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Lawrence E. Henke

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IS THE FAIR LABOR STANDARDS ACT REALLY FAIR? GOVERNMENT ABUSE OR FINANCIAL NECESSITY: AN ANALYSIS OF THE FAIR LABOR STANDARDS ACT 1974 AMENDMENT—THE § 207(K) EXEMPTION

Lawrence E. Henke

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I. INTRODUCTION

THIS comment is a brief retrospective of the promulgation of the Fair Labor Standards Act (FLSA),¹ and a more in depth examination of the evolution and application of the subsection k exemption of the Fair Labor Standards Act Amendment of 1974. Considered one of the most important pieces of legislation Congress ever passed,² FLSA has undergone many revisions and amendments in an ongoing effort to meet the changing needs of society and to respond to judicial interpretation of FLSA.³ The 1974 Amendment included the addition of subsection k, a government exemption to FLSA's overtime provisions from the overtime provision of FLSA.⁴

The subsection k exemption specifically removed public agency employees engaged in fire protection or law enforcement activities.⁵ It allowed local government employers of more than five such employees to completely escape the requirement of paying overtime to those employees for hours worked in excess of 40 hours per week.⁶ In addition, subsection k provided a partial exemption to those employers by not recognizing the 40 hour work week as the basis for determining overtime pay requirements.⁷

During the 1974 Amendment's promulgation process, employers and labor met the application of FLSA overtime protection and regulation with mixed sentiments. Local government officials predicted financial ruin if Congress forced them to comply with FLSA, and claimed that the regulations were an unconstitutional federal intervention contrary to the

1. 29 U.S.C. §§ 201-207 (1994).

2. See JOSEPH E. KALET, PRIMER ON WAGE AND HOUR LAWS 1 (2d ed. 1990).

3. See generally The Davis-Bacon Act of 1931; The Walsh Healey Public Contracts Act of 1936, The Portal to Portal Act of 1947; The Fair Labor Standards Act Amendments of 1949, 1955, 1961, 1966, 1974, 1977, 1985, 1986, and 1989; The Equal Pay Act of 1963; and the Family and Medical Leave Act of 1993. *Employment Standards Administration, Wage Hour Division, History of the Wage Hour Division* (visited Mar. 7, 1999) <<http://www.dol.gov/dol/esa/public/aboutesa/history/whd/whdhist.htm>> [hereinafter *History of the Wage Hour Division*].

4. 29 U.S.C. § 207(k); see also *New 1974 Minimum Wage Law with Explanation*, Lab. L. Rep., April 9, 1974, at 405.

5. 29 U.S.C. § 207 (k).

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

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed . . . 216 hours . . . ; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours . . . bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Id.

6. See 1974 Minimum Wage Law, *supra* note 4, at 13-14.

7. See *id.*

10th Amendment.⁸ At the same time, labor leaders responded by calling for fair treatment of employees and equal application of the law to government employers.⁹

Justifications from both sides of the argument were fraught with emotional pleas aimed at influencing Congress' decision on the Amendment. Government officials proffered grim predictions of economic disaster and reduced services if forced to comply with the Senate version of the 1974 Amendment to FLSA's overtime provisions.¹⁰ In contrast, labor clearly supported the Senate's version, which proposed that government employees enjoy the same wage and hour protections as their private sector counterparts.¹¹

Conversely, the House's version of the Amendment proposed a complete removal of police and fire personnel from the protections of FLSA, as a necessary component of local government control over vital public services.¹² The House version, which represented a severe departure from the hard fought advances of organized labor and wage and hour legislation, was a blow to advocates of employee rights. Accordingly, the left, primarily organized labor, met it with opposition.¹³

This divergence resulted in a compromise between the Senate version of absolute compliance with the FLSA's 40 hour work week overtime provisions and the House version propounding complete removal of these employers from FLSA protections.¹⁴ The ensuing compromise included some limited protection for public sector employees, but also provided for a "phase in" period wherein the overtime threshold would gradually be reduced from 240 hours in a 28 day work cycle in the first year to 216 hours in the same cycle in the fourth year.¹⁵ During this phase in period, Congress authorized the Secretary of Labor to complete a study to determine the average work week for fire protection and law enforcement personnel. That figure, if lower than the interim 216 hour figure, would thereafter become the substitute threshold.

This compromise was an obvious acquiescence of principle in the name of the political process. As Senator Dent explained in his Senate floor comments on the compromise: "[W]e can work on legislation in a conference and we will finally get to the one item that either creates a deadlock or we have to work out a compromise."¹⁶ Removing public safety per-

8. See decisions discussed *infra* notes 125-201.

9. See *id.*

10. See 93 CONG. REC. S. 2747, reprinted in SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND PUBLIC WELFARE, UNITED STATES SENATE, 93RD CONG., 2ND SESS., LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974, at 1931-41 (1976) [hereinafter "Committee Report"].

11. See *id.* at 2265-66.

12. See generally H.R. Res. 7935, reprinted in Committee Report, *supra* note 10, at 90.

13. S541-9.1: *Brief Items of Testimony* Paul J. Minarchenko, legis director, American Federation of State, City, and Municipal Employees, AFL-CIO, 93rd Cong. (1973).

14. See Committee Report, *supra* note 10, at 1931-41.

15. See Fair Labor Standards Act of 1938, as amended, H.R. 342-11, 93rd Cong. (1974).

16. S. Conf. Rep. 93-2747, at 2383 (1974).

sonnel from the FLSA was that one item.¹⁷ The overtime exemption was a near fatal deadlock to the 1974 Amendment,¹⁸ averted only through a joint committee compromise resolution.

While the historical view of this legislative compromise will be one of political necessity, and possibly even partial victory for labor, its result could arguably be viewed as an uneven application of the overtime exemption among the different categories of public safety employees. As indicated throughout the legislative debate over this amendment, the over-riding concern evidenced in the debate involved the potential impact of imposing FLSA compliance on government employers, specifically paying overtime for the twenty-four-hour shift schedule of fire prevention employees. Furthermore, government officials anticipated, or at least predicted, a detrimental impact on the essential public safety services as a result of federally mandated compliance with FLSA regulations, as well as the financial impact that compliance would supposedly thrust onto local government employers.¹⁹

Arguably, including law enforcement services in this austere prediction does not comport with the statute's legislative intent; therefore, the amendment is over inclusive in its scope. The amendment swept the entire universe of public safety service providers, including law enforcement into the fray. The inclusion of public safety service providers was a result of the much anticipated cataclysmic impact of FLSA compliance for fire protection employees.²⁰

This global inclusion resulted in a long and sorted series of law suits, which has forced courts to interpret the application of the subsection k exemption to public safety professions, including law enforcement and emergency medical personnel. In fact, FLSA has been the subject of more litigation than any other federal statute.²¹ The inconsistent treatment that the federal courts have given this particular provision and the manner in which courts resolve the issues only compounds the interpretation dilemma.

This comment will examine the range of judicial interpretation for the subsection k exemption and how its application in the public employment sector. It will focus on whether the exemption is a valid exercise of federal legislative power and how judicial interpretation of the exemption has deviated from the statute's legislative intent. In addition, it will examine the question of the statute's over inclusiveness as it relates to law enforcement and emergency medical employees as well as the effect of the 1974 Amendment on government employees, government agencies, and the courts.

17. *See id.*

18. *See New 1974 Minimum Wage Law with Explanation, supra* note 4.

19. *See* Committee Report, *supra* note 10, at 1931.

20. *See id.*

21. *See* LOUIS WEINER, *FEDERAL WAGE AND HOUR LAW* ix (1977).

II. HISTORICAL BACKGROUND

While the historical background of the FLSA is somewhat long and laborious, an understanding of the Act's history and the purpose behind the legislation is necessary to appreciate the magnitude of present day courts' infidelity to the legislation's underlying Congressional intent.

A. FAIR LABOR STANDARDS ACT OF 1930

Congress promulgated FLSA as a remedial and humanitarian measure to stabilize the economy and protect the common labor force in response to the post-depression predominance of poverty and the fear of an ever increasing decline in the economy.²² While businessmen and legislators alike have always met the intrusion of the legislative branch into the business realm with skepticism,²³ there is a historical pattern of such intervention in response to economic downturns. For example, before FLSA, several foreign countries had enacted minimum wage laws,²⁴ and as early as 1840, President Martin Van Buren issued an executive order that limited laborers' hours on public works projects to ten hours per day.²⁵ Since that time, legislation and amendments have constantly and steadily regulated wages and hours.²⁶ In contemplating the Fair Labor Standards Act of 1938, Congress intended not only that the Act encompass the previous legislation, but that it also become the preeminent legislation of the wage and hour issue.²⁷

Emerging from the effects of the Great Depression, Congress embarked on a path of economic repair and reconstruction. Spurred by the Roosevelt administration's New Deal legislation and responding to social agitation regarding the shocking conditions in turn of the century "sweated trades", Congress once again ventured into the dreaded quagmire of legislative intervention in an attempt to regulate the minimum wage of laborers.²⁸ The National Industrial Recovery Act²⁹ and the National Labor Relations Act³⁰ are the root of FLSA's provisions. In fact, commentators have stated that FLSA is a re-enactment of these two pieces of legislation.³¹ With economic recovery as the legislation's primary goal, Congress developed a number of specific objectives from which to accomplish this recovery. Among the most prevalent were (i)

22. See PUBLISHERS' EDITORIAL STAFF, *THE NEW WAGE AND HOUR LAW* 1 (1949).

23. See ORME WHELOCK PHELPS, *THE LEGISLATIVE BACKGROUND OF THE FAIR LABOR STANDARDS ACT: A STUDY OF THE GROWTH OF NATIONAL SENTIMENT IN FAVOR OF GOVERNMENTAL REGULATION OF WAGE, HOURS AND CHILD LABOR* 1 (1939).

24. See Donald E. Cullen, *Minimum Wage Laws*, N.Y. ST. SCH. OF INDUS. & LAB. REL. BULL. February 1961, at 1 (New Zealand in 1894, various Australian states in 1896-1910, and Great Britain in 1909).

25. See PHELPS, *supra* note 23, at 27.

26. See *id.* at 65; see also *History of the Wage Hour Division*, *supra* note 3.

27. See KALET, *supra* note 2, at v.

28. See *id.* at 13.

29. See National Industrial Recovery Act, 48 Stat. 195 (1933).

30. See 29 U.S.C. § 152(2) (1993).

31. See PHELPS, *supra* note 23, at 5.

“the elimination of poverty resulting from substandard wages;” (ii) “the maintenance of the purchasing power necessary to sustain full employment;” (iii) “the establishment of a floor under all wages to prevent a downward wage spiral during depressed times;” and (iv) “the promotion of fair methods of business competition.”³²

The history of wage and hour legislation follows a pattern common to other welfare based programs.³³ In this respect, the legislation of minimum wage and maximum hours has been a creature of social pressure.³⁴ That pressure, in turn, has forced a plethora of changes to FLSA. By the time that Congress implemented the 1949 Amendment, the minimum wage had nearly doubled and the code spelled out overtime requirements for hourly wages in exacting detail.³⁵ Subsequently, the additional congressional amendment activity increased FLSA’s domain in a consistent manner. For example, the 1966 Amendment brought state and local hospitals and educational institutions within the Act’s coverage, and in 1974 Congress included Federal and state employees within the coverage of FLSA minimum wage and maximum hour provisions.³⁶

B. AMENDMENT OF 1974

The 1974 amendment was a sweeping change in the coverage and application of FLSA. It substantially raised the minimum wage to \$2.30 an hour and the inclusion of Federal and state employees in the Act added several million employees to the protected ranks.³⁷ The impact of this amendment, from a financial and a logistical standpoint was immediate and intense, and local government officials made a pronounced outcry.³⁸ The impact of the subsection k exemption was also recognized as a sensitive political issue. For example, in the notice of hearing, the U.S. Department of Labor Wage and Hour Division called the subsection k exemption a “new and unique overtime” provision requiring public comment on its implementation.³⁹ In addition, the Department of Labor granted a stay of the Amendment’s implementation until January 1, 1975, primarily in response to the government forecasts of severe financial consequences resulting from forced compliance.⁴⁰ As one of the employers most heavily impacted, as well as the enforcement entity responsible for assuring compliance, the government was going to bear the brunt of this new legislation granting overtime protection to employees—and it was not prepared to do so.

