No. 17-____

IN THE

# Supreme Court of the United States

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AMERICAN FUTURE SYSTEMS, INC. d/b/a
PROGRESSIVE BUSINESS PUBLICATIONS, *et al.*,

*Petitioners,*

v.

R. ALEXANDER ACOSTA, SECRETARY,
U.S. DEPARTMENT OF LABOR,

*Respondents.*

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

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the case at bar, the United States Court of Appeals for the Third Circuit held that an employer must compensate all employee breaks of 20 minutes or less as "working" time under the Fair Labor Standards Act even though the timing, conditions, and duration of each break were determined by the employee taking the break. The court also made this decision without reference to which party—employer or employee—primarily benefitted from the break.

The Question Presented is: Whether compensability of "break" time should (as this Court and the Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits have held) be determined based on an assessment of all the facts and circumstances of the break, or should (as the Third, Ninth, and Eleventh Circuits have declared) be subject to bright-line rules advocated by the Department of Labor.

## RULE 29.6 STATEMENT

Petitioner American Future Systems, Inc. d/b/a Progressive Business Publications states that it has no parent corporation and that no publicly held corporation owns more than 10 percent of American Future Systems' stock.

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## PETITION FOR A WRIT OF CERTIORARI

American Future Systems, Inc., d/b/a Progressive Business Publications, and its President, Edward Satell, respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1a-28a) is reported at 873 F.3d 420. The decision of the District Court (Pet. App. 32a-70a) is not published in the *Federal Supplement* but is available at 2015 WL 8973055.

## JURISDICTION

The Court of Appeals issued its opinion and judgment on October 13, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. § 206(a):

> (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) except as otherwise provided in this section, not less than—
>
> (A) $5.85 an hour, beginning on the 60th day after May 25, 2007;
>
> (B) $6.55 an hour, beginning 12 months after that 60th day; and

> (C) $7.25 an hour, beginning 24 months after that 60th day . . . .

The Court of Appeals also relied on an interpretive guideline issued by the Department of Labor, 29 C.F.R. § 785.18. It reads:

> Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell v. Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945)).

## STATEMENT OF THE CASE

### A. The Statutory and Regulatory Framework

When Congress enacted the FLSA in 1938, it did so in the context of an economic and legal landscape that differs dramatically from what we know today. In 1930, those employed in the manufacturing sector made up nearly 29 percent of the American workforce—the largest share of any sector of the economy.[1] In 2010, by contrast, employees in manufacturing jobs comprised just over ten percent of the workforce.[2]

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[1] U.S. Dep't of Comm., Statistical Abstract of the United States tbl. 54 at 61 (1940).

[2] U.S. Dep't of Comm., Statistical Abstract of the United States tbl. 620 at 399 (2012).

Despite the prevalence of manufacturing during the late 1930s, production workers were not thriving. In his annual message to Congress in 1938, President Franklin D. Roosevelt decried the "starvation wages and intolerable hours," urging Congress to "end" such conditions through legislation.[3] President Roosevelt had previously told Congress that "goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."[4] It was against this backdrop that Congress drafted the FLSA.

At its core, the FLSA contains two key provisions: a guarantee of a minimum hourly wage, and a promise of additional compensation for hours worked above a certain weekly threshold. The FLSA grants the Secretary the authority to investigate whether employers have violated the FLSA and to bring enforcement actions against employers.[5]

In regard to the minimum wage, the FLSA requires that "[e]very employer shall pay to each of his employees . . . wages at [certain specified, minimum] rates."[6]

The FLSA also sets standards regarding an employer's overtime obligations. Those provisions require that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such

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[3] Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938).

[4] Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937).

[5] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 211, 217.

[6] *Id.* § 206(a).

employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[7] The FLSA does not require an employer to pay overtime when defined conditions are met, such as an employee under a collective bargaining agreement that limits hours to one thousand and forty hours during twenty-six week periods or a retail or service employee who makes more than one and half times the minimum hourly rate, with more than half his compensation in commissions.[8] Likewise, minimum wage and maximum hour requirements do not apply to certain classes of employees, such as a bona fide executive, administrative, or professional employee.[9]

For all its focus on "workweek[s]" and hours worked, the FLSA does not actually define "work."[10] Nor does the statute define "breaks" (or, for that matter, require employers to give breaks to their employees).[11] Absent such definitions, the "ultimate decisions on interpretations of the [FLSA] are made by the courts"[12]—an obligation that the courts have discharged with rigor and care for three-quarters of a century.

To be sure, the Department's Wage and Hour Division has promulgated interpretive guidelines regarding activ-

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[7] *Id.* § 207(a).

[8] *Id.* § 207(b)(1).

[9] *Id.* § 213.

[10] *See id.* § 203 (omitting any definition of "work"); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005) (stating that the FLSA does not define "work").

[11] *See also Mitchell v. JCG Indus.*, 753 F.3d 695, 702 (7th Cir. 2014) (Posner, J. concurring) (stating that the FLSA does not require lunch breaks).

[12] 29 C.F.R. § 785.2.

ities that qualify as "work."[13] But those guidelines—first promulgated in 1961 and based on interpretive bulletins first issued by the Department in 1940[14]—expressly disclaim any argument that they carry the force of law.[15]

Finally, it bears reiterating that those guidelines (and their previous interpretive incarnations) were issued in the context of the long-hour factory conditions of the 1930s and '40s—not the telesales workplace of the 21st century. Nevertheless, the language used by the Wage and Hour Division in 1940

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[13] *See e.g.*, *id.* § 785.16 (defining off-duty as hours not worked); § 785.18 (defining rest breaks as hours worked); *id.* § 785.19 (defining bona fide meal breaks as not hours worked).

[14] Wage and Hour Division, U.S. Department of Labor, Press Release, June 10, 1940 ("Employees coming under the provisions of the Fair Labor Standards Act must be paid for short rest periods . . . . A 'short' rest period . . . will include periods up to and including 20 minutes."); *see also* Interpretative Bulletin No. 785.3(c) (1955) ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked."). Interpretive bulletins, however, "are not issued as regulations under statutory authority" but simply express the "view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n. 17 (1942).

[15] 29 C.F.R. § 785.2; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("rulings, interpretations, and opinions of the Administrator [of the Wage and Hour Division]" are "not controlling upon the courts"); *id.* at 138 (noting that the Department's interpretive bulletins are "practical guide[s] to employers and employees as to how the office representing the public interest in [the FLSA's] enforcement").

remains essentially unchanged in the current interpretive guidelines on "rest" breaks: 29 C.F.R. § 785.18.[16]

## B. Progressive's Flexible Work Policy

Progressive sells business publications from multiple offices, most of which are in small towns.[17] Beginning in 2009, it sought to accommodate its employees' expressed desire for more flexible working arrangements. Prior to that time, the company had a policy that allowed representatives to take one break of up to 15 minutes in the morning and one break of up to 15 minutes in the afternoon, both of which were compensated. Pet. App. 131a. In response to its employees' request for greater flexibility or "flextime," Progressive's president "moved very quickly to look at [the Department's] website and then tr[ied] to get as much guidance as [he] could from [the] [D]epartment." Pet. App. 109a.

What he found was that the Department of Labor has defined flexible schedules as "an alternative to the traditional 9-5, 40-hour work week" that

> allows employees to vary their arrival and/or departure times. Under some policies, employees must work a prescribed number of hours

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[16] *Mitchell*, 235 F.2d at 624 (noting that the Secretary issued an interpretive press release in 1940 stating that "short rest periods up to and including twenty minutes should be compensated"); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 40 F. Supp. 4, 11 (N.D. Ala. 1941) (citing an opinion of the Wage and Hour Division that stated that "[t]he workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground").

[17] The Department of Labor collected records from 14 offices. Pet. App. 116a. Four of the fourteen offices closed between 2011 and 2013. Pet. App. 76a, ¶ 14.

> a pay period and be present during a daily "core time." The Fair Labor Standards Act (FLSA) does not address flexible work schedules. Alternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee (or the employee's representative).

