005)). In addition, the Court pointed out that the regulations specifically count travel and walking time after the start of the workday and before the end of the workday as compensable, when an employer requires an employee to do an activity or report to a specific place. *Id.* (citing 29 C.F.R. § 785.38).

146. *See* 29 C.F.R. § 790.6(b); *see also* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs–Appellants, *supra* note 139, at 12.

147. *See Alvarez*, 546 U.S. at 35–37.

148. Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *supra* note 139, at 13. Even though the reasonable time standard accounts for personal differences, the Court, in discussing the purpose of the continuous workday rule, is specifically saying it is not acceptable to take those differences into account. *Id.*

149. *Alvarez*, 546 U.S. at 37; s*ee* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *supra* note 139, at 13.

Thus, imposing a reasonableness standard on any time or activities within the employees' continuous workday is incompatible with *Alvarez*.

The Supreme Court also previously addressed compensable back pay in 1946 in *Anderson v. Mt. Clemens Pottery Co.*[150] Like *Alvarez*, the Court's reasoning in *Anderson* strongly supports an actual time test over a reasonable time test. First, the outcome of the case was pro-worker. The Court explained that it was unacceptable under the FLSA to shorten the workers' pay by up to fifty-six minutes per day.[151] Second, using a reasonable time standard to determine the amount of back pay is inconsistent with the rule emerging from the case that the employers must pay employees for all time employers required employees to be at work.[152] The Court stated that "since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises . . . the time spent in these activities must be accorded . . . compensation."[153] The Court emphasized that after receiving the benefits of the work, the employer cannot later object to payment.[154]

Despite wording that on its face seems to support the reasonable time standard,[155] the case as a whole and the reasoning behind the case demonstrate that it is illogical to use *Anderson* to support a reasonable time calculation.[156] The Court noted, "compensable working time was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route from time clock to work bench."[157] Reliance on this phrase as support for a reasonable time standard is misplaced. The larger picture of the case supports an actual time test. The Court made the "direct route" comment in the context of the *de minimis* doctrine, which takes into account the "realities of the industrial world" and dictates that when the activities only concern a few seconds or minutes, the employer is not necessarily required to compensate employees for that time.[158] This comment was referring to time that was later designated as preliminary because it occurred before the employees' first principal activity. Thus, the Court's wording merely suggests that not all activities that are integral and indispensible to the first principle activity are automatically compensable,

150. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. §§ 251–262 (2006), *as recognized in Alvarez*, 546 U.S. 21 (2005). Other than excepting time spent walking on the employer's premises before the start and after the finish of the principal work activities, which is not compensable under the FLSA, the PPA did not otherwise change the *Anderson* decision. *Alvarez*, 546 U.S. at 27.

151. *Anderson*, 328 U.S. at 691–92; *see supra* Part II.B.2.

152. *Anderson*, 328 U.S. at 690–91.

153. *Id.*

154. *Id.* at 688.

155. *See id.* at 692; *supra* Part II.B.2.

156. *Anderson*, 328 U.S. at 686–88.

157. *Id.* at 692.

158. *Id.*

especially if they only involve insignificant amounts of time. This suggestion is a far cry from advocating for the reasonable time test.

The Court's reasoning further supports the actual time test because the Court recognized that employers have a duty under the FLSA to keep proper records[159] and recognized that employees should not be punished for their inability to prove the exact amount of time worked when the employer fails to do so.[160] The Court noted that even though the burden is on the employee to prove he performed the work for which he claims he was not compensated, if the employee cannot calculate the actual time worked because the employer failed to keep proper records, then the solution is not to penalize the employee.[161] The Court should not deny the employee recovery because the employee cannot prove the "precise extent" of work.[162] The Court's damages standard was based on the theory that employees should be paid for all actual time worked.[163] This was a practical and necessary means of calculating time where records were unavailable.[164] The calculation method was the Court's best attempt to determine how much time the employees had worked and was not meant to penalize employees.[165] The Ninth Circuit in *Alvarez* also recognized the same principle—that when employee records of actual time worked do not exist, the award of damages can be based on reasonable inferences.[166] Because the Supreme Court's reasoning in *Alvarez* and *Anderson* drives home the notion that employers must pay employees for all time worked during the workday, the actual time test is the most logical interpretation of this existing precedent.