32. CULLEN, *supra* note 24, at 3.

33. *See id.* at 1.

34. *See* PHELPS, *supra* note 23, at 3 (stating “social pressures are the demands of members of a given society for a specified form of action”).

35. *See generally* THE NEW WAGE AND HOUR LAW, *supra* note 22.

36. *See* KALET, *supra* note 2, at 14-15.

37. *See* New 1974 Minimum Wage Law with Explanation, *supra* note 4, at 5.

38. *See* Jesse Katz, *Madera Police Case Pushes Pay for Interrupted Meals; No Free Lunch with Law Enforcement Officers*, L.A. TIMES, Oct. 27, 1985, at Metro 5.

39. 39 Fed. Reg. 17,596-97 (1974).

40. *See* 39 Fed. Reg. 44,142 (1974).

III. THE FAIR LABOR STANDARDS ACT AMENDMENT OF 1974

A. EARLY CONSTITUTIONAL CHALLENGES

The purpose of FLSA legislation was to “restore a measure of dignity” to the nation’s labor force.⁴¹ The 1974 Amendment created changes to the FLSA that reverberated throughout all levels of government. Local officials claimed that the provisions bringing all government employees within the protections of FLSA would drive local government into financial ruin, and that the Federal government was invading local government control in violation of the Tenth Amendment.⁴² State and local government officials widely supported these Constitutional challenges; however, FLSA has “been well tested and consistently upheld” against Constitutional challenges.⁴³ Considered to be a valid exercise of its power under the Commerce Clause, Congress used FLSA to regulate minimum wages and maximum hours of the national labor force, now including state and local government employees.⁴⁴

B. NATIONAL LEAGUE OF CITIES V. USERY

The Supreme Court ruling in *Usery* addressed the fears and suspicions that local government officials voiced concerning federal intervention of state sovereignty in violation of the 10th Amendment.⁴⁵ In a five to four decision, which overruled *Wirtz*,⁴⁶ the Supreme Court held that Congress’s exercise of its Commerce Clause power to prescribe minimum wages and overtime pay for employees of state and local governments was an impermissible intrusion on the sovereignty of the states because it “would impair the states’ ‘ability to function effectively in the federal system’”⁴⁷ This was a dramatic departure from the Court’s earlier position in *Wirtz*,⁴⁸ wherein the Court held resolutely in a six to two decision⁴⁹ that the Commerce Clause did allow for Congressional intrusion

41. H.R. Rep. No. 101-260, at 14-15 (1989).

42. See 93 CONG. REC. S2747, reprinted in Committee Reports, *supra* note 10, at 1712 (Statement of Sen. Taft referring to the prior testimony of Mr. William F. Danielson, director of personnel for the City of Sacramento, CA.).

43. See KALET, *supra* note 2, at 19.

44. See *id.* at 15.

45. National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

46. Maryland v. Wirtz, 392 U.S. 183 (1968), overruled by National League of Tribes v. Usery, 426 U.S. 833 (1976).

47. See *Usery*, 426 U.S. at 833 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

48. See *Wirtz*, 392 U.S. at 183 (the Supreme Court upheld the application of FLSA to a limited number of state government employers, including schools, hospitals, nursing homes, and transit systems); see also Fry v. United States, 421 U.S. 542, 547-48 (1975) (allowing Congressional intrusion into state government as an emergency measure to counter severe national inflation).

49. Justice Marshall took no part in the *Wirtz* decision; however, he later held with the majority in *Garcia*, see *infra* note 5, that the exercise of the Commerce Clause Power by Congress in regulating the minimum wage and maximum hour provisions of FLSA was permissible.

into state government inasmuch as the regulation related to the operation of local schools or hospitals case.⁵⁰

In contrast, the *Usery* Court opined that states have the power to determine government employees' wages, hours, and overtime compensation.⁵¹ The question before the court was, however, "whether these determinations are functions essential to separate and independent existence" sufficient to invoke Tenth Amendment protections.⁵² The court ultimately answered that question in the affirmative. The Supreme Court holding stated that by enforcing FLSA regulations against state and local government employers, Congress was improperly exercising power over state governments, and the Court simply would not extend the Commerce Clause that far.⁵³ The Court further found that this exercise of Congressional authority displaced the sovereignty of state governments—eliminating their ability to structure the integral functions of traditional state operations.⁵⁴ That intrusion was contrary to the federal system of government embodied in the Constitution.⁵⁵

C. GARCIA V. SAN ANTONIO MASS TRANSIT AUTHORITY

The *Usery* decision constructively removed approximately 63 million state and local government employees from the protections of the FLSA.⁵⁶ Until the landmark case of *Garcia v. San Antonio Metropolitan Transit Authority*,⁵⁷ local government employers enjoyed, some might even say abused, this freedom from federal oversight. In another five to four decision, the Supreme Court addressed the implications and application of the 10th Amendment and the issue of federally mandated minimum wage and hour regulations on local and state government employers.⁵⁸ With the relatively recent *Usery* holding that federal intervention was unconstitutional, most employers confidently predicted that this case would simply follow the *Usery* progeny.⁵⁹ The contrary holding and explicit over-ruling of *Usery* surprised many employers, not the least of which were the government employers.⁶⁰

50. See *Wirtz*, 392 U.S. at 193-99.

51. See *Usery*, 426 U.S. at 845.

52. *Id.* (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)).

53. See *id.* at 852.

54. See *id.*

55. See *id.*; see also John E. DuMont, Comment, *State Immunity from Federal Regulation – Before and After Garcia: How Accurate was the Supreme Court's Prediction in Garcia v. SAMTA that Political Process Inherent in our System of Federalism was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391, 392 (1993).

56. See WEINER, *supra* note 21, at 32-33.

57. 469 U.S. 528 (1985).

58. See *id.* at 530.

59. See Linda S. Vanden Heuvel, *Garcia v. San Antonio Metropolitan Transit Authority Public Authorities Subject to Fair Labor Standards Act*, 58 WIS. B. BULL. 17 (1985).

60. See generally *Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Of the core justices who upheld the use of the Commerce Clause in the *Wirtz* case (Harlan, Warren, Black, Brennan, White, and Fortas), Justices Brennan and White were

The *Garcia* decision effectively brought all state and local government employees under the provisions and protections of FLSA, not just those select categories identified in *Usery*.⁶¹ This meant that employees now arguably possessed better bargaining positions, increased salary benefits, and improved working conditions.⁶² The Court's rationale balanced this result by holding that the political process available to the states protected them from undue federal government intrusion; therefore, judicial restraint of Congress' power under the Commerce Clause was unnecessary.⁶³ While labor viewed these improved employee benefits as a positive application of the FLSA, employers did not receive the news so graciously. For example, Governor John Ashcroft told a Senate panel that the *Garcia* decision would cost the State of Missouri and local governments more than \$8 million in overtime and result in a reduction of essential state services.⁶⁴ Echoing these fears, Representative Harold Ford (D-Tenn) stated that the ruling and subsequent enforcement of the provisions "has generated much confusion and will cause substantial hardships to many state and local government employees, specifically those involved in hazardous activities, such as fire protection and law enforcement."⁶⁵

Because the local government constitutional challenge in *Usery* came on the heels of the 1974 Amendment, most of the overtime exemption questions for government employers under this Amendment were moot, or government employers postponed compliance pending the Supreme Court's ruling. The ruling freed post *Usery* government employers from FLSA regulation in the areas of "traditional government functions."⁶⁶ Therefore, the *Usery* decision rendered FLSA regulations unenforceable for public sector employees engaged in the eight identified "traditional"

unable to reaffirm that power in *Usery*, being joined in their dissent by only Justices Marshall and Stevens. The remaining majority from *Wirtz*, Justices Harlan, Black, Fortas, and Chief Justice Warren had all left the court and were replaced with more conservative justices.

However, by holding in *Usery* to limit the Federal government's power under the Commerce Clause, the majority (Burger, Rehnquist, Blackman, Powell, and Stewart), which included only Justice Stevens from the *Wirtz* court joined by a series of recent conservative appointees, overturned *Wirtz* in a 5-4 decision. In the *Garcia* case that followed, the court composition was nearly identical to that of the *Usery* court; only Justice Stewart, who had joined with the majority in *Usery*, was gone. Justice O'Connor was now on the bench and considered a conservative vote to follow Chief Justice Burger and the majority from *Usery*. Justice O'Connor did in fact join with the Chief Justice, and Justices Rehnquist and Powell, but they emerged as the minority. The surprise came when Justice Blackmun, who had held in *Usery* to restrict Federal government intervention and control of state and local employers, joined the majority in *Garcia* holding to allow the federal government the power to enforce FLSA regulations governing the wage and hour requirements on local government employers. See *id.*

61. See *id.*

62. See *id.*

63. See Michael Jilka, *For Whom Does the Clock Tick: Public Employers' Liability for Overtime Compensation Under Federal Law*, 63 J. KAN. B. ASS'N 34, 35 (1994).

64. See Jim Michaels, STATES NEWS SERVICES, July 24, 1985.

65. David E. Anderson, *Administration Pondering Change in Labor Law*, UPI, August 26, 1985.

66. National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

local government functions: (1) schools, (2) hospitals, (3) fire prevention, (4) police protection, (5) sanitation, (6) public health, (7) parks and recreation, and (8) libraries and museums.⁶⁷

However, the confusion and interpretation difficulties Rep. Ford predicted did not take long to develop following *Garcia*. The Supreme Court had replaced the "traditional functions" test with a four part test, which enumerated a list of prerequisites for governmental immunity.⁶⁸ The Court found that the traditional functions rationale was not practical, nor functional, stating that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function[s]' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest."⁶⁹ In an attempt to create a workable evaluation of state immunity, the Court developed the four part *Garcia* test. Specifically, the court stated that to escape FLSA regulation under *Garcia*, state activity must meet the following conditions:

- [(1)] the federal statute at issue must regulate "the States as States,"
- [(2)] the statute must "address matters that are indisputably attribute[s] of state sovereignty,"
- [(3)] state compliance with the federal obligation must "directly impair [the State's] ability to structure integral operations in areas of traditional governmental functions," [and]
- [(4)] the relation of state and federal interest . . . justifies state submission.⁷⁰

If the government employer met these prerequisites, it could avoid compliance with the FLSA minimum wage and maximum hour provisions.⁷¹

The Court opined that the safeguards of the political process were sufficient to protect states from federal intervention; therefore, the judiciary did not need to obviate these protections.⁷² "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."⁷³

After *Garcia*, many government employees, including law enforcement and fire protection personnel, sought legal redress to force local government employers to comply with the FLSA overtime provisions. For example, in 1985, Madera, California police officers filed suit in California Superior Court. The California Highway Patrol, San Diego police officers, and Newport Beach and Vernon County Sheriff's departments followed their lead.⁷⁴ At the same time, adhering to the Supreme Court's

67. See Conrad F. Fritsch, *Minimum Wage and Maximum Hour Provisions in the Public Sector*, Report of the Minimum Wage Study Commission, Vol. III, June 1981.