Pet. App. 240a.[18]

Shortly thereafter, Progressive decided to adopt a flexible work policy. Under the new policy, work was measured as time logged onto a computer, whether that time was spent on an active sales call, recording the results of a call, participating in training or administrative activities, or engaging in other activities that were considered work-related. Pet. App. 78a ¶ 30. When not performing work-related tasks, the employees were expected to log off. *Ibid*. Once they did so, they were free to do whatever they wanted.[19] They could run errands, make personal calls, or engage in other pursuits that interested them, and they could do so from the office, from their home, or wherever else they wished. Their breaks could be as

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[18] The Department has touted flexible scheduling as enabling "both individual and business needs to be met through making changes to the time (when), location (where), and manner (how) in which an employee works. Flexibility should be mutually beneficial to both the employer and employee and result in superior outcomes." Pet. App. 238a. Indeed, in 2011, the Department boasted that it was "committed to helping all Americans balance their work and home responsibilities, and to exploring solutions to challenges faced by both employers and employees." Pet. App. 235a-236a.

[19] The Department for its part, agreed that there were no constraints on what employees could do during the time off—including working for someone else or drinking alcohol, Pet. App. 90a; Pet. App. 96a—but asserted that Progressive still needed to pay its employees in either circumstance.

long or as short as they desired, and they could use the break to accomplish one task or several tasks, with no questions or second-guessing—or any other constraint. Indeed, some of those providing affidavits expressly praised that flexibility because, *inter alia*, it allowed them to make calls related to a second job. *E.g.*, Pet. App. 152a-153a, 183a-184a, 193a.

Progressive paid its employees through a combination of hourly wages and performance bonuses. According to a July 2009 schedule, a person who worked fewer than 40 hours in a two-week period would earn $7.25 per hour, with an added bonus if he or she made more than one sale per hour. Pet. App. 121a-122a. The hourly base rate increased for those working more hours, and the bonus increased for those making more sales per hour. *Ibid*. The average number of hours worked at each location ranged from 4.78 hours per day in Wyomissing, Pennsylvania, to 5.71 hours per day in Altoona, Pennsylvania. Pet. App. 116a.

Although the company asked them to project how much time they intended to work during each upcoming two-week period, employees had complete flexibility on how and when they worked those hours—whether working from nine to five a few days a week, mornings some days and afternoons on other days, or even coming, leaving, and returning during a given day.[20]

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[20] As one example, an employee at the Dubois location had log-on and log-off information from June 25-July 8, 2012. He started work at 8:15 on June 25, 26, 27, and 29, as well as July 2, 3, and 5. On June 25 and 26, he left at 3:30; on the 27th, he left at 3:15. On June 29, he left at 12:23. The following week, he left at 3:00, noon, and 2:20 on the three days he worked. Pet. App. 135a; s*ee also* Pet. App. 138a (where a different employee attests that he "typically choose[s] to arrive around 8:15 a.m. and finish working around 12:00 p.m. or 1:00 p.m."); Pet. App. 173a (another employee

Consistent with that principle of self-determination, employees were told that "Representatives may take personal breaks at anytime for any reason." Pet. App. 124a. These breaks were not compensated. *Ibid.*[21] "Log-off" time was used for personal matters that could be as ordinary as calling to set up medical appointments, pay bills, or submit assignments to school. But the log-off time was also for matters that might take varying amounts of time, such as talking to a son stationed in Afghanistan; getting a medical injection; or participating in a call or meeting of uncertain duration. One person taught music lessons and performed. Pet. App. 138a-139a, 142a-143a, 147a-148a, 164a-165a, 169a, 179a, 188a-189a, 198a-199a, 202a-203a, 207a-209a, 217a-218a.

The employees frequently observed that they did not pay attention in setting their breaks to whether a break was longer or shorter than 20 minutes. Pet. App. 144a, 148a, 154a, 160a, 166a, 170a, 175a, 180a, 194a, 199a, 203a, 210a, 214a, 220a, 225a. Indeed, for many personal matters, it was impossible to know in advance how long the break would turn out to be. *E.g.*, Pet. App. 229a.

### C. The Department's Enforcement Action

Despite its avowed endorsement of employers' adoption of flexible work schedules, the Department of Labor was skeptical of Progressive's new break

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generally works 10-20 hours a week); Pet. App. 187a (explaining that the times and days are not set in advance); Pet. App. 103a (president explaining that if an employee worked for 20 minutes, left for five hours and then returned, that would be within the flexible policy).

[21] The President testified that the lunch policy had also changed, although it was not reflected on the 2009 schedule. Pet. App. 106a.

practice from the very beginning of its implementation. According to the Stipulated Facts presented to the District Court, the Department of Labor began its investigation of the then-nascent break policy in or around June 2009. Pet. App. 76a, ¶ 15. On March 16, 2011, the Department informed Progressive that "breaks of twenty minutes or less were compensable" and that it believed Progressive was not paying statutory minimum wage. *Id.*, ¶ 16.[22]

The Secretary of Labor filed the Complaint on November 1, 2012. *Id.*, ¶ 17. The Complaint sought back wages from 2009 forward, as well as liquid-dated damages. The investigative report that the Department placed in the record covered 2009-2013, and it showed that over the course of 308,274 days, employees had spent an average of just over an hour logged off, split almost down the middle between breaks shorter than twenty minutes and those longer than twenty minutes. Pet. App 117a-120a. The Department argued that the half of the logged-off time spent in "short" breaks should be looked at in isolation and in hindsight as "rest" breaks within the meaning of 29 C.F.R. § 785.18. Progressive, in contrast, argued

[22] In pursuing this case, the Department has repeatedly pressed the narrative that a Progressive employee would be forced to work hours on end without being given paid work breaks to go to the bathroom. There is no basis in the record for that conclusion. Indeed, at least some of the persons interviewed by the Department described their experiences under *the fixed break* policy. *See*, *e.g*., Pet. App. 231a (describing a 15 minute break at 10 a.m., a 45 minute break at 12:15 p.m., and a 15 minute break at 2:00 p.m.). That person also said that he or she could "take a *few more* small breaks to get up, go to the bathroom." Pet. App. 231a-232a. (emphasis added). Under that reasoning, Progressive should pay for five 15-minute breaks in a five-hour day, a policy that would not be advisable or feasible—and certainly is not the law.

that the policy—and the breaks taken under it—needed to be judged as a whole. Accordingly, Progressive took the view that time employees spent logged off was not "working" time at all, regardless of how long the break turned out to be, because Progressive exerted no control over the timing or length of the break, or over the employee's location or conduct while logged off. Consequently, Progressive argued that if any of the Wage and Hour Division's guidelines applied, it was 29 C.F.R. § 785.16,[23] which suggests criteria for determining whether an employee is "off duty" at a particular time.

After discovery and an exchange of expert reports, the parties filed cross-motions for summary judgment, with the Secretary seeking a determination of liability on Fair Labor Standards Act minimum wage and recordkeeping violations, as well as a determination of Mr. Satell's role as an employer, liquidated damages, and willfulness. The Secretary did not ask for an immediate determination of the amount of damages. Progressive moved for summary judgment on all claims. Pet. App. 33a, n.1.

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[23] Section 785.16's subsection (a) provides:

> Periods 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 are not hours worked. He 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. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

The Honorable Felipe Restrepo denied Progressive's motion for summary judgment and granted the Secretary's on December 16, 2015, in a memorandum opinion. Pet. App. 32a-70a. The District Court first decided that Progressive's breaks were "[r]est periods of short duration, running from 5 minutes to about 20 minutes" that were governed by 29 C.F.R. § 785.18. In deciding how much deference to apply, the District Court reluctantly applied *Skidmore v. Swift*, 323 U.S. 134 (1944), but only because the parties had agreed that that was the appropriate standard. Pet. App. 43a-45a. The District Court then reasoned that Section 785.18 is "both longstanding and unchanging," Pet. App. 48a, and found that, notwithstanding the disagreement between the parties as to who benefits from the breaks, Section 785.18 "undoubtedly furthers the other articulated purposes of the FLSA"; "improves employee efficiency generally;" and "at least arguably improves the efficiency of Progressive employees." Pet. App. 50a.[24] Accordingly, the District Court was "convinced that § 785.18 should be afforded the most substantial deference permitted under the sliding-scale of *Skidmore*." Pet. App. 51a. Recognizing that "Progressive's break policy and workplace may be unique," the Court nevertheless followed other district courts that had found short breaks compensable under Section 785.18. Pet. App. 53a-55a.

The District Court went on to find that Mr. Satell was an employer, Pet. App. 63a, that liquidated damages would apply, Pet. App. 67a, and that the

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[24] The Department's factory-floor-based expectation notwithstanding, Progressive's expert report showed the opposite was true in the actual situation presented here: a representative is *less* productive on a per-hour basis the more breaks that person takes. Pet. App. 113a.