2. The Actual Time Test Better Effectuates the Purpose of the FLSA

There are many reasons why the actual time test better effectuates the purpose of the FLSA.[167] Notably, the DOL has taken the position that, regardless of the situation, employees must be paid for all hours worked.[168]

159. *Id.* at 688; *see also* 29 U.S.C. § 211(c) (2006) ("Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him . . . .").

160. *Anderson*, 328 U.S. at 687–88.

161. *Id.*

162. *Id.* at 687.

163. *Id.* at 687–88.

164. *Id.*

165. *Id.*

166. Alvarez v. IBP, Inc., 339 F.3d 894, 914–15 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *supra* note 139, at 17 ("Thus, while a calculation of back pay might necessitate an 'average,' the measure of compensable time is that actually spent . . . .").

167. *See supra* Part II.

168. *See* 29 C.F.R. § 785.11 (2012) ("Work not requested but suffered or permitted is work time."). As long as an "employer knows or has a reason to believe that" an employee is

Because the DOL is the agency that legally administers and enforces the FLSA, when interpreting the FLSA, interpretive regulations and advisory memorandums written by the DOL and the Secretary of Labor should be heavily relied upon.[169] When companies asked the DOL whether it would be permissible to pay all employees based on the amount of time it takes the employees to do certain work rather than the actual time, the DOL responded that "in order to comply with the FLSA and its implementing regulations . . . a company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear."[170] In addition, the DOL has taken the staunch position that "[t]he amount of money an employee should receive cannot be determined without knowing the number of hours worked."[171]

In addition, Congress drafted the FLSA to protect workers and to ensure they receive fair pay.[172] The FLSA provision allowing workers to bring individual and class-action claims against employers for wage violations further exemplifies the purpose of the FLSA.[173] Case law and congressional amendments interpreting the FLSA have continually expanded the definition of "compensable time" and have favored protection of all nonexempt employees from unfair working conditions.[174] This history reflects the principles of equity and fairness at the core of the FLSA—"a fair day's pay for a fair day's work"[175]— and underscores the importance of the policy of fairness behind the minimum wage and overtime provisions. The actual time test best effectuates this policy of fairness because it better guarantees that in a successful FLSA suit for back pay employees will be paid the money they rightfully earned. It also arguably decreases some of the risks of joining a class-action suit because, if the employees win, they know they

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continuing to work, the employer is suffering or permitting that work and therefore must compensate the employee for his time. *Id.*

169. *See* HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT, *supra* note 15, at i.

170. Wage and Hour Opinion Letter, 2001 WL 58864, at *2. The implementing regulations refer to 29 C.F.R. § 516.2, which specifies the general requirements for employers when keeping employee records.

171. 29 C.F.R. § 785.1. In general, 29 C.F.R. §§ 785.1–.5 discuss the issues involved in determining what activities constitute work time.

172. *See* Dorris, *supra* note 6, at 1253–57 (discussing the many reasons why Congress initially enacted the FLSA, including bettering labor conditions that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (quoting 29 U.S.C. § 202 (2006) (internal quotation marks omitted))); *see also* John S. Forsythe, Note, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464–73 (1939); *supra* Part II.

173. 29 U.S.C. § 216(b); Dorris, *supra* note 6, at 1254.

174. For a discussion of the major Supreme Court cases and Congressional amendments to the FLSA, all of which favor the employees over the employers, see *supra* Part II.

175. Message from Franklin D. Roosevelt to Congress, *supra* note 1.

will get paid for all the hours they actually worked (or as close thereto as the court can determine if records are not available).