68. See *Garcia v. San Antonio Metro. Transit Auth.* 469 U.S. 528, 537 (1985).

69. *Id.* at 531.

70. *Id.* at 537; see also, DuMont, *supra* note 55, at 395.

71. See *Garcia*, 469 U.S. at 537.

72. See *id.* at 555-56.

73. *Id.*

74. See Katz, *supra* note 38.

prediction, or possibly even its suggestion, state and local government officials besieged Congress with pleas for relief from immediate compliance with FLSA.⁷⁵

In response to this pressure, Congress granted state and local government employers some reprieve from FLSA overtime regulations by establishing an alternative payment option—compensatory time in lieu of cash payment.⁷⁶ Codified at 29 U.S.C. § 207(o), this provision allowed state and local employers to use compensatory time instead of making cash payments for overtime their employees earned, up to a maximum of 480 hours of accumulated time.⁷⁷ Because this option is not available to employers in the private sector, it is a significant remedy.⁷⁸ As the legislative history indicates, Congress passed this provision “in recognition of the special needs of state and local governments.”⁷⁹ Thus, both employers and employees are left to grapple with the subsection k exemption and the alternative payment options as the means of regulating maximum hours and overtime pay to fire protection and law enforcement employees.

IV. APPLICATION OF THE FAIR LABOR STANDARDS ACT

A. FLSA SUBSECTION (K) EXCEPTION

The subsection (k) exemption applies to government agencies that employ fire protection and law enforcement personnel.⁸⁰ While not a mandatory provision, the employer may opt for the § 207(k) exception to escape the mandatory FLSA § 201(a) overtime provision, which requires an overtime compensation payment at a rate of one and one half times the regular rate for any work in excess of eight hours in a work day or forty hours in a work week.⁸¹ The 207(k) option is, however, an employer’s affirmative responsibility and the employer therefor bears the burden of proving the exemption’s invocation under FLSA as an affirmative defense.⁸² Since the exemptions from FLSA compliance are construed narrowly against the employer⁸³ and liberally in favor of the employee,⁸⁴ the employer must not only prove the exemption by clear and affirmative evidence,⁸⁵ but must also show that its employees “fit plainly and unmistakably within the exemption’s terms.”⁸⁶ Therefore, the question of whether the employer has in fact opted for a subsection (k)

75. See generally, COMMITTEE REPORT, *supra* note 10, at 1931-41.

76. See 29 U.S.C. § 207(o) (1985).

77. *Id.*

78. See 29 U.S.C. §§ 201-207; 29 C.F.R. § 553.20 to .29 (1997).

79. DuMont, *supra* note 55, at 398.

80. See 29 U.S.C. § 207(k).

81. See 29 U.S.C. § 207(a).

82. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1973).

83. See *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

84. See *Hodgson v. University Club Tower, Inc.*, 466 F.2d 745, 746 (10th Cir. 1972).

85. See *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984).

86. *Hurley v. Oregon*, 859 F. Supp. 427, 430 (D. Or. 1993), *rev'd on other grounds*, 27 F.3d 392 (9th Cir. 1994).

exemption is both a threshold question for protection under the provision and a question of fact for the fact-finder.⁸⁷

Under subsection (k), the employer is allowed to establish a "work period" outside of the traditional seven day work week. Such work period may range from seven to twenty-eight days, wherein the employee is not entitled to overtime payment until such time that the "hours worked" exceeds the maximum hours ceiling (212 for fire protection personnel, or 171 for law enforcement personnel).⁸⁸ For example, a government employer may establish a twenty-eight day work period for all law enforcement personnel under the subsection (k) exemption, but it must pay the regular rate for only the first 171 hours and overtime pay for any additional hours of work.⁸⁹

The very cautious manner in which the Department of Labor (DOL) entered into the investigatory stage of enforcing the post- *Garcia* regulations evidences the difficulty inherent in dealing with crucial issues such as wages and maximum hours. Following the *Garcia* decision, DOL established a five-step investigation policy for enforcing FLSA regulations on government employers.⁹⁰ The slow and deliberate transition into enforcing the FLSA regulations against government employers demonstrates the importance DOL placed on FLSA compliance. DOL attempted to soften the impact of compliance by staying the investigation process and granting government employers a grace period. In fact, DOL envisioned the subsection (k) exemption as a means to mitigate the impact of FLSA compliance on local government.⁹¹

Establishing a framework to apply the overtime provisions was the next step in enforcing FLSA regulations on government employers. The gravamen of any subsection (k) overtime dispute centers on the distinction of the term "work period," and determination of compensable time within that period, such as meal times, and other disputed times that may or may not be considered work. For example, in *Fraternal Order of Police v. Smyrna*, the court held that key to the City's defense was the fact that it specifically elected to take advantage of the subsection 207(k) exemption. By presenting: (i) a policy statement declaring subsection 207(k) exemption status; (ii) an interdepartmental memorandum referring to the sub-

87. See *Lee v. Coahoma County Miss.*, 937 F.2d 220, 224 (5th Cir. 1991), amended by 37 F.3d 1068 (5th Cir. 1993).

88. See 29 C.F.R. § 553.230. 48 Fed. Reg. 40,518 (1983) reports the study that established these overtime thresholds. The maximum number of hours are adjusted proportionately if the identified work period is other than twenty-eight days. See 29 C.F.R. § 553.230(b).

89. See 29 C.F.R. § 553.230.

90. See *Statements on FLSA Presented Before the Senate Labor and Human Resources Subcommittee on Labor*, Daily Lab. Rep. (BNA) No. 176, at E-1 (Sept. 11, 1985) [hereinafter *Statements on FLSA*].

91. See S. REP. NO. 99-159, at 5 (1985) (stating "[s]ection 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government by providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which . . . provid[es] for a gradual phase-in period").

section 207(k) provisions in the payment of overtime; (iii) affidavits of managers relating the preparations made to convert to a 28 day work period; and (iv) record evidence of a 28 day work cycle,⁹² the city showed that it had established a definitive work period in an effort to comply with the FLSA regulations and comport with the hourly requirements.⁹³ The term “work period” therefore, serves as the basis upon which to allow exemption; if the work period either exceeds 28 days, or is less than 7 days, the period falls outside the parameters in which the employer may choose the exemption.⁹⁴

As codified in the Code of Federal Regulations (CFR), the term “work period” is currently defined as:

any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee’s work period is established, however, it remains fixed regardless of how many hours are worked within the period.⁹⁵

Thus, after establishing the work period, the regulation defines the threshold of hours worked.⁹⁶

Despite the CFR’s guidance, distinguishing between the different interpretations of “hours worked” and “work period” remains difficult. For example, in its proposed regulations the DOL defined “hours worked” to include:

all the time an employee is on duty on the employer’s premises or at a prescribed workplace, as well as all other time during which the employee is “suffered or permitted to work,” including all pre-shift and post-shift activities integral to his principal activity or closely related to it, such as attending roll call, writing up and completing tickets, and washing and reracking hoses.⁹⁷

Nonetheless, this definition apparently was not definitive, because what followed was a series of disputes over the meaning of “hours worked” as compensable time; specifically what “hours worked” meant in relation to “on call time,” “meal time,” “waiting time,” and other “preliminary and postliminary” activity.⁹⁸

92. See *Kermit C. Sanders Lodge No. 13, Fraternal Order of Police No. 13 v. Smyrna*, 862 F. Supp. 351, 355-56 (N.D. Ga. 1994).

93. See *id.* at 357.

94. See 29 C.F.R. § 553.224(a); see also, *Smyrna*, 862 F. Supp. at 355.

95. 29 C.F.R. § 553.224(a).

96. See 29 C.F.R. § 553.230.

97. *Labor Department Issues Proposed Rules on Public Employer Compliance with FLSA*, Daily Lab. Rep. (BNA) No. 76, at A-5 (Apr. 21, 1986). See also *Interim Rules Issued on Public Employer FLSA Compliance*, Daily Lab. Rep. (BNA) No. 1160, at 527 (Apr. 21, 1986).

98. See *infra* notes 116-37 and accompanying text. For a discussion of the preliminary and postliminary activity, see generally KALET, *supra* note 2, at 65-77 (discussing the

In addition, the "hours worked" concept defined in § 201(a) no longer regulated the payment of overtime by government employers in the law enforcement and fire protection categories.⁹⁹ The congressional joint committee compromise settled on the more flexible term "tour of duty."¹⁰⁰ Yet, the skepticism regarding the precision and practical application of this definition was clear: "the amendments direct the Secretary of Labor to define what constitutes a 'tour of duty.' Presumably, this definition will answer such questions as to whether or not sleeping time and meal periods should be included within the phrase."¹⁰¹

Little guidance exists regarding what Congress intended "tour of duty" to mean. In 1974, DOL had not yet prepared a definition of the term, and the congressional debate over the amendment revealed little discussion regarding the intended parameters of "tour of duty."¹⁰² The clarification came later from DOL. It defined the term to include sleeping and meal time if the employee was on duty for 24 hours or less.¹⁰³ These particular time periods were, therefore, excludable for employees on duty longer than 24 hours if an express or implied agreement existed.¹⁰⁴ Upon further refining, the "tour of duty" definition evolved to its current interpretation:

the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include "shifts" assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the "shift" which the public agency employer assigns.¹⁰⁵

The confusion surrounding implementation of the FLSA provisions did not end with the definition of "work period" or "tour of duty." Once those terms received a workable definition, the debate centered on the specific activity within the "tour of duty" and "work period." Both employers and employees tried to exact as much time from the other as possible. The government employer attempted to obtain the maximum as much actual work time and service provision time as possible;¹⁰⁶ while

Supreme Court ruling in *Anderson v. Mt. Clemens Pottery Co.* and the creation of the Portal-to-Portal Act of 1947).

99. See S. REP. No. 93-758, at 6-7 (1974). See also COMMERCE CLEARING HOUSE, INC., 1974 GUIDEBOOK TO FEDERAL WAGE-HOUR LAWS § 306A (5th ed. 1974).

100. See S. REP. No. 93-758, at 7.

101. 1974 GUIDEBOOK, *supra* note 99, at 108.

102. See *id.*

103. See COMMERCE CLEARING HOUSE, INC., 1978 GUIDEBOOK TO FEDERAL WAGE-HOUR LAWS § 306A (6th ed. 1977).

104. See *id.*

105. 29 C.F.R. § 553.220(a).

106. See *Statements on FLSA*, *supra* note 90. Statement of the International Association of Chiefs of Police, William Summers, supervising attorney:

Law enforcement agencies have the responsibility of providing the public with protection on a 24-hour basis. The only way law enforcement administrators have been able to do this is through the flexibility that has been afforded them to schedule their employees both sworn and civilian, as needed without worrying that there is no money left in the budget to pay over-

the employees attempted to recoup compensation for time previously spent in allegedly work related activities.¹⁰⁷ The problem of inconsistent results, which the Supreme Court cited as one of the factors necessitating *Usery's* overruling in *Garcia*,¹⁰⁸ were recurring post-*Garcia* with equal frequency and severity.