Department was entitled to summary judgment on record-keeping violations, Pet. App. 69a.[25]

On October 13, 2017, the Court of Appeals affirmed, with Judge McKee authoring an opinion in which Judges Rendell and Fuentes joined. Specifically, the Third Circuit agreed with the District Court that the Department's "rest break" guideline, 29 C.F.R. § 785.18, was entitled to "the highest level of deference under Skidmore." *Am. Future Sys.*, 873 F.3d at 427. The court therefore concluded that the "bright line" rule announced in that guideline was controlling and required Progressive to compensate its employees for all breaks that, when viewed in hindsight, turned out to be 20 or fewer minutes in length. *Id.* at 430-33. In so holding, the Third Circuit rejected Progressive's plea that the court perform the fact- and circumstance-specific test this Court articulated in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), reasoning that that case was inapplicable because it "did not involve the compensability of breaks of twenty minutes or less." *Am. Future Sys.*, 873 F.3d at 431.[26]

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[25] Although the District Court denied summary judgment on willfulness and the Secretary did not move on damages, the parties entered into a stipulation as to the remaining claims and the case was closed by the District Court (Kearney, J.) on May 11, 2016. Pet. App. 73a.

[26] Following the events chronicled above and in light of the Department's insistence that all breaks of 20 or fewer minutes be compensated, Progressive altered its policy to provide that all employee breaks must be at least 25 minutes in length. That change will make no difference to the person who attends counseling sessions or parent-teacher conferences in the middle of the day, but it does alter the picture for employees who required shorter time intervals to accomplish their personal tasks. Now, instead of taking 10 unpaid minutes to do whatever they needed to do, they must take at least 25 unpaid minutes.

## REASONS FOR GRANTING THE PETITION

At the core of this case lies a straightforward legal question: What test should a court apply in determining whether an employee must be compensated for time spent not in active labor? The Courts of Appeals are divided on how to decide that issue.

On the one hand, decisions of this Court and of several Courts of Appeals (namely the Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits[27]) hold that the proper standard is the fact- and circumstance-sensitive "predominant benefit" test, which turns on who principally benefits from the break and, correlatively, whether the conditions of the break are such that the employee may effectively use the time for his or her own purposes. If that non-working time primarily benefits the employer (*e.g.*, by improving productivity or filling a role that an employer would otherwise have to retain someone else to fill), it is working time, and must be compensated. But if, by contrast, it primarily benefits the employee (*e.g.*, by affording the employee time to engage in non-work-related pursuits), it is non-working time, and need not be compensated.

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Why anyone would think that that outcome is an improvement for Progressive's employees is a mystery. But that is the Department's position.

[27] *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58, 64-65 (2d Cir. 1997); *Roy v. Cty. of Lexington, S.C.*, 141 F.3d 533, 545 (4th Cir. 1998); *F.W. Stock & Sons, Inc. v. Thompson*, 194 F.2d 493, 496-97 (6th Cir. 1952) (table) (*per curiam*); *Henson v. Pulaski Cty Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993); *Mitchell v. Greinetz*, 235 F.2d 621, 623 (10th Cir. 1956); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163 (D.C. Cir. 1975).

On the other side of the ledger, a number of courts, including the Third, Ninth, and Eleventh Circuits,[28] have sidelined the predominant-benefit test in favor of rigid, bright-line rules. Accordingly, the Department contended below, and the Third Circuit agreed, that all (non-meal) breaks under 20 minutes in length are, as a matter of law, "work" within the meaning of the FLSA—and thus must be compensated by an employer.

Given the Circuits' inability to reach consensus on this question—and, indeed, their underlying inability to agree on the proper statutory construction framework to apply in addressing it—this Court's review is needed.

## I. THE CIRCUITS ARE DIVIDED ON THE PROPER METHOD FOR DETERMINING WHEN BREAKS SHOULD BE TREATED AS "WORK" UNDER THE FLSA.

### A. The Circuits Are Divided in Their Approach to Analyzing the Compensability of "Breaks."

The question *how* to determine whether a particular period of non-working time should nevertheless be counted as "work" under the FLSA should not be open for debate.

This Court's jurisprudence on the issue began in 1944, when it interpreted the FLSA's use of the term "work" as referring to "physical or mental exertion (whether burdensome or not) *controlled or required by*

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[28] *U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 422-23 (3d Cir. 2017) (decision below); *Rother v. Lupenko*, 515 F. App'x 672, 674-75 (9th Cir. 2013); *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975); *Kohlheim v. Glynn Cty., Ga.*, 915 F.2d 1473, 1477 & n.20 (11th Cir. 1990).

*the employer* ***and*** *pursued necessarily and primarily for the benefit of the employer and his business*." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (emphasis added) (travel time from mine entrance to subterranean work station was compensable).

Later that same year, the Court analyzed whether compensation was owed for "time during which these men were required to be on the employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work." *Armour & Co. v. Wantock*, 323 U.S. 126, 128 (1944). The Court identified the question "[w]hether time is spent predominantly for the employer's benefit or for the employee's" as critical in assessing whether idle time was nevertheless "working" time. *Id*. at 133,

And any lingering doubt was wiped away two years later in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). There, the Court concluded that time employees spent walking from the clock where they punched in to their individual duty stations in a factory was compensable time, because it "was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory." *Id.* at 691. "Without such walking on the part of the employees," the Court explained, "*the productive aims of the employer could not have been achieved*." *Ibid.* (emphasis added). Furthermore, "[t]he *employees'* convenience and necessity . . . bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business." *Ibid.* (emphasis added).

In light of these decisions, it is hard to see how the "breaks" taken by Progressive's employees could be

said to constitute time spent engaged in "work" under the FLSA. It is undisputed that under Progressive's flex-time policy, once an employee logged off, the company asserted no control of any kind over the employee, who was not in any sense "on call" and was free to leave the facility at any time for any pursuit and for as long as he or she wanted. Time spent while logged off was not even arguably "physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal,* 321 U.S. at 598. Instead, every minute of that time was completely controlled by the employee and could be "pursued" entirely for his or her own benefit, or for the benefit of others of the employee's choosing, including other employers. This Court has never suggested that the concept of "work" under the FLSA can be stretched so far.

That said, surely the canonical cases discussed above must at least stand for the proposition that courts evaluating whether a particular "break" is in fact "work" time under the FLSA should evaluate (1) whether a particular period of "idle" time is established to benefit the employer or the employee; (2) the extent to which the employee's conduct during the "idle" time is dictated by the employer, and (3) whether the period of "idle" time is of adequate duration, and afforded under such conditions, that an employee may utilize it for personal, non-work-related purposes. Given the holdings described above, this basic legal standard should not be in dispute.

Yet here we are. Seven decades after those decisions issued, both the Secretary of Labor and a number of Courts of Appeals have taken it upon themselves to pare back this Court's decisions, replacing them (and

the flexible standard they embody) with a series of rigid, bright-line rules regarding various kinds of "breaks," including the rule that all breaks of 20 minutes or less are *always* "working" time, and thus *always* compensable, under the FLSA.

The decision below exemplifies this approach, adopting the Department's proposed interpretation of the FLSA (as articulated in 29 C.F.R. § 785.18) without performing any independent analysis of what constitutes "work" under the FLSA. Applying that rigid test, the court concluded that *all* periods during which Progressive employees are logged off from their computers—regardless of the reason for the cessation or whom it would principally benefit—must be compensated as "work" time if the break ultimately ends up being 20 minutes or shorter in length. 873 F.3d at 422-23, 425-26.

And the Third Circuit is by no means alone in its approach. At least two other Courts of Appeals have similarly abjured the predominant-benefit test in favor of a bright-line approach to compensability of break time. The Ninth Circuit, for example, has declared it to be "the general rule under federal law that breaks of less than 30 minutes are compensable." *Rother*, 515 F. App'x at 674-75 (citing 29 C.F.R. §§ 785.18 and 785.19); *accord Elmer's Disposal Serv.*, 510 F.2d at 88 ("An employee cannot be docked for lunch breaks during which he is required to continue with *any* duties related to his work." (emphasis added)). *See also Kohlheim v. Glynn Cty., Ga.*, 915 F.2d 1473, 1477 & n.20 (11th Cir. 1990) (applying the Department's total-relief-from-duty standard, articulated in 29 C.F.R. § 785.19, to hold that firefighters' lunch breaks must be compensated because they were

required to remain at the firehouse and respond to emergencies during such breaks).