The actual time test also best incentivizes employers to abide by the FLSA provision requiring them to keep accurate records and guaranteeing their employees receive fair compensation.[176] If employers knew that they could get away with only paying employees for a "reasonable" amount of work instead of their "actual" amount of work, there would be no incentive to comply with this particular provision.[177] Employers might ignore this FLSA provision if Congress or the Court adopted the reasonable time standard. Failing to punish or sanction employers for poor record-keeping and instead rewarding employers by requiring only that they pay reasonable retroactive damages—rather than damages for the actual time an employee worked—renders the provision useless. Not only does this test penalize employees, it encourages employers to continue their non-compliance with FLSA provisions concerning record-keeping requirements.[178] Conversely, the actual time test incentivizes employer compliance with FLSA record-keeping requirements because employers without accurate employee records face uncertain results in court. Therefore, not only is the actual time test the most logical interpretation of existing legal precedent, it also best adheres to the FLSA's purpose, thus effectuating the statute.

B. Application of the Actual Time Test Will Result in More Desirable Practical Implications

The practical implications of the actual time test are more positive than those of the reasonable time test. The adoption of an actual time test would incentivize employers to comply with the FLSA and use alternative means to handle employee misbehavior. The actual time test would also incentivize employers to negotiate employee contracts regarding compensability issues and would provide a more objective and clear standard for courts to apply in future cases to ensure equality of treatment for all employees governed by the FLSA.

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176. 29 U.S.C. § 211(c).

177. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946) (arguing that if a court denies an employee back pay on grounds that the employee cannot prove the exact amount of uncompensated work performed, the court is rewarding the employer). This takes the employer off the hook for failure to keep proper records and means the employee is working without "due compensation as contemplated by the [FLSA]." *Id.* at 687.

178. *See, e.g.*, Perez v. Mountaire Farms, Inc., 650 F.3d 350, 374–75 (4th Cir. 2011) (dispelling the employer's notion that it was not its burden to keep accurate records of all employee activities). If the court applied a reasonable time calculation in *Perez* for back pay, it would have penalized the employees for their employer's failure to keep records, and it would encourage the employer to continue with its blatant non-compliance of the FLSA provision. *See* 29 U.S.C. § 211(c).

1. The Actual Time Test Will Create Better Incentives for Employers

The actual time test allows courts to account for the realities of the workplace. Employers are in a better position to deal with compensability issues than employees.[179] Many times, employees are not in any position to argue over wages or hours due to fear of retaliation. To counteract the imbalance of power in favor of the employer, the actual time standard will: (1) incentivize employers to anticipate problems and negotiate contracts; and (2) motivate employers to create effective disciplinary policies to deal with misbehaving employees.[180]

If employers know that the courts will apply an actual time standard to determine the appropriate amount of back pay, employers will have an incentive to negotiate explicit contracts with employees in advance to anticipate compensability issues and settle them outside of court. Unlike the reasonableness standard—where employers could potentially gain a huge windfall in a lawsuit if the calculated reasonable amount of time is much less than the actual amount of time—the actual time test does not allow employers to reap a reward for failing to pay their employees.[181] Applying the actual time test, it is likely that employers will have to pay higher amounts in retroactive back pay and overtime wages. Thus, the option to instead negotiate specific contractual terms for employee expectations and other work-related issues provides the employer with more control over which activities are allowable and compensable.[182] It also provides the

179. *See* 29 C.F.R. § 785.13 (2012) ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. . . . Management has the power to enforce the rule and must make every effort to do so.").

180. *See, e.g.*, Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir. 2008) ("An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. . . . This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours." (citation omitted)); Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 527 (2d Cir. 1998) ("Involving both employee and employer representatives in negotiations to decide how many off-duty hours will be compensated is a simple solution benefiting all parties."); Plaintiffs-Appellants' Principal Brief at 69, Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012) (No. 11-2344), 2011 WL 5154877, at *57 ("Reasonableness or inefficiency are *disciplinary matters* directed to an offending employee, not a basis for deciding what is compensable for employees as a whole as a matter of law.").