B. WHAT IS COMPENSABLE TIME?

The "compensable time" distinction became the focal point of the public sector employer claims under FLSA.¹⁰⁹ The issues pertaining to these disputes primarily centered around the interpretation of "work," "meal times," "on-call times," and "sleep times," specifically focusing on whether these activities were compensable time under FLSA and the subsection (k) exemptions.¹¹⁰ Compensable time is defined under § 553.221 as "all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer."¹¹¹ This definition tracked the proposed DOL language from 1985, retaining the key elements of "on duty" and "suffered or permitted to work for the employer."¹¹² Therefore, any claim for overtime compensation relied on the time being compensable as defined by regulation, having occurred while the employee was on duty, and the activity (or work) being suffered or permitted for the benefit of the employer.¹¹³

Subsection (c) of the compensable time definition also presented a refinement that has generated more controversy within the public employment sector.¹¹⁴ It states: "[t]ime spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work."¹¹⁵ While intended to clarify compensable situations for an employee, the provision merely exacerbated the situation by throwing the elements "so circumscribed" and "effectively

time. . . . Although [the subsection (k) exemption] gives agencies some flexibility, it is not enough.

Id.

107. See 25 Gov't Empl. Rel. Rep. (BNA) No. 1238, at 1569 (Nov. 9, 1987); 32 Gov't Empl. Rel. Rep. (BNA) No. 1585, at 1249 (Oct. 10, 1994); 32 Gov't Empl. Rel. Rep. (BNA) No. 1555, at 335 (Mar. 7, 1994).

108. See *Garcia v. San Antonio Metro. Transit Auth.*, 460 U.S. 528, 546-47 (1985).

109. See J.J. Director, Annotation, *Call or Waiting Time as Working Time within the Minimum Wage and Overtime Provisions of the Fair Labor Standards Act* (29 U.S.C. §§ 206, 207), 3 A.L.R. FED. 675, 683 (1970 & Supp. 1998); Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, 274-75 (1978) & Supp. 1999.

110. See *id.*

111. 29 C.F.R. § 553.221(b).

112. See *Labor Department Issues Proposed Rules on Public Employer Compliance with FLSA*, *supra* note 97.

113. See 29 C.F.R. § 553.221.

114. See 29 C.F.R. § 553.221(c).

115. *Id.*

using the time for personal pursuits" into the interpretation fray.¹¹⁶ Struggling to bring order to the application of this statute, courts wrestled with the task of defining these terms or elements.

C. DEFINING "ON DUTY"

The next step in any determination of compensable time is establishing that the activity occurred while the employee was "on duty" and that the activity constituted "work." "The regulation defines "on duty" in rather vague terms through a series of individualized situations rather than by traditional statutory language.¹¹⁷ The definition seems to hinge upon whether the employee is able "to use the time effectively for his own purposes."¹¹⁸ If the time belongs to and is controlled by the employer, or if the employee is obliged to wait, then the time is compensable.¹¹⁹ This is very helpful if the employment question falls within one of these limited employment roles listed in the statute; however, to find a more definitive description of "on duty," one must travel a tortured path and turn to the antonym, "off duty." "Off duty" is defined as "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes"¹²⁰ The logical conclusion, therefore, is that "on duty" is merely the opposite of "off duty."

D. WHAT IS WORK?

Upon the determination of "on duty," defining "work" is the next step. "Work" is not specifically defined by statute.¹²¹ Nonetheless, a combination of definitions from § 203,¹²² the definitions of "employ," "hours worked,"¹²³ and guidance¹²⁴ and the regulation on judicial construction, created a general description of "work" that includes any activity spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and pri-

116. *Id.*

117. *See* 29 C.F.R. § 785.15 (1997).

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity.

Id.

118. *Id.*

119. *See id.*

120. 29 CFR § 785.16(a) (explaining further that the employee is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived).

121. *See* 29 C.F.R. § 785.6 ("The act, however, contains no definition of 'work.'").

122. *See* 29 U.S.C. § 203(g).

123. *See id.* § 203(o).

124. *See* 29 C.F.R. § 785.7.

marily for the benefit of the employer of his business.”¹²⁵

This definition also comports with the Supreme Court’s two prong test developed in *Armour & Co. v. Wantock*.¹²⁶ The *Wantock* test stated that if the activity is: “[i] controlled or required by the employer, and [(ii)] pursued necessarily and primarily for the benefit of the employer and his business,” then the activity constitutes work.¹²⁷ Although *Wantock* considerably predates the *Garcia* ruling, the “primarily for the benefit of the employer and his business” language remains a consistent theme and plays a significant role in the subsequent meal time issue cases.¹²⁸

E. ARE MEAL TIMES WORK TIME?

Having established the outer boundaries for “work period” and “tour of duty,” identified compensable time, and clarified work activity, the next logical progression entails determining whether an activity within the work period is, in fact, compensable. The more frequent disputes under subsection (k) revolve around meal times and sleep periods and whether this time constitutes work or compensable “on call” status. The original 1974 Amendment did not specifically address the meal period issue.¹²⁹ But following enactment of the Amendment, the prevailing commentary established a three part analysis for meal periods:

- (1) The meal period must be at least thirty minutes long, but shorter periods would be evaluated on a case by case basis;
- (2) “The employee must be completely relieved from all duties, even inactive duties;” and
- (3) “The employee must be free to leave his post of duty; however, he can be confined to the plant premises.”¹³⁰

The early rationale that meal times were compensable barring certain conditions precipitated the interim litigation, and resulted in refinement of the definition. Mealtime is now explained as:

Bona fide meal times are not worktime The employee must be completely relieved from duty for the purposes of eating regular meals The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.¹³¹

125. *Id.* (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).

126. 323 U.S. 126, 132-33 (1944).

127. BETTY SOUTHARD MURPHY ELLIOT S. AZOFF, *GUIDE TO WAGE AND HOUR REGULATION, A PRACTICAL GUIDE FOR THE CORPORATE PRACTITIONER* 28-9 (1987). *See also* *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1162 (D.C. Cir. 1975).

128. *See generally* cases on meal time as compensable time, *infra*, notes 139-75.

129. *See* Committee on Education and Labor, Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1974 and related provisions of law (1974).

130. COMMERCE CLEARING HOUSE, INC., 1974 *GUIDEBOOK TO FEDERAL WAGE-HOUR LAWS*, § 603.11 (5th ed. 1974).

131. 29 C.F.R. § 785.19.

While broad based, this general definition fails to provide any concrete guidance for public safety exempted employees. Specifically relating to subsection (k) qualified employers, § 553.223 states, “[i]f a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section [20]7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the tests in § 785.19 of this title are met.”¹³² This would only allow the employer to meet the criteria of § 785.19 only if it complies with § 207(a)(1), the traditional five-day, forty-hour work week, and if it pays overtime for any work time performed beyond the regular eight hour day or five day work week.¹³³

If the employer does elect to use the subsection (k) exemption, however, allowing for the establishment of a seven to twenty-eight day work period and a proportional ratio of up to 171 hours of work at regular rates, the employer can only exclude the meal period for tours of duty of 24 hours or less if the employee is completely relieved from duty and if the employer complies with § 785.19.¹³⁴ The relative similarity between the two regulations prompts the question, “why was the extra provision placed in § 553.223, the specific provision established for law enforcement and fire protection personnel?”¹³⁵ It seems axiomatic that this provision established an added requirement for those employers opting for the extended hours of service at regular rates and longer work periods—the added requirement being complete removal from duty.

While the Eleventh Circuit in *Avery*¹³⁶ interpreted the inconsistent language to mean that the differences in the two regulations resulted in a lesser burden on the employer, the counter argument is equally plausible. One might infer that the “completely removed from duty” language consoled for those employees subjected to the extended, non-traditional work periods. Unfortunately, however, the legislative history of the Amendment and incorporated floor debate fails to answer that question or offer any rationale for the different language.¹³⁷ Thus, any inference is left to the individual courts to interpret.¹³⁸

Interestingly, the Amendment’s early interpretation, see 1974 *GUIDEBOOK TO FEDERAL WAGE-HOUR LAWS*, *supra* note 130, at 170, began with the premise that the meal time is compensable unless certain criteria were met. However, the current version begins with the definitive statement that meal times are not compensable. Instead, it uses those same basic criteria as qualifiers couched in slightly different terms. See 29 C.F.R. § 785.19.

132. 29 C.F.R. § 553.223(a).

133. See 29 U.S.C. §§ 201-207.

134. See 29 C.F.R. § 553.223(b) (1997).

135. 29 C.F.R. §§ 553.223 and 785.19 (1997). The language of the two regulations is virtually the same, with the added requirement of § 553.223 that the employee is “completely relieved from duty during the meal period,” and § 785.19 that states “the employee must be completely relieved from duty for the purposes of eating regular meals.” *Id.* (emphasis added).

136. See *Avery v. City of Talladega*, Alabama, 24 F.3d 1337, 1344-45 (11th Cir. 1994).

137. See generally, COMMITTEE REPORT, *supra* note 10.

138. In 1996, the U.S. Supreme Court decided that under the 11th Amendment of the U.S. Constitution states are immune from suit in federal court under the FLSA. Accord-

V. JUDICIAL ANALYSIS OF MEAL TIMES

The judicial analysis of meal periods as compensable time also provides little guidance to answer the question of how a meal time relates to work and overtime pay. The U.S. Supreme Court has heard only two cases relating specifically to the application of FLSA subsection 207(k) exemption.¹³⁹ Those cases dealt with the broad application of the regulation, rather than any specific definitional questions. Consequently, the court gave no clear rule of interpretation. Furthermore, an interpretation apparently is not forthcoming because the Supreme Court has indicated its reluctance to address this issue in prior dicta:

We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. This involves scrutiny and construction of the working agreements between the particular parties, appraisal of their practical construction of the agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances.¹⁴⁰

This leaves little doubt that the trial courts will decide whether real times are compensable on an ad-hoc case-by-case basis.

The case histories reveal that several federal courts have adopted, in some form or another, the “predominant benefit” test¹⁴¹ in evaluating waiting time and determining whether or not the meal time of an employee is compensable.¹⁴² The basis of this analysis is the Supreme Court’s general wage and hour ruling in *Wantock*¹⁴³ in which the court applied a type of predominant benefits test to the waiting time fire guards spent while on the employer’s premises.¹⁴⁴ This test evaluates the restrictions placed on the employee and questions whether the time the employee spent is “primarily for the benefit of the employer.”¹⁴⁵

ingly, state employees may only sue their employers under the FLSA in the less favorable state forum. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54-57 (1996).

139. See *National League of Cities v. Usery*, 426 U.S. 833 (1976); See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

140. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37 (1944) (citations omitted).

141. See *Lamon v. City of Shawnee*, 972 F.2d 1145, 1156 (10th Cir. 1992), cert. Denied, 507 U.S. 972 (1993). This case developed the “predominant benefit” test, which involved an interpretation of 29 C.F.R. § 785.19, which provides that “a law enforcement employee is completely relieved from duty during a meal period . . . when the employee’s time is not spent predominantly for the benefit of the employer.” *Id.*

142. See generally discussion of court holdings, *supra* notes 125-27.

143. *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944).

144. See *id.* The firefighters were employed to fight fires only. The men began their shifts at 8:00 a.m. by punching time cards. For nine hours, including a half hour for lunch, they inspected, cleaned, and maintained the company’s fire fighting equipment. At 5:00 p.m., they punched out. However, the men remained on call in the fire hall on company property until 8:00 a.m. the next morning.