In contrast to these cases stand opposing decisions from several other Courts of Appeals. Thus, in *Southern New England Telecommunications*, 121 F.3d 58 (2d Cir. 1997), the Second Circuit decided that whether a meal break was compensable turned on whether, during the break, the "worker performs activities predominantly for the benefit of the employer." *Id.* at 64. In that case, the court confronted a work environment in which installers of telephone poles and cables were required, during their 30-minute lunch breaks, to stand guard over their outdoor worksites—both to prevent theft of valuable equipment and to protect passersby from the hazards of an active worksite. *Id.* at 63. The court held that this eat-while-guarding structure rendered the meal breaks as periods primarily for the benefit of the employer, because the employer would otherwise have been obligated to hire other workers to perform those functions during the meal breaks. *Id.* at 65. In so holding, the court expressly rejected the complete-relief-from-duty standard advocated by the Department because it "is inconsistent with controlling Supreme Court precedent defining 'work.'"[29]

*Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975), is to similar effect. There, the court held that time employees spent accompanying OSHA inspectors on a walkthrough of their employer's facility was not

[29] Compounding the irony of this case (and of the Department's position), if the complete-relief-from-duty standard of § 785.19 had been the standard applied here, there would have been little doubt that Progressive employees' breaks did *not* qualify as "work" time given the total lack of restrictions placed on workers during those breaks.

compensable time. First, although the court acknowledged that improving workplace safety *did* benefit the employer, it nevertheless concluded that the time was not *primarily* for the employer's benefit. *Id.* at 1163 ("It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require a finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer are not worktime activities under FLSA." (emphasis in original)).

Second, and even more significant to the *Leone* court, the employees' decision to accompany the inspectors was entirely voluntary and self-determined. *Ibid.* ("During an OSHA inspection, the employer exercises no control over the choice of an employee representative or the forms and extent of his participation."). Because the non-working time was not employer-directed or -controlled, it failed the *Armour & Co.* test for compensability.

Other circuits are in accord. *See Stock & Sons*, 194 F.2d at 496-97 (Sixth Circuit) ("Time spent predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the provisions of the Fair Labor Standards Act." (internal quotation marks omitted)); *Henson*, 6 F.3d at 534 (Eighth Circuit) (concluding that the predominant-benefit test "comports with the Supreme Court's admonition to use a practical, realistic approach under the unique circumstances of each case when deciding whether certain activities constitute compensable work"); *Greinetz*, 235 F.2d at 623 (Tenth Circuit) (listing as critical factors in the compensability analysis (1) "whether idle time is

spent predominantly for the employer's or employee's benefit," and (2) "whether the time is of sufficient duration and taken under such conditions that it is available to employees for their own use and purposes disassociated from their employment time"); *Roy*, 141 F.3d at 545 (4th Circuit) ("[T]he most appropriate standard for compensability is a 'flexible and realistic' one where we determine whether, on balance, employees use mealtime for their own, or for their employer's benefit.").[30]

Nothing better illustrates this division of authority than the divergent approaches of the Eighth and Eleventh Circuits. In the Eighth Circuit, where the predominant-benefit test holds sway, police officers who remain on-call during their lunch breaks are not compensated for those breaks, whereas, in the Eleventh Circuit, similarly constrained firefighters are compensated for their meal periods because the obligation to respond to emergencies means that their meal breaks cannot satisfy the all-or-nothing require-

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[30] To be sure, some of the cases cited above arose in the context of what the Department refers to as "rest" breaks, *see* 29 C.F.R. § 785.18 (declaring that breaks of fewer than twenty minutes' duration must be compensated), while others arose in the context of meal breaks, *see id.* § 785.19. For purposes of the question presented here, however, that is a distinction without a difference because the central issue in both sets of cases (and, indeed, in most disputes over whether an employer has paid its workers the FLSA-mandated minimum or overtime wage) was how many hours of "work" those employees performed for their employer. And *that* question (as already explained) requires resort either to the flexible, all-things-considered standard that this Court has announced, or to the bright-line rules the Department has created. *Which* of the Department's bright-line rules would apply in a given case ought not to matter in answering the antecedent question whether it is appropriate to apply a bright-line rule in the first place.

ment of total relief from duty. *Compare Henson*, 6 F.3d at 534 ("We find it unrealistic to hold that an employer must compensate employees for all meal periods in which the employee is relieved of all duties except simply remaining on-call to respond to emergencies, which the completely-relieved-from-duty standard would seem to require."), *with Kohlheim*, 915 F.2d at 1477 (holding meal breaks compensable because, "[d]uring meal times the firefighters were required to remain at the station and were subject to emergency calls").

This Court's review is needed to resolve this division—and to restore the longstanding rule that compensability is to be judged according to all the facts and circumstances of the relevant period of idleness.

### B. The Circuits Are Divided on the Proper Deference Framework to Apply When Evaluating the Department's Interpretation of the FLSA.

Lurking beneath the surface of—and largely driving—the discord among the Courts of Appeals on the substantive question discussed above is a deeper confusion on how much deference to afford the Department's interpretive guidelines on the compensability of break time.

In the present case, for example, the Third Circuit determined that the Department's bright-line rule requiring compensation for all work stoppages of 20 minutes or less "should be afforded the highest level of deference under *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)]." *Am. Future Sys.*, 873 F.3d at 427. In practice, that "deference" meant accepting the Depart

ment's proffered rule without conducting even a *pro forma* predominant-benefit analysis. *See generally id.* at 426-29.

Such wholesale outsourcing of the judicial function goes beyond even what *Chevron* deference would allow, because under that framework a court is at least required to assess whether the agency's proffered position is a *reasonable* construction of the relevant statutory scheme. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Here, by contrast, no such check was performed, with the result that interpretive rules designed for the assembly-line factory have been engrafted onto the fundamentally different setting of a telesales call center that allows its workers to start and stop work as many times as they want, for as long as they want, at any point during the "workday." Pet. App. 124a.

To be sure, the Court of Appeals purported to ask whether the Department's "rest break" guideline was "reasonable," but that inquiry focused on whether the guideline was reasonable as a *policy* matter, not a legal one. *See Am. Future Sys.*, 873 F.3d at 428-29. Indeed, the court justified deferring to the Department's guidelines because, in the panel's view, breaks under 20 minutes in length are highly beneficial *to the employee* and should therefore be encouraged by rendering them compensable. *See ibid.* ("[I]t is readily apparent that by safeguarding employees from having their wages withheld when they take breaks of twenty minutes or less to visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work, the regulation undoubtedly *protects employee health and general well-being* by not dissuading employees from taking such breaks when they are needed." (emphasis added) (internal quotation marks

omitted)). But that rationale turns on its head the test this Court has decreed for assessing whether idle time is "work" time under the FLSA. *See, e.g.*, *Armour & Co.*, 323 U.S. at 133 (deeming the question "[w]hether time is spent predominantly for the *employer's* benefit" to be central to the compensability analysis (emphasis added)).

Nor is the Third Circuit alone in adopting a reflexive deference to the Department's guidelines on the compensation of "break" time. *See, e.g.*, *Rother v. Lupenko*, 515 F. App'x 672, 674-675 (9th Cir. 2013) ("As for the merits of Plaintiffs' claims, it is the general rule under federal law that breaks of less than thirty minutes are compensable. 29 C.F.R. §§ 785.18, 785.19. Although in some cases 'special circumstances' may mean that a meal break of less than thirty minutes need not be counted as compensable time worked, *see* 29 C.F.R. § 785.19, there is no basis on this record to conclude that such circumstances existed in this case as a matter of law."); *Kohlheim v. Glynn Cnty., Ga.*, 915 F.2d 1473, 1477 nn.19-20 (11th Cir. 1990) ("The FLSA regulations are entitled to great weight and should not be lightly set aside, so we join the other circuits which have adopted the mealtime exclusion standards of § 785.19 as an appropriate statement of the law.").