181. In *Perez*, the employer, Mountaire Farms, argued that it "should not be required to compensate the employees for the time spent donning and doffing their protective gear at the beginning and the end of the work shifts, because any calculation of such time would impose unreasonable and substantial administrative difficulties" on an employer. *Perez*, 650 F.3d at 374. The Fourth Circuit disagreed with the argument and put the burden to keep accurate time entirely on the employer. *Id.* at 374–75. Using the actual time test to calculate those damages forbids the employer from reaping the benefit of its own failure to keep time, when it already had the timekeeping system in place that could be modified to keep track of these activities.

182. *See* 29 C.F.R. § 785.8. These contracts are of course subject to the FLSA regulations including the Continuous Workday Rule and other rules promulgated by the DOL despite any

employee with knowledge of which activities, especially at the beginning and end of the day, are compensable.[183] Further, understanding which activities are compensable allows employers to encourage efficient work practices through contract. In fact, the DOL has already recognized that contracts and efficient management are effective ways to minimize paying for unwanted technically compensable time.[184]

The DOL has explicitly stated that:

> [i]n all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and *must make every effort to do so.*[185]

The DOL Wage and Hour Division has recognized the importance of these agreements in circumstances where employees reside on the employer's premises or work from home.[186] These agreements are especially useful tools in the prevention of future cases similar to the canine police officer cases, where it is difficult to monitor the number of off-duty hours an employee works. For example, if the contract provision lists fifty hours as the maximum number of compensable off-duty hours, and that number has been negotiated and is a fair number to the employee, a court will most likely uphold the contract, and the employer will not have to pay the employee for additional hours worked beyond the contracted fifty hours.

Contracts are also an attractive tool for employers because, if an employee sues for unpaid wages for an activity in the contract, the contract itself will be reviewed for "reasonableness," and courts will most likely show deference to the terms of the contract provided they are fair.[187] In *Holzapfel*

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existing custom, contract, or other agreement not to pay. Therefore, a contract would most likely be struck down if an employer arbitrarily contracted not to pay employees for a given task during the middle of the workday. *See also Holzapfel*, 145 F.3d at 526–27; 29 C.F.R. §§ 785.9, 785.26 (statutory exemptions).

183. *See, e.g.*, Rudolph v. Metro. Airports Comm'n, 103 F.3d 677, 683–84 (8th Cir. 1996). *Rudolph* is an example where the Eighth Circuit ruled in favor of the employer when a specific agreement defined the amount of compensable time. *Id.* The court was unsympathetic to the employees' claims that they should be paid for the additional hours worked past those agreed upon in the agreement. *Id.* at 683 ("[Employees] contend that they actually worked more than provided for on off-duty days. But the agreement explicitly dictates the amount of time they were to spend on dog care, and specifies that they needed to obtain prior approval for any additional time they thought necessary. Thus, the additional work the jury found plaintiffs to have performed was neither 'suffered nor permitted' by [the employer].").

184. *See* 29 C.F.R. § 785.13.

185. *Id.* (emphasis added).

186. *See id.* § 785.23. There might be an argument to expand these agreements to apply to other working situations as well, but that is outside the scope of this Note.

187. *See* Brock v. City of Cincinnati, 236 F.3d 793, 806 (2001) ("A court's task is not to find *the* reasonable agreement . . . [i]nstead, a court must ascertain whether *this* agreement falls

v. Town of Newburgh, N.Y., the Second Circuit recognized the benefit of this solution when it endorsed negotiations between employees and employers to decide how many off-duty and overtime hours will be compensated.[188] This solution is also particularly relevant in light of recent technological changes allowing employees to work outside the actual workplace using company cell phones, tablets, and laptops.[189] If employers are worried about potential FLSA claims for unpaid wages from employees working outside the workplace, they can contract for a set number of hours in advance.