145. *Id.*

Those circuits that have followed the predominant benefits rationale to evaluate the real time issue have produced varied results. The courts have looked at, *inter alia*, the restrictions placed on the employees and whether the employer controls the time.¹⁴⁶ Integral to this evaluation of the FLSA application is the interplay between § 785.19 and § 553.223 in defining meal times.¹⁴⁷

The Tenth Circuit was the first court to specifically look at the meal time issue and attempt to apply some qualitative analysis to the employee's activities. In *Lamon*, the court went beyond the bare requirements of § 785.19 and examined the particular activities that the employees performed and the restrictions that the employer placed upon them.¹⁴⁸ The *Lamon* court clearly adopted the predominant benefits test stating, "in the § 207(k) context a law enforcement employee is considered to be completely relieved from duty during a meal period when the employee's time is not spent *predominantly for the benefit of the employer*."¹⁴⁹ Citing several restrictions that the employer placed on the meal period, the *Lamon* court held that the evidence supported the employee's compensation claim for the meal period.¹⁵⁰ The court specifically cited the interaction of § 785.19 and § 553.223 as a factor in determining the compensability of meal periods. To this end, the employee must be completely relieved from duty to exclude the time; however, being on-call and having some limited responsibility does not, in and of itself, constitute working time.¹⁵¹

Following the Tenth Circuit's analysis, the Seventh Circuit also adopted the predominant benefits test.¹⁵² It examined the interplay of the two regulations regarding meal times and concluded that slavish adherence to the regulation's exact wording was neither the intent, nor the function of the regulation.¹⁵³ In overruling the district court, the appellate court stated, "[t]he examination of compensability should not turn on a crabbed comparison between the mealtime restrictions and the necessarily arbitrary, and certainly not all-encompassing, examples in the regulations."¹⁵⁴ The court then held that the *Lamon* standard was indeed the correct formula for evaluating the compensability of meal time.¹⁵⁵ The *Alexander* court opined that meal time is compensable when the employee is "unable [to] comfortably and adequately . . . pass the mealtime because the [employee's] time or attention is devoted primarily to official

146. See, e.g., *Armitage v. City of Emporia*, 982 F.2d 430, 432 (10th Cir. 1992).

147. See *Avery v. City of Talladega*, 24 F.3d 1337, 1346 (11th Cir. 1994).

148. *Lamon v. City of Shawnee*, 972 F.2d 1145, 1157-59 (10th Cir. 1992).

149. *Id.* at 1155 (emphasis added).

150. See *id.* at 1156 (holding that the evidence points but one way and that no reasonable inference supports the employer's claim)

151. See *id.* at 1157.

152. See *Alexander v. City of Chicago*, 994 F.2d 333, 339-40 (7th Cir. 1993).

153. See *id.* at 336 (overruling the trial court's holding that if the employment activity did not fit explicitly in the definition's examples, it was not compensable time).

154. *Id.* at 337.

155. See *id.* (stating that the appropriate standard is one that sensibly integrates developing case law with the regulations' language and purpose).

responsibilities.”¹⁵⁶ While this is a far superior method of analysis than the district court’s stringent adherence to the *Lee*¹⁵⁷ methodology, it appears to implicitly require active involvement in employment responsibilities to make the time compensable.¹⁵⁸

Examining this issue several times, the Fifth Circuit addressed the regulations’ application both in an *Alexander* strict adherence methodology¹⁵⁹ and under the *Lamon* predominant benefits test. For example, the Fifth Circuit strictly followed the exact wording of the statute and comments, citing verbatim the examples within § 553.223 in its *Lee v. Coahoma County* ruling. Because the court found that employee activity did not compare precisely with the activity examples, it held the time was not compensable.¹⁶⁰ This strict adherence rationale does not allow for any interpretation or evaluation the individual case’s unique facts and is therefore generally considered a minority view.

The circuit split on precisely which methodology to use further illustrates the abounding difference of opinions on this issue. For example, in *Henson v. Pulaski County Sheriff Department*,¹⁶¹ the Eighth Circuit did not recognize the *Lamon* predominant benefits test but instead reverted to the Supreme Court’s basic analysis from *Swift*.¹⁶² Likewise, in *Monahan v. County of Chesterfield* the Fourth Circuit also disagreed with the *Lamon* analysis and predominant benefits test.¹⁶³ The *Monahan* court held that the employment agreement precluded back pay, but *in dicta* stated that meal time is compensable time, as opposed to gap time, which is not.¹⁶⁴ The Second Circuit also had difficulty interpreting the meal time issue in a private employer case.¹⁶⁵ The court held that meal periods are compensable under the FLSA when employees perform duties predominantly for the employer’s benefit during a meal break.¹⁶⁶ The key distinction from *Lamon*, however, was not what the workers did during the meal break, but rather that “the workers’ on-site presence [was] solely for the benefit of the employer and, in their absence, the company would have to pay others to perform those same services.”¹⁶⁷ The court correctly recognized that the employer was effectively receiving free labor by not compensating these workers.¹⁶⁸

156. *Id.* (quoting *Lamon*, 972 F.2d at 1155-56).

157. *See Lee v. Coahoma County*, 937 F.2d 220, 225 (5th Cir. 1991), *amended and superseded by Lee v. Coahoma County*, 37 F.3d 1068 (5th Cir. 1993).

158. *See generally, infra* notes 243-53.

159. *See Alexander*, 994 F.2d at 339.

160. *See Lee*, 937 F.2d at 225.

161. 6 F.3d 531, 534 (8th Cir. 1993).

162. *See Skimmer v. Swift*, 323 U.S. 134, 136-37 (1944).

163. *See Monahan v. County of Chesterfield*, 95 F.3d 1263, 1267 (4th Cir. 1996); *see also Johnson v. City of Columbia*, 949 F.2d 127, 129 (4th Cir. 1991); *Bagrowski v. Maryland Port Auth.*, 845 F. Supp. 1116, 1119-20 (D. Md. 1994).

164. *See Monahan*, 95 F.3d at 1269.

165. *See Reich v. Southern N.E. Telecomm. Corp.*, 121 F.3d 58, 63 (2d Cir. 1997).

166. *See id.* at 65.

167. *Id.*

168. *See id.*

Further, the Ninth Circuit, while adopting a form of the predominant benefits test, has been more liberal in its review. Several California state court cases have held that meal times are compensable; however, these cases rely principally upon state law and collective bargaining agreement interpretations.¹⁶⁹ That said, the California Court of Appeals shed some light on the interpretation of the § 553.223 provision:

Section 553,15 of title 29 of the Code of Federal Regulations provides in relevant part: . . . Where the employer has elected to use the Section 7(k) exemption, . . . mealtime cannot be excluded from compensable hours of work where . . . the employee is on duty for less than 24 hours.¹⁷⁰

In another case, the Washington State Supreme Court held that meal time of Washington state troopers was compensable both under state law and FLSA standards.¹⁷¹ The court held that the patrolmen were not free agents but were instead under the employer's control during meal time. Therefore, the meal time was work time.¹⁷² In another state court case from the Ninth Circuit, the Arizona Court of Appeals held that officers' meal time was work time under a form of the predominant benefits test.¹⁷³ In addition to construing meal time as work time, the court also held that parties could not waive FLSA rights by a collective bargaining agreement.¹⁷⁴ While these three state court cases interpret both state law and FLSA application to the meal time issue, they follow the Ninth Circuit's rationale in evaluating FLSA regulations.¹⁷⁵ The state courts each used basically the same interpretation of the work time issues and then reached similar conclusions regarding the compensability of meal times: meal times are compensable work time.

These examples indicate the circuit's inconsistent interpretation and demonstrate the need for either a Supreme Court review on the "completely relieved from duty" language, or a re-evaluation of the initial Tenth Circuit "predominant benefits" analysis that led to the varied results.

VI. CRITICAL ANALYSIS

The review and analysis of the subsection (k) exemptions to FLSA will focus on three primary issues. First, whether the exception was necessary

169. See, e.g., *California Association of Highway Patrolmen v. Department of Personnel Admin.*, 229 Cal. Rep. 729, 735-36 (Cal. App. 3 Dist. 1986) (holding that the memorandum of understanding precluded the payment of overtime for meal times, but under FLSA the meal time cannot be excluded from work time).

170. *Id.* at 737.

171. See *Weeks v. Chief of the Wash. State Patrol*, 639 P.2d 732, 734 (Wash. 1982).

172. See *id.* at 734.

173. See *Prendergast v. City of Tempe*, 691 P.2d 726, 730 (Ariz. Ct. App. 1984).

174. See *id.*

175. See *Owens v. Local No. 169, Ass'n of W. Pulp and Paper Workers*, 971 F.2d 347, 350 (9th Cir. 1992) (addressing the general applicability of FLSA to on-call time for the first time, the Ninth Circuit used Swift's predominant benefits analysis model as the starting point, but then went to the Tenth Circuit's poisonous tree for further guidance).

from an economic standpoint, as government employers vehemently pro-pounded will be discussed. Second, whether including law enforcement employees was over-inclusive, or whether excluding other public safety employees was under-inclusive in applying the exemption rationale. Third, assuming that the statute is neither over- nor under-inclusive, whether the court's interpretation and analysis in defining work time is flawed will be addressed.¹⁷⁶

A. IS THE GOVERNMENT EMPLOYER EXEMPTION NECESSARY?

From the embryonic stages of the 1974 FLSA amendment, Congress diverted the amendment's focus from ensuring the fair treatment of employees and addressing the employee's needs to the financial impact that the amendment and its requirements would have on the employer. Congressional hearings were replete with claims of lost services, reduction in public safety capabilities, and doomsday predictions of financial ruin.¹⁷⁷ While the Supreme Court's ruling in *Usery* stayed the amendment's impact, the amendment's wage and hour requirements remained intact until *Garcia* in 1985. Arguably government employers were negligent, or at the very least speculative in their anticipation, regarding the amendment's implications. A more accurate characterization, however, is that they were confident in their belief that the ruling approved employment practices leading up to the 1974 amendment.¹⁷⁸

This reliance resulted in a status quo from 1974 until 1985. The *Garcia* ruling, however, surprised government employers who were confident in their outlook¹⁷⁹ by suddenly removing their cloak of protection from the FLSA. For example, a commentator reviewing the *Garcia* decision in 1985 noted, "[t]he Court's decision in *Garcia* was largely unexpected, and the full ramifications of the decision remain unclear."¹⁸⁰ Despite eleven years of forewarning that the tides were turning against past employment practices, this improvident thinking remained. Now facing post *Garcia* regulations, government employers once again sought relief from the impact of FLSA compliance. As an example, Los Angeles City Attorney James Hahn filed a lawsuit against DOL in an attempt to force a phase-in period for Los Angeles' compliance with the regulations.¹⁸¹ The complaint alleged "irreparable harm in that the increased salaries and other benefits required by the FLSA and paid to the city's public safety employees

176. It bears suggesting that courts have not properly applied statutory interpretation principles in analyzing the exemption, but rather have ignored congressional intent and deviated from the statute's purpose. In doing this, courts have engaged in judicial activism by attempting to balance the economic realities of enforcing compliance against local government employers, which contravenes legislative intent.

177. See generally, Committee Report, *supra* note 10.

178. See Fritsch, *supra* note 67, at 211.

179. See generally, *supra* note 58 and accompanying discussion.

180. Terence G. Connor & Ronald Witkowski, *Garcia v. San Antonio Metropolitan Transit Authority: Public Employers Meet the FLSA*, 59 FLA. B.J. 33 (1985).