In contrast, other Circuits (including the Second, Fourth, Sixth, and Eighth) have been more circumspect in assessing the Department's guidelines. The Sixth Circuit, for example, has taken the view that the proper order of statutory-construction operations is for the court to (1) perform an independent analysis of the statutory question; and then, if that analysis is inconclusive, (2) consider any relevant agency views under the appropriate deference framework (*Chevron*

or *Skidmore*). *See Grand Trunk W. R.R. Co. v. United States Dept. of Labor,* 875 F.3d 821, 831 (6th Cir. 2017); *see also Henson*, 6 F.3d at 534 (rejecting the bright-line rule of § 785.19 in favor of the "predominantly-for-the-benefit-of-the-employer standard" because it was "[e]stablished in the earliest Supreme Court cases interpreting the FLSA" and "comports with the Supreme Court's admonition to use a practical, realistic approach under the unique circumstances of each case when deciding whether certain activities constitute compensable work"); *So. New England Telecom. Corp.*, 121 F.3d at 65 (rejecting the bright-line rule of § 785.19 "because the completely-removed-from-duty standard is inconsistent with controlling Supreme Court precedent defining 'work'"); *Roy*, 141 F.3d at 545 ("[T]he most appropriate standard for compensability is a 'flexible and realistic' one where we determine whether, on balance, employees use mealtime for their own, or for their employer's benefit.").

Finally, it is also worth emphasizing that the deep deference given in this case is inconsistent with the guidelines themselves, which expressly disavow any claim to carry the force of law. To that end, Section 785.2 acknowledges that "[t]he ultimate decisions on interpretations of the act are made by the courts" and concedes that the guidelines at issue are merely statements of the "positions [the Department] will take in the enforcement of the Act." 29 C.F.R. § 785.2.

Granting review in this case would thus also bring clarity to the deference framework courts are to apply in evaluating the Department's interpretive guidance.

## II. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS IT.

**1.** The Question Presented is of great importance to business owners and employees alike—and especially to those in each group who seek to modernize labor arrangements to suit the needs and expectations of a 21st-century workforce.

As the *amicus* brief of Support Center for Child Advocates explained in the Court of Appeals, the modern economy has changed drastically from the one that existed when the FLSA was enacted. *See* Br. of Support Center for Child Advocates, *U.S. Dep't of Labor v. Am. Future Sys., Inc.*, No. 16-2685, at 3-4 (3d Cir. Sep. 20, 2016). Largely gone, for example, are the days of the one-income household and the 8-hour shift in the mine or on the factory floor. *Id.* at 3. Nowadays, multiple incomes are the rule, whether through two working spouses, a second job, or (in some cases) both. *See id.* at 3-4, 6.

Those fundamental economic and societal shifts, combined with the rise of technology that enables workers to keep tabs on personal matters from anywhere and at any time, has driven an increased interest in flexible-hours arrangements. *Id.* at 6. Nor have those needs arisen evenly across all socioeconomic groups. Lower-income workers frequently have the greatest need for flexibility, due to the unpredictable scheduling that often attends low-wage employment, the need to juggle multiple jobs and other demands to make ends meet, and the inability to pay for child or elder care. *Id.* at 4-5.

As a consequence, fostering the proliferation of flexible-hours arrangements—or, at a minimum,

providing employers and employees the breathing room to continue their efforts to find mutually agreeable flexible-hours arrangements—is a goal that all stakeholders should heartily endorse.

And, indeed, even the Department continues to give lip service to this goal. The DOL website has, since before this litigation began, clearly stated that "[t]he Fair Labor Standards Act (FLSA) does not address flexible work schedules" and that "[a]lternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee (or the employee's representative)." U.S. Dep't of Labor, Flexible Schedules, https://www.dol.gov/general/topic/workhours/flexibleschedules (last visited Dec. 26, 2017). But that assurance of freedom to contract is at loggerheads with the real-world implications of the decision below, which effectively precludes employers and employees from freely and mutually agreeing to a system that permits workers to stop work at any time, for any reason, for as long as they want, under any circumstances.

Regardless of the reasons for the Department's apparent about-face, the continued evolution of flexible-hours policies is and will remain of great importance to all employment stakeholders for the foreseeable future. The Department's draconian enforcement in this case[31] and its inconsistent messaging on how such arrangements are to be regulated under the FLSA will only sow confusion in the marketplace and discourage

[31] Damages were assessed against the Company and against its President, Edward Satell, who was held to be personally liable both for the unpaid break time and for liquidated damages (on account of a supposed failure to adopt the new flextime policy in good faith). Pet. App. 63a, 66a-67a.

further proliferation of this salutary innovation in employment practices.

**2.** This case is also an ideal vehicle to address the Question Presented. The Question Presented was briefed, argued, and decided in both the District Court and Court of Appeals. As such, it is both fully preserved and well-developed. Nor are there any other impediments to reaching this issue: There are no jurisdictional or similar threshold issues; the question is central to this case and determinative of the outcome here; and, as discussed at length above, will have implications for many other cases and employers across the country.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 11, 2018

# APPENDIX

# APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed 10/13/2017]

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No. 16-2685

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SECRETARY UNITED STATES DEPARTMENT OF LABOR

v.

AMERICAN FUTURE SYSTEMS, INC. d/b/a
PROGRESSIVE BUSINESS PUBLICATIONS, a
Corporation; EDWARD SATELL, Individually and as
President of the above referenced Corporation,

*Appellants*

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA (No. 2-12-cv-06171)
District Judge: Honorable Mark A. Kearney[1]

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Argued
February 9, 2017

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[1] The District Court opinion was authored by Judge Restrepo before he was appointed to this Court. The case was thereafter transferred to Judge Kearney.

Before: McKEE, RENDELL, FUENTES, *Circuit Judges*.
(Opinion Filed: October 13, 2017)

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OPINION OF THE COURT

McKEE, *Circuit Judge*.

## I. INTRODUCTION

We are asked to decide whether the Fair Labor Standards Act requires employers to compensate employees for breaks of 20 minutes or less during which they are logged off of their computers and free of any work related duties. For the reasons set forth below, we conclude that the Fair Labor Standards Act does require employers to compensate employees for all rest breaks of twenty minutes or less. Accordingly, we will affirm the District Court's decision.

## II. FACTS AND PROCEDURAL HISTORY

American Future Systems, d/b/a Progressive Business Publications, publishes and distributes business publications and sells them through its sales representatives. Edward Satell is the President, CEO, and owner of the company. Sales representatives are paid an hourly wage and receive bonuses based on the number of sales per hour while they are logged onto the computer at their workstation. They also receive

extra compensation if they maintain a certain sales-per-hour level over a given two-week period.

Progressive previously had a policy that gave employees two fifteen-minute paid breaks per day. In 2009, Progressive changed its policy by eliminating paid breaks but allowing employees to log off of their computers at any time. However, employees are only paid for time they are logged on. Progressive refers to this as "flexible time" or "flex time" and explains that it "arises out of an employer's policy that maximizes its employees' ability to take breaks from work at any time, for any reason, and for any duration."[2]

Furthermore, under this policy, every two weeks, sales representatives estimate the total number of hours that they expect to work during the upcoming two-week pay period. They are subject to discipline, including termination, for failing to work the number of hours they commit to.[3] Progressive also sends representatives home for the day if their sales are not high enough[4] and sets fixed work schedules or daily requirements for representatives when that is deemed necessary.[5]

Apart from those requirements, representatives can decide when they will work between the hours of 8:30 AM and 5:00 PM from Monday to Friday, so long as they do not work more than forty hours each week.[6] As noted above, during the work day, they can log off of

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[2] Appellant's Br. at 4.

[3] JA-201-069 4019 4799 5169 525-319 939-439 10599 10829 1252.

[4] JA-10649 10839 10939 12209 1250.

[5] JA-940-47.

[6] JA-523.

their computers at any time, for any reason, and for any length of time and may leave the office when they are logged off. Employees choose their start and end time and can take as many breaks as they please. However, Progressive only pays sales representatives for time they are logged off of their computers if they are logged off for less than ninety seconds. This includes time they are logged off to use the bathroom or get coffee. The policy also applies to any break an employee may decide to take after a particularly difficult sales call to get ready for the next call. On average, representatives are each paid for just over five hours per day at the federal minimum wage of $7.25 per hour.[7]

The Secretary filed suit against Progressive and Satell alleging that they violated the FLSA by failing to pay the federal minimum wage to employees subject to this policy, and by failing to maintain mandatory time records.[8] The Secretary of Labor argued that this policy violated section 6 of the Fair Labor Standards Act[9] "by failing to compensate . . . sales representative employees for break[s] of twenty minutes or less . . . ."[10] The Secretary sought to recover unpaid compensation owed to Progressive's employees, an equal amount in liquidated damages, and a permanent injunction enjoining Progressive from committing future violations.[11]

Progressive moved for summary judgment, and the Secretary moved for partial summary judgment on

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[7] JA-847.