The actual time test will also incentivize employers to create effective disciplinary policies to deal with misbehaving employees. One of the main arguments in favor of adopting the reasonable time standard, and one of the weaknesses of the actual time test, is that the actual time test rewards employees for slow and ineffective work.[190] This weakness is not enough to overcome the other beneficial implications of the actual time test and does not merit codification of the reasonable time test. Employers have numerous other ways to address the problem of employee misbehavior such as intentionally slow work.[191] In addition, relative to the total number of employees governed by the FLSA, there are arguably only a minority that would abuse the system in this manner. Instead of punishing all employees for the wrongdoing of a select few who try to cheat the system, employers should devise disciplinary policies that explicitly define prohibited behavior. Policies give employers the ability to punish and eventually terminate employment for violation of the disciplinary provisions.[192] The disciplinary provisions can explicitly note that specific activities will only be compensated up to a certain extent and that, if the employee chooses to disregard the provision (assuming the compensable time chosen is reasonable), he or she will either be punished or the company will be justified in not providing pay

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within a broad zone of reasonableness, considering its terms and all of the facts and circumstances of the parties' relationship."); *see also* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 603 (1944) (suggesting that if the precise computation of actual compensable time is impossible or difficult then a contract may govern the calculation of the work time if the provisions are reasonable).

188. Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 527 (2d Cir. 1998) (viewing agreements as the best possible solution to the overtime compensation issue presented by the case and specifically advocating and encouraging their use); *see also Brock*, 236 F.3d at 805 (reiterating the importance of agreements on compensable hours and encouraging their use in situations where it might be difficult to determine the exact number of hours worked such as a police officer training his police dog while at home and off duty).

189. *See generally* Gutierrez & Neguse, *supra* note 10 (discussing the impact of new technologies on the FLSA).

190. *See* Brief for Appellee at 56–57, Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012) (No. 11-2344), 2012 WL 120804, at *56–57.

191. *See* 29 C.F.R. § 785.13.

192. *See Brock*, 236 F.3d at 806; *Holzapfel*, 145 F.3d at 527.

for the "actual" time worked.[193] Creating effective negotiations and disciplinary provisions might increase transaction costs for the employer—who may have to work with attorneys to draft legal and effective contracts and disciplinary policies—but these costs are less burdensome than litigation with an uncertain outcome.[194] This is especially true when one takes into account the frequency with which FLSA compensable time claims are litigated.[195]

2. The Actual Time Test Is the More Straightforward and Objective Legal Standard for Courts to Apply

The impact that the compensation calculation test will have on the role of the courts is also important. The actual time test is more straightforward than the reasonable time test and will be an easier standard for courts to apply. The judiciary is in no better position than anyone else to determine what a "reasonable" amount of time would have been for an employee to spend on a particular work activity.[196] It is more appropriate to have the judiciary apply an objective standard and utilize expert witnesses and other evidence to determine, as best as possible, the *actual* amount of compensable time worked. It is not the role of the courts to determine the meaning of "reasonable" in each particular factual situation when Congress and the courts have already defined "work" and have never qualified that definition by requiring the work be reasonable to be compensable.[197]

The actual time test is a more straightforward calculation test to apply both in cases when the employer has records of the employees' actual work

193. *See, e.g.*, *Brock*, 236 F.3d at 806 ("The key question is whether the agreement the parties reached is reasonable, meaning one out of a variety of acceptable agreements. A court's task is not to find *the* reasonable agreement, for none exists. Instead, a court must ascertain whether *this* agreement falls within a broad zone of reasonableness, considering its terms and all of the facts and circumstances of the parties' relationship.").