181. See *Los Angeles Files Complaint to Require Phase-In Period for Complying with FLSA*, 162 Daily Lab. Rep. (BNA) at A-2 (Aug. 21, 1985).

will not be recoverable at law or equity, crucial city services will be abandoned or inadequately performed, and significant numbers of city employees will be involuntarily discharged.”¹⁸² The complaint also demonstrated the imprudent thinking of the employers of the time. Specifically, employers alleged that had they known of the imminent change, they would have bargained differently with employees in the most recent contract negotiations.¹⁸³ In particular, the city would have negotiated lower salaries to curb the additional costs of FLSA compliance.¹⁸⁴

The veracity of the government employers’ financial claims is at the heart of the question: is the FLSA protection of government employers necessary? In their reply brief in *Usery*, the appellants alleged that upholding the 1974 amendment would increase the cost for police and fire services from 50% to 100%.¹⁸⁵ But, Conrad Fritsch, Senior Economist for the Minimum Wage Study Commission, estimated a 23% increase as the worst-case scenario for police and fire employers due to the FLSA overtime requirements.¹⁸⁶ In a survey of eligible fire protection employees, only about 10% were eligible for the 23% increase.¹⁸⁷ Nationally, the average wage costs pursuant to compliance with the 1974 amendment would increase no more than 2.8%.¹⁸⁸

Likewise, the same the “sky is falling” post *Garcia*, predictions appeared somewhat different in reality. Labor forces accused public employers of exaggerating the impact for political effect.¹⁸⁹ Peggy Connerton, Service Employees International Union Chief Economist, accused public employers of “‘grossly exaggerating the financial costs of the FLSA’s overtime provisions.’”¹⁹⁰ In contrast, the Services Employees International Union survey of all public employees concluded that compliance would result in an increase of only “‘a fraction of a percent and at most 2.5 percent of wages.’”¹⁹¹ The survey further estimated compliance costs at only 0.16 of 1% of the \$184 billion wage bills of state and local governments.¹⁹²

Furthermore, during congressional testimony, Senator Pete Wilson estimated the economic impact to local and state government to be billions

182. *Id.*

183. *See id.*

184. *See id.*

185. *See* FRITSCH, *supra* note 67, at 211.

186. *See id.*

187. *See id.* at 212.

188. *See id.* (noting that this statistic assumes no change in employment levels or tour of duty hours, and that the increases would be lowest in the Northeast regions, but considerably higher in the South, North Central and West).

189. *See Costs of FLSA’s Overtime Provisions Disputed by Unions, Public Employers*, Daily Lab. Rep. (BNA), at A-8 (July 26, 1985).

190. *Id.*

191. *Id.*

192. *See id.*

of dollars.¹⁹³ He estimated a \$300 million cost to California alone.¹⁹⁴ In contrast, the DOL estimate of the 1974 Amendment's impact was only \$27 million nationwide.¹⁹⁵ Recognizing the impact, but somewhat impassively dismissing the local complaints, the DOL stated:

Whatever impact there is, however, is the result of the 1974 Amendments, which, after Congress had considered these same arguments, expressly extended overtime protection to employees engaged in fire protection and law enforcement activities. Moreover, the extent to which the Act will have a cost impact on such public agencies depends, in large part, upon which of the several alternatives open to them the State and local jurisdictions elect to use.¹⁹⁶

Clearly, the true nature of the Amendment's financial impacts were unknown. Furthermore, based on its statement, the DOL did not view the impact as a significant impediment to applying FLSA regulations to local government employers, and as it succinctly pointed out, Congress implicitly dismissed these concerns by passing the amendment.¹⁹⁷

Also questionable is whether the exemption to government employers was a necessary solution to a real problem or merely a federal response to political pressure from state and local governments. When Congress implemented the 1974 amendments, approximately 4% of public sector employees were receiving wages at or below the minimum wage level.¹⁹⁸ Based on national wage distributions estimated from the Current Population Survey, conducted in May, 1974, the percentage of public sector employees at or below the minimum wage actually increased to 10.1% in 1980—during the time that *Usery* stayed enforcement of the FLSA amendment.¹⁹⁹ This data indicate that during the time period when government employers were exempt from FLSA regulation, more of their employees were forced into the poverty ranks. Because public sector employers were not keeping pace with their private sector counterparts or their workers' wage requirements, they did not need protection from FLSA. Public sector employers were actually the specific targets of the FLSA regulations.

Further, Congress's intent in passing the 1974 amendments was to insure government compliance with the rules it was imposing on the private sector. Senator Williams, during floor debate on S.2747, stated on February 28, 1974, that:

There are a number of reasons to cover employees of State and local governments. The committee intends that Government apply to it-

193. See 131 CONG. REC. S9489-03 (daily ed. July 15, 1985) (statement of Sen. Wilson).

194. See *id.* at 39. Sen. Wilson quoted Los Angeles Mayor Tom Bradley in estimating the cost to Los Angeles alone at \$50 million. He then went on to explain that the incremental costs to Los Angeles County would exceed \$50 million.

195. See *Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities*, 39 Fed. Reg. 44,142 (1974).

196. *Id.*

197. See *id.*

198. See FRITSCH, *supra* note 67, at 218.

199. See *id.*

self the same standard it applies to private employers Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in Government business.²⁰⁰

This is certainly not a unique position for the federal government to take. James Madison advocated this equity principle as early as 1790.²⁰¹ Madison wrote in Federalist No. 57, “[c]ongress can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”²⁰² Additionally, Thomas Jefferson wrote, “the framers of our constitution . . . [took] care to provide that the laws should bind equally on all, and especially that those who make them shall not exempt themselves from their operation.”²⁰³

Given the application of the subsection 207(k) exemption, this equal compliance seems displaced. Congress never intended subsection (k) to allow government employers to avoid paying overtime wages, but rather to “soften the impact of the FLSA on the fire protection and law enforcement activities of state and local government”²⁰⁴ Thus, state or local government employers’ continued lobbying, and federal legislators continued granting of immunity from FLSA provisions not only exceeds the intent of the 1974 Amendment, but also run afoul of the inherent qualities of fairness and equality before the law upon which this nation was founded.

B. IS THE SUBSECTION 207(K) EXEMPTION OVER-INCLUSIVE OR UNDER-INCLUSIVE?

On another front, the subsection 207(k) exemption is vulnerable to criticism based on the breadth of its application. In its present application to police and fire employees, the provision may be over-inclusive or perhaps under-inclusive. This evaluation rests on the intent of Congress’ in presenting the Amendment in its original form and the legislative process that created the Amendment’s ultimate form.

Placing all law enforcement employees in the “expanded work period” solution to the proposed amendment appears over-inclusive. Reviewing the original proposal and floor debate that accompanied the amendment, concerns regarding the inclusion of public sector employees in FLSA coverage centered on the financial impact of compliance on state and local government employers.²⁰⁵ In his opening remarks, Senator Dominick, for himself and, his co-sponsor Senator Taft, qualified the issue of government employee coverage with the following statement:

The second difference between this bill and the substitute I sponsored last year is that this bill would extend [FLSA.] coverage to

200. COMMITTEE REPORT, *supra* note 10, at 1649.

201. *Should Congress Be Above the Law*, HERITAGE FOUND. REP., November 2, 1993.

202. *Id.*

203. *Id.* (alteration in original).

204. H.R. REP. NO. 101-260, at 10 (1989).

205. *See* Committee Report, *supra* note 10, at 2.

some 4.7 million Federal, State, and local government employees not now covered by the Fair Labor Standards Act The extension of basic minimum wage coverage to additional government employees since it does not include overtime coverage, would have a relatively slight cost impact.²⁰⁶

The bill provided a five year phase-in period for law enforcement and fire protection personnel, ultimately resulting in a 160 hour work period in 28 days.²⁰⁷ In effect, this would have given all government employees, public safety employees included, a 40 hour work week or its equivalent after five years of gradual phase-in. The work schedule provision would amend section 7 “to provide for overtime averaging over a twenty-eight day period and a phase down from 48 to 40 hours per week without time-and-a-half penalty for state and local government employees engaged in fire protection and law enforcement activities, including security personnel in correctional institutions.”²⁰⁸

This indicates that Congress, or at least the Senate, favored a 40 hour work week for all employees, including government employees. The proposed provision furthered the goal of having FLSA provide both consistency to employment relationships and stability to wages on a national scale.

In contrast to the Senate version, however, the House version of the Amendment proposed a total exemption from FLSA coverage for “any employee of a State or political subdivision of a State engaged in fire protection or law enforcement activities; or”²⁰⁹ This provision would effectively eliminate FLSA coverage of these particular employees.

As the amendment progressed through the legislative process, the financial impact of FLSA compliance became the heart of the House version of the amendment. Reflecting the House’s acquiescence to a certain amount of overtime for police and fire protection employees, Representative Frenzel stated:

I voted for the House bill because these employees were specifically exempted. I cannot vote for the conference report, because the House has accepted the Senate language, and that language would be disastrous for the municipalities in my area Municipal budgets are fine-tuned to municipal levies and levy limits. Municipalities cannot stand uncertainties [For example,] St. Louis Park, Minn., a town of 55,000 in the middle of my district, computes its extra costs over the 5-year period at today’s wage and fringe scales to be nearly \$1 million Realistically its only alternatives are first, to cut fire-fighting services or second, to cut some other needed local service and then decide whether to pay overtime or hire new firefighters.²¹⁰

206. Committee Report, *supra* note 10, at 2.

207. See S.1861, 93rd Cong. § 1 (1973).

208. Committee Report, *supra* note 10, at 55.

209. H.R. 7935, 93rd Cong. § 1 (1973).

210. Committee Report, *supra* note 10, at 1190.

Concern over fire department liability, not other public safety services such as law enforcement or emergency medical care, drove this financial tug-of-war. In reality, most other service providers use the more traditional 40 hour work week, as opposed to the "kelley" schedule fire departments use.²¹¹ Accordingly, very few law enforcement or emergency medical employees work more than 168 hours in a 28 day work period.²¹² Therefore, the danger lay in the fire protection employees' 24 hour shift responsibilities, not other public safety services. If it were truly a safety issue, however, in which response to emergency situations was the concern, why weren't the water, streets, and traffic maintenance personnel included? Given that a traffic jam or weather related emergency can occur frequently, these personnel are necessary inclusions to any emergency situation provision.

In fact, fire department liability was the gravamen of the debates and comments concerning the subsection (k) exemption. For example, Representative Frenzel, in consideration of H.R. 7935 (H. Rep. 93-413), stated on August 3, 1973, that his primary concerns were the liability exposure of fire protection personnel; in fact, he mentioned no other service professionals in his comments.²¹³ Representative Keating, who touted his past government service as a basis for rejecting any bill that provided overtime for fire protection employees joined Representative Frenzel in his comments.²¹⁴ Connecticut Representative Sarasin also echoed a concern for the liability of covering fire department personnel,²¹⁵ as did Representative J. William Stanton.²¹⁶

Additionally, during Senate debate on March 7, 1974, Senator Williams stated that the subsection 207(k) exemption was a direct result of "the specific problems firemen face" by inclusion under FLSA regulation.²¹⁷ He added,

211. Kelley schedules are a variation of 24 hours on duty, 48 off duty, taking into consideration that some of the on duty time is spent on personal endeavors such as eating, sleeping, or watching TV.

212. See FRITTSCH, *supra* note 67, at 212.

213. See COMMITTEE REPORT, *supra* note 10, at 1190-91.

Mr. Frenzel. Mr. Speaker, a review of the conference report has confirmed my belief that the House conferees have receded to the Senate in some of its important provisions. The provision most important to me and to my constituents is the one that relates to coverage of public safety and fire fighting employees

Firefighters in my district work 24-hour shifts with 48 hours off. Their total hours in a normal 28-[day work] week period would be about 228 However, if fire calls occur during the sleep time, this exemption is lost. Since fire calls are unpredictable, overtime is unpredictable.