[8] 29 U.S.C. §§ 206, 211(c).

[9] 29 U.S.C. § 206.

[10] Appellee's Br. at 2-3.

[11] 29 U.S.C. §§ 216(c), 217.

select issues, including its minimum wage claim and claim for liquidated damages. The District Court denied Progressive's motion and granted the Secretary's motion in part.[12] In doing so, the court noted that the Department of Labor ("DOL") hasconsistently applied the Wage and Hour Division's ("WHD")[13] interpretation of the FLSA under 29 C.F.R. § 785.18 to this kind of break. That regulation provides that:

> Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.[14]

The District Court afforded the Secretary's interpretation of section 785.18 substantial deference.[15] It agreed that section 785.18 created a bright-line rule and concluded that Progressive therefore violated the FLSA by failing to pay its employees for rest breaks of twenty minutes or less. This appeal followed.

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[12] The Secretary moved for summary judgment on FLSA minimum wage liability, FLSA recordkeeping liability, and Satell's role as an employer under the FLSA, liquidated damages, and willfulness, but not on the actual damages calculation. The District Court denied the Secretary's motion with respect to willfulness of the violations. *Perez v. Am. Future Sys., Inc.*, No. 12-6171, 2015 WL 8973055, at *1 n.1 (E.D. Pa. Dec. 16, 2015).

[13] Congress delegated authority to WHD to administer the FLSA. *See* 29 U.S.C. § 204(a) ("There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division . . . .").

[14] 29 C.F.R. § 785.18.

[15] *See Skidmore v. Swift Co.*, 323 U.S. 134 (1944).

## III. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment de novo.[16] Summary judgment is appropriate where the moving party is entitled to judgment as a matter of law, and there is no genuine dispute as to any material fact.[17] In reviewing a motion for summary judgment, we view the evidence in the light most favorable to the non-moving party.[18] We refrain from making credibility determinations or weighing the evidence.[19]

We review the District Court's decision to deny or limit liquidated damages for abuse of discretion.[20] Although we must apply the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) when reviewing the District Court's findings of fact "which underlie its 'good faith' and 'reasonableness' determinations . . . and the finding of subjective good faith itself, we exercise plenary review of the [D]istrict [C]ourt's legal conclusion that [a party] had 'reasonable grounds for believing' that its violative conduct was not a violation of the FLSA."[21]

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[16] *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

[17] *See, e.g.*, *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 112 (3d Cir. 1996).

[18] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[20] *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir. 1991).

[21] *Id.* (citation omitted).

## IV. DISCUSSION

Progressive advances three arguments on appeal: (1) that time spent logged off under its flexible break policy categorically does not constitute work; (2) that the District Court erred in finding that WHD's interpretive regulation on breaks less than twenty minutes long, 29 C.F.R § 785.18, is entitled to substantial deference; and (3) that the District Court erred in adopting the bright-line rule embodied in 29 C.F.R. § 785.18 rather than using a fact-specific analysis. We do not find any of these arguments persuasive.

### A. Applicability of the FLSA

Progressive first argues that under its policy, because employees are basically free to do anything they choose and can even leave the job site when logged off of their computers, the time when employees are logged off of their computers does not constitute "work," and therefore, the FLSA does not apply. We disagree.

The FLSA governs compensation for "hours worked."[22] But it does not define "work."[23] It is well established that some breaks constitute "hours worked" under the FLSA.[24] Thus, hours worked is not limited to the time an employee actually performs his or her job duties.[25] The FLSA does not require employers to provide their employees with breaks. However, if an employer chooses to provide short breaks of five to twenty

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[22] 29 C.F.R. § 778.224 ("Under the Act an employee must be compensated for all hours worked.").

[23] *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005).

[24] *See Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 331 (3d Cir. 2016).

[25] *See Armour & Co. v. Wantock*, 323 U.S. 126, 133-34 (1944).

minutes, the employer is required to compensate employees for such breaks as hours worked.[26]

Progressive argues that it does not have a "break policy" per se. Rather, it claims that the "flexible time" policy described above, which allows employees to do whatever they wish and be wherever they want for periods of twenty minutes or less while logged off of their computers,

does not constitute "hours worked." According to Progressive, since the FLSA does not require it to provide breaks, it does not need to compensate its employees for these periods.

Although Progressive's position may have some superficial appeal, it cannot withstand scrutiny. According to Progressive, if an employer has a policy allowing employees to log off and leave their work stations at any time, for any reason, it does not have to compensate employees if they take a break. Progressive does not deny that it permits employees to log off; it just refuses to call those time periods "breaks." This misses the point of the FLSA's regulatory scheme. Its protections cannot be negated by employers' characterizations that deprive employees of rights they are entitled to under the FLSA.[27] The "log off" times are clearly "breaks" to which the FLSA applies.

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[26] *See* 29 C.F.R. § 785.18.

[27] *See* Amicus Curiae A Better Balance and National Employment Law Project, Inc. Br. at 4 ("The FLSA was passed to 'lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions,' *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947), by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' *See A.H. Phillips, Inc. v. Walling*,

The policy that Progressive refers to as "flexible time" forces employees to choose between such basic necessities as going to the bathroom or getting paid unless the employee can sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than ninety seconds. If the employee can somehow manage to do that, he or she will be paid for the intervening period. If the employee requires more than ninety seconds to get to the bathroom and back, the employee will not be paid for the period logged off of, and away from, the employee's computer. That result is absolutely contrary to the FLSA.[28] The FLSA is a "humanitarian and remedial legislation" and "has been liberally interpreted."[29]

Although employers need not have any break policy, we refuse to hold that the FLSA allows employers to circumvent its remedial mandates by disguising a

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324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1937)").

[28] Indeed, unless he or she has access to something akin to a Portkey, if an employee is sufficiently athletic to get from workstation to bathroom, relieve himself or herself, wash his or her hands, and return to the workstation in ninety seconds, it is highly unlikely that the employee would be working at Progressive for a minimum wage rather than playing for a professional sports franchise or advertising a brand of athletic footwear. Moreover, given the time restraints imposed by certain biological necessities beyond the employee's control, we doubt an employee could manage this feat even if he or she had access to a Portkey. *See* J.K. Rowling, *Harry Potter and the Goblet of Fire* 70 (Scholastic Inc. 1st ed. 2000) (In the Harry Potter series, Portkeys are "objects that are used to transport wizards from one spot to another . . . .").

[29] *Brock v. Richardson*, 812 F.2d 121, 123 (3d Cir. 1987) (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

break policy as "flexible time," as Progressive is seeking to do here. Accordingly, we find that Progressive does have a break policy, and thus, the FLSA applies. We therefore must determine if this break policy is contrary to the FLSA.

### B. *Skidmore* Deference

The FLSA is silent as to the specific requirements regarding "break" periods, but WHD's interpretation is clear. The parties agreed at the District Court level that *Skidmore*[30] would determine the level of deference owed to WHD's interpretation in section 785.18. Progressive argues that the District Court overstated this level of deference. It contends that WHD's interpretation "do[es] not have the force of law."[31] Instead, the regulations are merely "positions [the DOL] will take in the enforcement of the Act."[32] While it is true that these interpretations are not technically "law," the regulations nevertheless "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[33]

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[30] 323 U.S. 134. The parties agree that the level of deference required under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is not applicable.

[31] *Babcock v. Butler County*, 806 F.3d 153, 157 n.7 (3d Cir. 2015) ("In evaluating the effect of these regulations, it is significant to keep in mind that the Supreme Court has commented that interpretive regulations issued by the Secretary of the Department of Labor under the FLSA do not have the force of law; the regulations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting *Skidmore*, 323 U.S. at 140).

[32] 29 C.F.R. § 785.2.

[33] *Babcock*, 806 F.3d at 157 n.7 (quoting *Skidmore*, 323 U.S. at 140).