194. *See id.* Based on the court's discussion that an agreement only has to fall in a "broad zone" of reasonableness, it's likely that an agreement with unsurprising compensation terms and disciplinary provisions would be upheld. *Id.*

195. WAGE & HOUR DIV., EMP'T STANDARDS ADMIN, U.S. DEP'T OF LABOR, WAGE AND HOUR COLLECTS OVER $1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001 (2008), *available at* www.dol.gov/whd/statistics/2008FiscalYear.htm. In 2010 alone, 6081 FLSA cases were commenced in U.S. federal district courts and this number increased to 7008 in 2011. U.S. COURTS, *supra* note 22.

196. *See Brock*, 236 F.3d at 803 (stating that it is not the role of the courts to "inquire into the reasonableness of the amount of work employees actually performed or determine what would have been a reasonable amount of work for an employer to seek and an employee to perform" and that the reasonableness standard is more appropriate for evaluating agreements that the parties had previously reached); *supra* Part IV.B.1 (discussing the benefits of employers and employees negotiating agreements beforehand).

197. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *supra* note 139, at 14–17 (clarifying that approximating damages when records are not available is not the same thing as excluding specific activities from compensable time because they are not considered "reasonable"); *supra* Part II.

time and those cases where the employer does not have records. First, if the employer has employee records, courts can simply look to those records to determine the amount of compensable time and resulting back pay. Additionally, if a court remands a case, the court can remand with specific instructions to apply the actual time test.[198] This is the most straightforward option for the courts because neither the judges nor the juries are substituting any of their own judgment. The actual time worked is the actual time for which the workers will receive pay. This is true regardless of whether or not the judge or the jury thought that it was reasonable.

Though the actual time test is slightly less straightforward in cases where the employer does not have accurate records, it is nonetheless the more straightforward and objective standard to use. On the surface, it might appear that implementing an actual time test when there are no records of the actual time is the same thing as using a reasonable time test to come up with a fair amount of time for which to pay the employees. There is, however, a key difference: the actual time test better protects the employees and effectuates the purpose of the FLSA.[199] The actual time test clarifies how the courts frame the issue of determining back pay and requires that courts reach the most equitable answers, not necessarily the most easily determined answers. Conversely, the reasonable time test suggests it is okay for the courts to exclude activities from compensable time because the activities themselves are not reasonable.[200] It forces the courts to keep in mind that the FLSA does not require work to be reasonable.[201] Additionally, it forces courts to take into account that all employees are different and take varying amounts of time to complete similar tasks.[202] It also makes clear that the reality that it may be more difficult to calculate the actual time worked does *not* justify courts depriving workers of fair pay for hours worked by substituting their own judgment of what would have been a reasonable amount of time to complete the particular task.

For example, implementing an actual time test might require a court to award damages differently between eighty-year-old plaintiffs and twenty-year-old plaintiffs if there was a large discrepancy in the amount of time it took each different group of plaintiffs to do the work. In contrast, under a

198. *See, e.g.*, Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 528 (2d Cir. 1998) (remanding for a new trial to decide whether the officer worked unpaid overtime hours, and if so, how many).

199. *See supra* Part IV.A.2.

200. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 15–16, Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012) (No. 11-2344), 2011 WL 5357150 at *15–16.

201. *See* 29 C.F.R. § 785.11 (2012) (stating work performed to wrap up the day is still work).

202. *See* Reich v. IBP, Inc., 38 F.3d 1123, 1127 (10th Cir. 1994) (discussing the district court's finding that there was "considerable flexibility" and discretion regarding the time and speed that employees performed their activities).

reasonable time standard, the eighty-year-old plaintiffs would receive much less back pay if there were many other employees who completed the activities more quickly and efficiently, thus lowering the average amount of time it took an alleged reasonable employee. It is possible that implementing the actual time test will impose a difficult burden on courts in some class-action cases with a variety of different employees when records are not available. Again, this possible negative consequence does not outweigh the beneficial aspects of the actual time test. Though the reasonable time test might be the more efficient option for the courts to employ in these difficult cases, it fails to take into account the individualized nature of the FLSA and fails to ensure uniformity in application—that all workers are receiving pay for all time worked. The reasonable time standard does not compensate all employees for all time worked but justifies doing so. The actual time standard does.