Rep. Frenzel's comments continued to explain the burdens of fire protection services if Congress mandated FLSA compliance. See *id.*

214. See *id.* at 1191.

215. See *id.* Rep. Sarasin related that in the Connecticut state legislature, a similar provision for wage and overtime provisions created a dilemma when applied to the fire departments. See *id.*

216. See *id.* at 1192. Rep. Stanton stated that the overtime provisions in the conference bill would "raise havoc in the small towns and communities" in his district. See *id.*

217. See Committee Report, *supra* note 10, at 1935.

[t]he committee believes that these regulations adequately allow for the unique work schedules of firefighters while providing for those who daily protect our lives the basic protections of the FLSA. We believe that these employees are entitled to the same protection of the act as we are affording all other State and local government employees.²¹⁸

Other opposition to the overtime protection included comment from Senator Dominick, who presented a letter from R.N. Linrothe, director of the City of Aurora, Colorado, which detailed his specific concern regarding fire department scheduling and overtime liability.²¹⁹ In addition, Arizona Senator Fannin expressed concern, stating:

Mr. President, I commend the distinguished Senator from Ohio [Senator Dominick] for his statement regarding the problems that exist with respect to the provision in this bill that would apply to firemen. I had some local officials in my office today, complaining bitterly about this provision and giving expression about the tremendous cost involved, when it is not even fair to the firemen.²²⁰

Senator Helms' comments dealt exclusively with the burdens of funding fire department overtime liability balanced against the relatively small percentage of active fire suppression duties performed.²²¹ Likewise, Senator Tower voiced the concerns of Texans that the liability of funding fire department overtime provisions would be devastating: "Just to give my colleagues an example, I have been informed by city officials in Dallas that this extension of overtime coverage for firemen will cost that city \$6 million in its first year."²²²

Other examples permeated the Congressional record as the debate on overtime compliance and municipal finances flourished, but the underlying tenant was clear: funding liability for fire protection personnel was the critical issue, not funding for law enforcement, emergency medical personnel, or any other public safety employees. Representative Dent explained that the issue nearly deadlocked the 1974 Amendment, and that the Senate gave up public safety coverage to gain concession from the House.²²³ He noted:

It will be determined on the national basis of the work schedules of the firemen on [the] one hand and of the policemen on the other, because we know that the conditions that obtain in the firefighters' work schedules are completely different than those worked by policemen.

Yet, we applied to the police the exact same formula that we applied to the firemen. We believe that under the conditions we were faced with, a situation that plainly told the Members of the House that unless we did something for firemen and policemen, the Senate

218. *Id.* at 1936.

219. *See id.* at 1939.

220. *Id.* at 1799.

221. *See id.* at 1931-34.

222. *Id.* at 1936.

223. *See* Committee Report, *supra* note 10, at 2381-83.

would move to deadlock the conference.²²⁴

Quite obviously, the debate's focus in both the House and Senate was over the firefighter issue. But Congress was not alone in its recognition of this emphasis. The Labor Relations Reporter, April 15, 1974, noted "[t]he Committee intends this regulation to be applicable to the numerous local fire fighting units which work 24 hour shifts."²²⁵ The Reporter further stated,

[t]he Senate floor manager expanded upon the intent of this provision in the debate preceding final passage of the conference report. Senator Williams noted: "In establishing this 'tour of duty' concept as a new element of the [FLSA], the conferees were recognizing that the work schedule of fire fighters is dictated by the needs of the community."²²⁶

Furthermore, in the Notice of Hearing on the Hours of Work for Firemen and Policemen, the DOL set out an interim rule. Although the rule was to apply to both fire protection and law enforcement employees, the regulation concludes with "[t]hus for firemen with tours of duty of 24 hours or less no time may be deducted for meals or sleeping."²²⁷

Although the statute included a law enforcement employees category, they were not the focal point of the issue nor were they the problem. For example, after the DOL concluded its study to determine the average hours for overtime consideration, it assigned law enforcement personnel the threshold of 171 hours in a 28 day work period.²²⁸ Another DOL study concluded, however, that law enforcement personnel nationwide worked an average of only 165 hours in a 28 day period.²²⁹

In summary, political conciliation, not factual comparability, included law enforcement employees in the exemption from overtime protection as a means of appeasing the powers that be in the House. Thus, based upon incomplete knowledge of the true problem,²³⁰ Congress arbitrarily included law enforcement personnel in the subsection 207(k) exemptions. Consequently, whether they were properly included remains an unanswered question.

Moreover, if Congress intended for the exemption to cover law enforcement employees, what is the logical rationale for excluding other

224. *Id.* at 2383.

225. GERALD M. FEDER, HIGHLIGHTS OF THE NEW WAGE AND HOUR LAW 17 (1974).

226. *Id.* at 18.

227. 39 Fed. Reg. 17,597 (1974).

228. See 29 C.F.R. § 553.230; see also, 48 Fed. Reg. 40,519 (1983).

229. See FRITSCH, *supra* note 67, at 228. Table A-4 indicates that the average hours state and local law enforcement personnel worked in 1975 (the year of the Department of Labor 171 hour study) was 165-164 for State and 166 for local. The cited source was U.S. Department of Labor Employment Standards Administration *Non Supervisory Fire Protection and Law Enforcement Employees in State and Local Government*, (Dec., 1975, Table 5). See *id.*

230. See Committee Report, *supra* note 10, at 2422. Senator Schweiker stated, "One of the reasons for the strong differences between the House and Senate was, as the Senator from Ohio pointed out, there is a lack of knowledge of the practices, of the hours of work and patterns of work that firemen particularly have in their jobs." *Id.*

public safety employees? Any emergency situation that a local or state government faces does not normally necessitate response from a single agency. Support functions exist for any emergency. Ancillary agencies include streets and maintenance, water department, traffic signal maintenance, and logistical support personnel. In an emergency situation, paying one fragment of the government response unit overtime and not the other is illogical. Yet this is the result of the present statute's application.

C. JUDICIAL ANALYSIS

This final discussion concerns the judicial interpretation analysis applied to the subsection 207(k) exemption. Assuming that the intended scope of subsection 207(k) was to include the law enforcement employee, the exclusion of meal times from compensable work time is still an inappropriate exclusion from FLSA coverage.

Public sector employment law litigation focuses almost exclusively on the application of subsection 207(k).²³¹ The exclusion of meal time from the definition of hours worked is the overwhelming dispute. The Supreme Court has explicitly refused to set forth bright-line rules regarding meal time and work time.²³² In *Swift*, the Supreme Court noted that these cases are so fact specific that the trial court and fact finder are better able to determine whether meal time is work time.²³³ Leaving the issue to trial courts resulted in an inherent divergence of opinion. Without Supreme Court precedent, any resultant pattern of interpretation generally follows the first circuit court to interpret an issue. Resulting legal principles therefore rely upon the fortuity of which court first decides an issue and in what type of case that that decision is made.

1. *The Judicial Analysis Fails to Follow Accepted Rules of Statutory Interpretation*

The Tenth Circuit was one of the first courts that tried to quantitatively address the meal time versus work time issue. In *Lamon*,²³⁴ the court recognized that the compensability issue revolved around the interplay between 29 CFR §§ 785.19 and 553.223.²³⁵ The crux of the issue is what standards are used to determine whether the employee is working and what test is used to interpret work.²³⁶

The *Lamon* court began its analysis by noting the similarity between the two regulations. They interpreted the more general of the regulations, § 795.19, to apply to all FLSA employee relationships. For the more specific subsection 207(k) employers, the court applied the more specific regulation, § 553.223. This standard correctly recognized the dif-

231. See FEDER, *supra* note 225, at 17.

232. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).

233. See *id.* at 136-37.

234. See *Lamon v. City of Shawnee*, 972 F.2d 1145, 1147 (10th Cir. 1992).

235. See *id.* at 1156-57.

236. See *id.*

ferences between the two employment relationships, and the trial court correctly applied the more specific regulation in deference to the employee.²³⁷

Finding the District Court's jury instructions on the proper standard for applying the "completely relieved from duty" language in § 553.223(b) improper, the Tenth Circuit abandoned the basic principles of statutory interpretation. When interpreting a statute, courts must start with the statute's language,²³⁸ and reviewing courts must look first and foremost to the statute's text.²³⁹ Presumably, Congress, in making laws and changes, intends that its amendments have real and substantial meaning and effect.²⁴⁰ Accordingly, Congress used the emphatic term "completely relieved from duty," as opposed to simply "relieved from duty" for a reason. Courts are to enforce statutory language according to its terms²⁴¹ and enforce the statute's plain meaning.²⁴² Absent some contrary indication, court should assume that words in a statute bear their ordinary, contemporary, and common meaning.²⁴³

By applying a meaning other than the unambiguous ordinary meaning of "completely relieved from duty," the court improperly overruled the trial court and disregarded the jury's findings. It not only overlooked the plain language of the statute, but also eviscerated the word "completely" from the statute. Courts must interpret statutes, if possible, to give each word some operative effect.²⁴⁴ No judicial necessity mandated exceeding the statute to understand the regulation's meaning. For a statute to be unambiguous, it need only be plain to anyone reading it and encompass the conduct at issue.²⁴⁵ Without question, therefore, the terminology "completely relieved from duty" means what it says. In addition, the referral to § 785.19, which explains that the employee is not relieved from duty if he or she performs any duties, whether active or inactive, further underscores the intent of "completely." Conversely, reconciling an interpretation or construction, which could sustain a conclusion that the phrase "unless the employee's time is spent predominantly for the benefit of the employer" is synonymous with "completely relieved from duty," is difficult.

Therefore, the Tenth Circuit's "predominant benefits test" for evaluating meal time as work time is an example of improper statutory construction. Complicating the issue is that other courts and circuits subsequently used this test, however ill conceived, to determine the compensability of

237. *See id.*

238. *See Bailey v. United States*, 516 U.S. 137, 144 (1995).

239. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994).

240. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995).

241. *See Arkansas v. Farm Credit Serv. of Cent. Ark.*, 520 U.S. 821, 827 (1997).

242. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993).

243. *See Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 207 (1997).

244. *See id.* at 209.

245. *See Salinas v. United States*, 522 U.S. 52, 60 (1997).

meal times in other claims. The rotten fruit of the Tenth Circuit's tree has contaminated the barrel of ensuing cases.

2. *The Courts Have Engaged in Judicial Activism*

Another criticism of the Tenth Circuit's *Lamon* decision is that the court engaged in judicial activism by going beyond the words of the statute. For unstated reasons, the Tenth Circuit ventured far from the statutory language and essentially acted as a judicial legislature. In a statutory construction case, the beginning of any analysis must be the language of the statute itself. When the statute speaks with clarity to the issue, judicial inquiry into the statute's meaning, in all but the most extraordinary and rare circumstances, ceases.²⁴⁶ Thus, if the intent of Congress is evident from the language of the statute, the matter is closed.²⁴⁷

Inquiry must cease when statutory language is unambiguous and the statutory scheme is coherent and consistent.²⁴⁸ Courts must ordinarily regard the statute's unambiguous language as conclusive, in the absence of clearly expressed legislative intent to the contrary.²⁴⁹ In *Lamon*, the Tenth Circuit took a plainly written protective statute and forced an obtuse interpretation from a prior, factually distinguishable Supreme Court ruling.²⁵⁰ In so doing, the court ignored the statute's plain language and rendered it meaningless. This further renders worthless notions of judicial restraint, because courts ordinarily must resist reading into a statute words or elements that do not appear on its face.²⁵¹

Under FLSA, the employer who opts for the subsection 207(k) exemption gains the benefit of a work period expanded up to 28 days, within which the regular hours of pay threshold is increased to 216 from 171, as opposed to the regular 40 hour work week under subsection 207(a)(1).²⁵² Furthermore, in subsection 207(k) situations, the meal period provision specifically states that unless specific restrictions are met, the employer may not discount meal time for shifts under 24 hours.²⁵³ The *Lamon* court reasoned that the added requirements were on the employee, rather than on the employer.²⁵⁴ This statute's logic conflicts with not only the intent, but with a literal reading of the statute's wording.