An agency's interpretation of a statute "may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency . . ., and given the value of uniformity in its administrative and judicial understandings of what a national law requires."[34] The weight afforded the agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[35]

We have "adopted *Mead*'s conceptualization of the Skidmore framework as a 'sliding-scale' test in which the level of weight afforded to an interpretation varies depending on [the] analysis of the enumerated factors."[36] Those factors include whether the interpretation was: (1) issued contemporaneously with the statute; (2) consistent with other agency pronouncements; (3) reasonable given the language and purposes of the statute; (4) within the expertise of the relevant agency; and (5) part of a longstanding and unchanging policy.[37]

Applying these factors, we conclude that WHD's interpretation, as set forth in section 785.18, should be

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[34] *De Leon-Ochoa v. Att'y Gen. U.S.*, 622 F.3d 341, 349 (3d Cir. 2010) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), 533 U.S. at 234-35) (internal quotation marks omitted).

[35] *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

[36] *Hagans v. Comm'r of Social Sec.*, 694 F.3d 287, 304 (3d Cir. 2012) (quoting *Mead Corp.*, 533 U.S. at 228).

[37] *Id.* at 304-05; *see also Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir. 1999) (if an agency has been granted administrative authority by Congress, *Skidmore* deference is warranted "as long as it is consistent with other agency pronouncements and furthers the purposes of the Act.").

afforded the highest level of deference under *Skidmore*. First, Congress ratified WHD's interpretation, which had been in place since 1940, by enacting former section 16(c) of the FLSA in 1949.[38] It states that:

> Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor . . . in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, . . . except to the extent that any such order, regulation, interpretation . . . may be inconsistent with the provisions of the Act . . . .[39]

Second, WHD's interpretation of the regulations controlling this dispute has been consistent throughout the various opinion letters the DOL has issued to address this matter.[40] The Department of Labor has

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[38] *Steiner v. Mitchell*, 350 U.S. 247, 255 n.8 (1956).

[39] *Id.* (citing Fair Labor Standards Amendments of 1949, Pub. L. No. 393, section 16(c), 63 Stat. 910, 920 (1949), 29 U.S.C. § 208 note).

[40] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Aug. 13, 1964) (JA 1351-52) ("[I]f [break] periods are given and are of short duration (normally 20 minutes or less) they must be counted as hours worked and the employees must receive compensation for them. . . . The way in which the employee utilizes his time during the rest periods described in your letter, or the name attached to them, is irrelevant, and the absence of such breaks in the past would not relieve an employer from compensating his employees for them when they occur."); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Oct. 13, 1964) (JA-1353) ("[R]est periods of short duration, running from 5 minutes to about 20 minutes, must be counted as hours worked."); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 25, 1995) (JA-1361 62) ("[R]est periods . . . of short duration,

consistently held for over 46 years that such breaks are hours worked under the FLSA, without evaluating the relative merits of an employee's activities. This position [is] found at 29 C.F.R. 785.18 . . . . The compensability of short breaks by workers has seldom, if ever, been questioned . . . . The FLSA does not require an employer to provide its employees with rest periods or breaks. If the employer decides to permit short breaks, however, the time is compensable hours worked.[41]

Third, we have no difficulty concluding that WHD's interpretation is reasonable given the language and purpose of the FLSA. In enacting the FLSA, Congress recognized the effect of labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and

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running from 5 to 20 minutes are common in industry. . . . It is our longstanding position that such breaks must be counted as hours worked. The fact that certain employees may choose to smoke during such breaks contrary to their employer's policy would not, in our opinion, affect the compensability of such breaks. . . . While there may be valid health reasons for prohibiting 'smoking breaks,' it does not follow that employee efficiency is not enhanced by such breaks as is the case with respect to 'coffee breaks'. In other words, we think it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc. . . . Our views should not, however, be construed to prevent an employer from adopting a policy that prohibits smoking in the workplace, or devising appropriate disciplinary procedures for violations of such policy. But an employer may not arbitrarily fail to count time spent in breaks during the workday because the employee was smoking at his or her workplace or outside thereof.").

[41] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1005233, at *1 (Dec. 2, 1996).

general well-being of workers."[42] The existence of such conditions:

> (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.[43]

Accordingly, the FLSA was designed "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."[44] As the District Court explained, it is readily apparent that by safeguarding employees from having their wages withheld when they take breaks of twenty minutes or less "to visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work, the regulation undoubtedly protects employee health and general well-being by not dissuading employees from taking such breaks when they are needed."[45]

This interpretation was well within WHD's expertise.[46] Lastly, as the District Court correctly pointed

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[42] 29 U.S.C. § 202(a).

[43] *Id.*

[44] *Id.* § 202(b).

[45] *Am. Future Sys., Inc.*, 2015 WL 8973055, at *7.

[46] 29 U.S.C. § 204(a) ("There is created in the Department of Labor a Wage and Hour Division which shall be under the

out, "[s]ection 785.18 is a rule that is both longstanding and unchanging. The text of the rule today is identical to the text of the rule when it was implemented in 1961."[47] Since all of these factors favor WHD's position, the District Court was correct to apply substantial *Skidmore* deference to section 785.18.

### C. Applicability of 29 C.F.R. § 785.16 versus 29 C.F.R. § 785.18

At the District Court level, Progressive also argued that because its employees used the time when they were logged off solely for their own benefit, 29 C.F.R. § 785.16, as opposed to 29 C.F.R. § 785.18, applies to its policy.[48] Before addressing the issue of applying section 785.18 as a bright-line rule, we wish to elaborate on this and note that the District Court correctly held that section 785.18 is applicable to this case.

Section 785.16 provides that:

> Periods 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 are not hours worked. He 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

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direction of an Administrator, to be known as the Administrator of the Wage and Hour Division . . . .").

[47] *Am. Future Sys., Inc.*, 2015 WL 8973055, at *7 (citing 26 Fed. Reg. 190 (Jan. 11, 1961)).

[48] *Id.* at *5.

> a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

Conversely, section 785.18 states that "[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in industry . . . . They *must* be counted as hours worked."[49]

Progressive argued that section 785.16 is applicable here because the "breaks" at issue are unrestricted periods that Progressive provides to its employees to use whenever they want and however they want. Thus, section 785.16, as opposed to section 785.18, applies.

As the District Court held, Progressive's argument fails to recognize that, although section 785.16 provides *general* guidance regarding the compensability of hours worked, section 785.18 sets forth a separate and more specific regulation carving out the compensability of breaks that are twenty minutes or less.[50] The Department of Labor has therefore determined as a matter of labor policy and practical consideration that breaks of twenty minutes or less are insufficient to allow for anything other than the kind of activity (or inactivity) that, by definition, primarily benefits the employer. That is certainly true here where such short work intervals better prepare the sales representative to deal with the next call. Thus, as the District Court correctly explained, in this case where breaks of

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[49] 29 C.F.R. § 785.18 (emphasis added).

[50] *See West v. Keve*, 721 F.2d 91, 96 (3d Cir. 1983) ("It is a fundamental principle of statutory construction that the specific language controls over general language.").

twenty minutes or less are in question, section 785.16 is inapplicable. We therefore hold that section 785.18 applies to Progressive's "flexible time" policy.

D. 29 C.F.R. § 785.18 as a bright-line rule

Progressive also argues that section 785.18 should not be enforced as a bright-line rule that would require employers to compensate employees for any breaks that are twenty minutes or less.[51] Rather, Progressive insists that courts should analyze whether a given break is intended to benefit the employer or the employee. According to Progressive, if the break benefits the employee, she need not be compensated. In support of its argument, Progressive cites *Mitchell v. Greinetz*,[52] which section 785.18 incorporates in interpreting the FLSA,[53] and *Armour & Co. v. Wantock*.[54] We remain unconvinced.

Progressive claims that *Greinetz* mandates a fact-intensive inquiry to determine when idle time is compensable.[55] However, Progressive ignores that the

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[51] By statute, short breaks to express breast milk need not be compensated, 29 U.S.C. § 207(4), and unauthorized extensions of authorized paid breaks need not be compensated. *Lillehagan v. Alorica, Inc.*, No. SACV 13-0092-DOC, 2014 WL 6989230, at *10 (C.D. Cal. Dec. 10, 2014) (citing Chapter 31a01(c) of DOL Field Operations Handbook, Dec. 15, 2000).

[52] 235 F.2d 621 (10th Cir. 1956).

[53] *See* 29 C.F.R. § 785.18.