In these difficult situations where courts must determine the amount of back pay without records of actual hours worked, courts can follow the lead of the Fourth Circuit in *Perez* and utilize studies and other testimony to come as close to determining actual time as possible.[203] Doing so will reduce plaintiffs' and defendants' need to each hire an expert witness to try to calculate the actual and reasonable amount of retroactive wages that the jury then has to compare. Even if both parties attempt to calculate an amount of back pay, the issue will likely be less adversarial, and the extreme differences in amount of time for compensable back pay will likely be reduced to more moderate discrepancies. It will also result in greater uniformity across all federal circuits. The judiciary is better suited to apply the more concrete and less subjective actual time test because, unlike the reasonable time test, the actual time test does not impose the burden upon judges of how to determine whether specific activities were or were not reasonable.[204] Overall, there are much stronger legal arguments to support the adoption of the actual time test instead of the reasonable time test. It is the more logical interpretation of Supreme Court precedent and it better effectuates the fairness purpose of the FLSA. There are also better practical implications that will flow from the adoption of the actual time test. It will create better incentives for employers and it will also be a more straightforward and objective standard for the courts to apply.

V. CONCLUSION

Since implementation of the FLSA, the Supreme Court and Congress have continued to address its ambiguities and provide clarity in the

203. Perez v. Mountaire Farms, Inc., 650 F.3d 350, 370–72 (4th Cir. 2011).

204. Judges that are unfamiliar with the specific day-to-day activities of employees, specific to each business, lack the particularized knowledge that would be required to make this judgment.

provisions regarding compensable time, but, to date, they have not answered all of the necessary questions.[205] Although the Court and Congress have better clarified the concept of "compensable time," they have not set a uniform standard for how courts should calculate this time.[206] The circuits are split over this issue, which has resulted in inconsistent treatment of employees in various federal circuits under the same federal statute.[207] Because the calculation of back pay is an ancillary issue in each FLSA case, the courts have not squarely addressed the topic even though it continues to be a matter of discussion in each of the FLSA back pay cases.

This Note argues that the best way to resolve this circuit split is with a congressional amendment to the FLSA codifying the actual time test as the required calculation method.[208] In the absence of a congressional amendment to the FLSA, the Supreme Court should formally adopt the actual time test over the reasonable time test. There is much stronger legal support for the actual time test.[209] It is the most logical interpretation of existing precedent and it better effectuates the purpose of the FLSA.[210] The actual time test also creates better practical implications than the reasonable time test.[211] It creates better incentives for employers to abide by the FLSA provisions and to handle employee misbehavior and compensable time through negotiations and agreements.[212] It also is a more straightforward and objective standard for courts to apply.[213] Adopting the actual time test means the elderly, hourly factory worker from the introduction receives back pay for *all* the time it took him to complete his tasks and not just the time the court found it was reasonable for a much younger employee to complete the same tasks.[214] By adopting the actual time test, the courts will be able to firmly uphold Roosevelt's original message to Congress and to ensure that all employees under the FLSA receive "a fair day's pay for a fair day's work."[215]

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205. *See supra* Parts II & III.

206. Lopez v. Tyson Foods, Inc., 690 F.3d 869, 878 (8th Cir. 2012) (noting that there is no Supreme Court precedent outright adopting or rejecting either of the two calculation methods).

207. *See supra* Part III. The Eighth, Ninth, and Tenth Circuits support adopting a reasonable time test, and the Second, Fourth, and Sixth Circuits support adopting an actual time test.

208. *See supra* Part IV.

209. *See supra* Part IV.A.

210. *See supra* Part IV.A.

211. *See supra* Part IV.B.

212. *See supra* Part IV.B.

213. *See supra* Part IV.B.

214. For the introductory hypothetical, see *supra* Part I.

215. Message from Franklin D. Roosevelt to Congress, *supra* note 1, at 210.