In the first proposal of the CFR regulations, the code stated an employee's complete relief from duty as its only requirement.²⁵⁵ No caveat existed for bestowing a benefit on the employer by any activity or any

246. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

247. See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993).

248. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

249. See *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

250. See *Lamon v. City of Shawnee*, 972 F.2d 1145, 1156-57 (10th Cir. 1992).

251. See *Bates v. United States*, 522 U.S. 23, 29 (1997).

252. See *Lamon*, 972 F.2d at 1154; see also 29 U.S.C. § 207(k); 29 U.S.C. § 207(a)(1).

253. Specifically, the employee must be completely relieved from duty, as well as meeting the requirements of § 785.19. See *Lamon*, 972 F.2d at 1155-56.

254. See *id.*

255. See *Draft Regulations Applying FLSA to State and Local Public Safety Agencies*, GOV'T EMPLOYEE REL. REP. (BNA) No. 1150, at 192 (Feb. 10, 1986).

restrictions on activity—the genesis of the “predominant benefits” test. Subsequent drafts also contained no restrictive language. Evidently, the code’s intention was not to be more generous to employers than the general language of § 785.19.

Apparently, Congress’ intent in codifying the DOL’s rules was to protect employees from over-reaching employers, who already had the advantage of expanded work periods. This was an impermissible invasion of an employee’s time, inasmuch as the principles, as well as the language itself of the FLSA does not allow the employer to claim all of an employee’s time, but only to compensate him for part of it.²⁵⁶

3. *The Courts Were Blinded by the Light*

An admittedly more subjective suggestion is that the Tenth Circuit was unable to overcome the doomsday claims of financial ruin the representatives of government employers propounded and therefore attempted to affix a legal justification to a fiscal dilemma. The Tenth Circuit’s seemingly intentional deviation from statutory language in adapting the predominant benefits test to the meal time issue supports this proposition.

However, Congress also faced a somewhat similar situation and was guilty of a comparable acquiescence. Following the *Garcia* ruling in 1985, the same doomsday prophets of 1974 returned to Congress and offered predictions of vast financial ruin and massive reductions in public safety services if Congress did not grant government employers relief from *Garcia*.²⁵⁷ This was a surprising prediction, or at least premature, because the provisions that *Garcia* mandated were yet unimplemented and the government employer had not yet been subject to a fiscal year of operation under FLSA regulation. Nevertheless, they claimed that government employers needed a further concession immediately. Ultimately, Congress relented and granted the subsection 207(o) exception to local government and state employers—allowing the use of compensation time in lieu of paying of overtime as a conciliatory response to their post *Garcia* pleas.²⁵⁸

Nonetheless, the Tenth Circuit’s judicial action overlooked the basic principle of statutory interpretation that Congress presumably acts intentionally and purposefully when it includes particular language in a statute.²⁵⁹ Furthermore, courts shall attempt to avoid any statutory interpretation that renders some words or terms altogether redundant.²⁶⁰

By eliminating the use and meaning of the word “completely” from the statute’s language, the adopting courts went beyond the statute’s scope. Arguably, the predominant benefits test wholly eliminated the code’s

256. See *Leahy v. City of Chicago*, 96 F.3d 228, 234 (7th Cir. 1996) (J. Cudahy, dissenting).

257. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1995).

258. See 29 U.S.C. § 207(o) (1994).

259. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

260. See *United States v. Alaska*, 521 U.S. 1, 59 (1997) (citation omitted).

plain language, replacing it with convoluted common law legislation. This violates the principal that the courts may only deviate from a statute's plain language in rare and exceptional circumstances.²⁶¹ If a statute's meaning is plain, the reviewing courts must defer to the Congressional intent expressed in the statute.²⁶² A strong presumption persists that the plain language of a statute expresses Congress' intent.²⁶³

An additional consideration is the Supreme Court rulings in thirty six other cases, in which it has interpreted some form of the term or phrase "relieved from duty."²⁶⁴ Not one of those cases contained an alternative interpretation of "relieved from duty" nor did any case apply an apportioned or gradient version of the term's definition and application.²⁶⁵ In each case, the court applied the ordinary and common meaning to the word "relieved," which was to release from an obligation, condition, or restriction.²⁶⁶

Therefore, the logical conclusion is that the Tenth Circuit was exercising judicial discretion beyond their capacity as a reviewing court. In the eloquent manner of Justice Cordozo, they were simply unable to distinguish between the two filaments in the bulb: (i) plain statutory language; and (ii) the predicted economic impact.²⁶⁷ The light shone bright for both, but the court was unable to look beyond the brighter filament of economic impact and hold for plain statutory language. That bright light has continued to blind the judiciary as other courts have adopted the Tenth Circuit's flawed analysis.

VII. CONCLUSION

A. SUMMARY

Based on the over-reaching benefits the application and interpretation of the subsection 207(k) exemption allows government employers, employees are losing millions of dollars in wages each year. As every alpha has its omega, government employers are gaining the benefit of receiving "free" labor in an equal amount. Based on an approximated average wage of a metropolitan public safety employee, an individual employee will lose over \$4,000 per year in unpaid overtime wages.²⁶⁸ In the law

261. See *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991).

262. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

263. See *Rubin v. United States*, 449 U.S. 424, 430 (1981).

264. See, e.g., *Perpich v. Department of Defense*, 496 U.S. 334 (1990); *Breinger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67 (1989); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989); *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Thomas v. Arn*, 474 U.S. 140 (1985).

265. See cases cited *supra* note 264.

266. See *MERRIAM WEBSTER'S COLLEGE DICTIONARY* 988 (10th ed. 1993).

267. See *Shepard v. United States*, 290 U.S. 96, 106 (1933) (borrowing the metaphor from Justice Cordozo's evidentiary ruling in that case).

268. This figure is based on an average hourly wage of \$9.00 per hour. One hour of uncompensated meal time per work day multiplied by fifty (50) work weeks. In addition,

enforcement profession alone, that amounts to over \$2.016 billion in government savings every year.²⁶⁹ Not surprisingly, government employers are adamant that they need this fiscal benefit. The drastic and deplorable conditions that first led to consideration of the FLSA back in the dark days of 1938 are beginning to look more pale as the impact of the more recent indignities are brought to light.

Furthermore, the government's duplicity is on the one hand forcing private employers to keep up with the rate of inflation and personal needs of their employees through minimum wage regulations, benefit retention statutes, and labor protection laws,²⁷⁰ while on the other hand granting immunity or relaxed requirements to government employers. Listening to the predictions of lost jobs, increased unemployment, minimal assistance value, and increased crime rates that will accompany another minimum wage hike, one might think that the government lobbyists from 1974 and 1985 are back, this time forecasting for business.²⁷¹ Given the \$2.016 billion savings that past squealing generated for government employers, this may be a well tested method of gaining legislative support and generating judicial blindness. One certainly could not blame the private sector for trying.

Anyway one slices it, using the subsection 207(k) exemption is a government abuse. It is a financial "golden goose" for the government employer, an unfair advantage over the private sector employer, and ultimately a disservice to the tax paying public because, in the end, the public loses. Whether through costs of litigation brought against the government employer, reductions in work output by government employees, or simply a detriment to one of the vital responsibilities of government—public safety, the cost is high.

B. EPILOGUE

In 1996, the Supreme Court ruled in *Seminole*²⁷² that Congress could not abrogate the state's sovereign immunity guaranteed under the 11th Amendment. While the breadth of the *Seminole* opinion is beyond the scope of this article, it does merit a brief discussion herein.²⁷³ In *Semi-*

eleven (11) hours of uncompensated overtime exists for every work period of twenty eight days.

269. See FBI UNIFORM CRIME REPORT, 1994 (Based on 501,823 law enforcement employees in 9,907 cities nationwide multiplied by the \$4,018.50 figure above).

270. See *The Politics of Minimum Wages*, CHI. TRIB., February 17, 1998, at 10 (President Clinton proposes another minimum wage hike); Charles Oliver, *Do Americans Hate the Rich?*, INVESTOR'S BUS. DAILY, February 20, 1998, at A1 (Business executives dispute the need and effects of a minimum wage hike); Max Lyons, *A Minimum Wage Gives Families Minimal Help*, BUS. WK., February 23, 1998, at 12 (Economic predictions of lost jobs due to minimum wage hike).

271. See Lyons, *supra* note 270.

272. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

273. The opinion was a 5-4 decision, with Justice Stevens writing a dissenting opinion, and Justice Souter filing a separate dissent, joined by Justices Ginsberg and Breyer. The distinction between whether Congress exercised power under the 14th Amendment or the Commerce Clause has somewhat whittled away the decision. See *id.*

nole, the Supreme Court struck down 25 U.S.C. § 2710(d)(7), in which Congress purported to authorize Indian tribes to sue states in federal court to enforce the Indian Gaming Regulatory Act of 1988.²⁷⁴ The state of Florida argued that this suit violated its sovereign immunity and the Supreme Court agreed.²⁷⁵

This holding effectively eliminated the federal court's jurisdiction over a suit brought by individuals against the state for the enforcement of a federally created statutory right created pursuant to Congress' power under the Interstate Commerce Clause.²⁷⁶ However, when Congress exercises power based on section 5 of the 14th Amendment, the state's immunity may be abrogated.²⁷⁷ The test of valid exercise of authority under *Seminole* is two fold: first, Congress must unequivocally express an intent to abrogate the state's immunity; and second, Congress must act pursuant to a valid exercise of its power.²⁷⁸

Accordingly, all of the circuits that have addressed the issue following *Seminole* have held that the FLSA's minimum wage and overtime provisions do not validly abrogate the States' 11th Amendment immunity. The circuits have rejected explicitly or implicitly, the argument that the wage and overtime provisions serve a valid 14th Amendment purpose.²⁷⁹ Furthermore, attempts to impute federal jurisdiction by arguing that while FLSA itself is not based on Congress's power under the 14th Amendment, the enforcement of FLSA regulations is a valid section 5 exercise of authority have likewise failed.²⁸⁰

The impact of these cases ensures that future claims of FLSA violations against state employers will be heard in state courts, which arguably are a more state employer friendly venue. After abdicating the adjudication of these issues to the states, perhaps the time is ripe for the Supreme Court to visit the subsection 207(k) exemption and to put an end to this unfortunate distinction. The illusive question remains, does "completely" mean completely?

274. See *Seminole*, 517 U.S. at 47.

275. See *id.* at 76.

276. See *id.*

277. See *id.*

278. See *id.*

279. See *Powell v. Florida*, 132 F.3d 677, 678 (11th Cir. 1998), cert. denied, 118 S. Ct. 2297 (1998); *Quillin v. Oregon*, 127 F.3d 1136, 1138-39 (9th Cir. 1997); *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37, 48-49 (1st Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 816-18 (10th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208-11 (6th Cir. 1996); *Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1997) (stating that, in light of *Seminole Tribe*, "[t]he only issue is whether Wisconsin has waived its 11th Amendment immunity from suit in federal court under the FLSA" and citing *Mills*, *Raper*, and *Wilson-Jones*).

280. See discussion *supra* note 279 (Three of these courts, however, expressly reserved the question of whether the Equal Pay Act validly serves a 14th Amendment purpose. See *Mills*, 118 F.3d at 48; *Aaron*, 115 F.3d at 817; *Raper*, 115 F.3d at 624).