[54] 323 U.S. 126, 133 (1944).

[55] *Mitchell*, 235 F.2d at 623 ("Whether idle time is compensable or not is sometimes a difficult question to answer. All the cases make it clear that under certain conditions it is a part of employment time and must, therefore, be compensated. While in the main the factors which must be considered are well known, the difficulty as always comes when we undertake to apply them to a given state of facts, and because facts differ decided cases are

*Greinetz* court deferred to WHD's interpretation and that several courts considering the issue have applied section 785.18 as a bright-line rule.[56] *Greinetz* noted that facts must be considered in determining if breaks are compensable hours worked. However, it also held that WHD's interpretation "adhered to since 1940 is entitled to great weight"[57] and that the court agreed with WHD "as to the correct interpretation of the Act as it relates to the question of short break periods, generally referred to as 'coffee breaks.'"[58] The court explained that although such breaks "are beneficial to the employees, they are equally beneficial to the employer in that they promote more efficiency and result in a greater output, and that this increased production is one of the primary factors, if not the prime factor, which leads the employer to institute such break periods."[59] The court also noted that "a number of states by statute or orders provide for short

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not controlling and are helpful only as they point the way. *Some of the factors to consider are whether idle time is spent predominantly for the employer's or employee's benefit, and whether the time is of sufficient duration and taken under such conditions that it is available to employees for their own use and purposes disassociated from their employment time. The cases also make it clear that the answers to these questions must be gleaned from all the facts and circumstances of each case.*" (emphases added)).

[56] *See Lillehagen v. Alorica,* No. 13-0092, 2014 WL 6989230, at *10 (C.D. Cal. Dec. 10, 2014); *Brown v. L & P Indus., LLC*, No. 04-0379, 2005 WL 3503637, at *6 (E.D. Ark. Dec. 21, 2005); *Kasten v. Saint-Gobain Perform. Plastics Corp*., 556 F. Supp. 2d 941, 953 (W.D. Wisc. 2008); *Martin v. Waldbaum, Inc.*, No. CV 86-0861, 1992 WL 314898, at *1 (E.D.N.Y. Oct. 16, 1992).

[57] *Greinetz*, 235 F.2d at 625.

[58] *Id.*

[59] *Id.*

rest periods and provide that such periods shall be compensated as work time."[60] Accordingly, Progressive's reliance on *Greinetz* is misplaced, as section 785.18 likely referred to it because it explicitly endorsed the interpretation.

Progressive's reliance on *Armour & Co.* is also not persuasive. We realize that the Supreme Court did not apply a bright-line rule in *Armour & Co.*[61] However, Progressive ignores the crucial fact that *Armour & Co.* did not involve the compensability of breaks of twenty minutes or less. It concerned the time between 5 PM to 8 AM during which firefighters "were required to be on their employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work."[62] The Court used the predominant benefit test to conclude that this time was compensable. The Secretary does not argue that this test should not be used when dealing with breaks of twenty-one minutes or more,[63] and compensability of breaks longer than twenty minutes is not before us.

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[60] *Id.*

[61] 323 U.S. at 133 ("Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.").

[62] *Id.* at 128.

[63] DOL's 1940 Press Release states:

> Employees coming under the provisions of the [FLSA] must be paid for short rest periods . . . . A "short" rest period . . . will include periods up to and including 20 minutes. *When rest periods customarily taken by employees are longer, final decision on whether or not the employee will be paid for it will rest with the [WHD]*

Progressive's argument for determining the compensability of break times is not only contrary to the regulatory scheme and case law, it would also establish an administrative regimen that would be burdensome and unworkable. Employers would have to analyze each break every employee takes to determine whether it primarily benefitted the employee or employer. Such an approach "would require a series of tests to evaluate the relative benefit provided to employee and employer and the impact on employee efficiency of each and every small work break ever taken by any employee."[64] This would not only be "an

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*Regional Director*. The following considerations will guide the Regional Director in making his decision: the freedom of the employee to leave the premises and go where he pleases during the intermission; the duration of the intermission—whether sufficient to permit the employee reasonable freedom of action and a real opportunity for relaxation; whether the intermission is clearly not an attempt to evade or circumvent the provisions of the [FLSA]. *See* Addendum A to Appellee's Br. (WHD Press Release No. R-837 (June 10, 1940)) (emphasis added); *see also* Addendum C to Appellee's Br. (Field Operations Handbook, 31a01 (Dec. 1955)) ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. . . . Where a regular rest period of known duration is longer than 20 minutes, the waiting time rules apply. In other words, if the employees are free to go where they please, and the rest period is long enough to permit the employees to use it for their own purposes, and if bona fide and not an attempt to evade or circumvent the Fair Labor Standards Act (FLSA) or Walsh-Healey Public Contracts Act (PCA), such periods are not hours worked.").

[64] *Lillehagen*, 13-0092, 2014 WL 6989230, at *5.

undesirable regulatory intrusion in the workplace with the potential to seriously disrupt many employer-employee relationships," but it would also be difficult, if not impossible, to implement in all workplace settings.[65] "[T]he government should not be in the business of determining what employees do on short work breaks, much less attempting to evaluate which short breaks merit or do not merit compensation. . . . [E]mployers and employees are best served by the bright line time test currently provided in Section 785.18."[66]

Nevertheless, Progressive argues that if a bright-line rule is enforced, employees will be allowed to take any number of breaks during their workday, and as long as they are less than twenty minutes, employers will have to compensate them. We recognize this is a theoretical possibility given the bright line imposed by section 785.18.[67] However, it is not a realistic one. "[W]here the employee is taking multiple, unscheduled nineteen-minute breaks over and above his or her scheduled breaks for example, the employer's recourse

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[65] *Id.* at *5-6.

[66] *Id.*

[67] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1005233, at *1 (employer requested that Department of Labor advise whether short smoking breaks of 3 to 4 minutes were compensable when taken in addition to other breaks allowed to employees, and the DOL stated "[t]he FLSA does not require an employer to provide its employees with rest periods or breaks. If the employer decides to permit short breaks, however, the time is compensable hours worked").

is to discipline or terminate the employee—not to withhold compensation."[68]

> Progressive notes that the sales representatives:
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> may log-off of the computer system at any time of the day, for any reason, and for any length of time, at which point, if they so choose, they may leave the office. . . . Others may work nonstop from the time they arrive until they decide to leave for the day. In other words, [they] choose the time they start, the time they stop, and whether and how much time they take off in-between.[69]

In an argument that is no doubt well-intentioned, Amicus Child Advocates argues that this "flex time" policy allows parents to address child-related needs and that it is essential for "all parents whose children are in out-of-home placement in foster care, and can provide tremendous benefits to parents . . . to deal with essential responsibilities such as scheduling second jobs, attending child-related appointments and . . . handling family-related issues . . ., and providing care for their children."[70] Amicus Childs Advocates also alerts us to a client it represented "who was placed in foster care because her mother was drug addicted. . . . [W]ithin two years, her mother had completed a drug and alcohol program, which allowed her daughter to move back in with her."[71] We do not doubt that such

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[68] *Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 442 (S.D. Ind. 2012).

[69] Appellant's Br. at 6.

[70] Amicus Curiae Support Center for Child Advocates' Br. at 4

[71] *Id*. at 2.

arguments by this Amicus result from a sincere effort to encourage flexible work place policies that are consistent with the organization's efforts to advance the welfare of at-risk children who have a particular need for parental support. However, those arguments, and similar arguments by Progressive, ignore the fact that the examples of employees' use of "break" time that Progressive presents involve activities that cannot generally be performed in twenty minutes. Thus, such examples exaggerate the extent to which the policy is intended to benefit the individual employee as opposed to the employer. This is particularly true if we factor in time getting to and from transportation to get to one's child (or to earn a degree or hold a second job). Accordingly, the restrictions endemic in the limited duration of twenty minutes or less illustrate the wisdom of concluding that the Secretary intended a bright line rule under the applicable regulations.

E. Liquidated Damages

Progressive also argues that the District Court abused its discretion in awarding liquidated damages.

If an employer violates the minimum wage provisions of the FLSA, it is liable for both the payment of unpaid wages and an additional equal amount of mandatory liquidated damages.[72] Liquidated damages are compensatory. They ease any hardship endured by

[72] 29 U.S.C. § 216(c) ("The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages."); *Cooper Elec. Supply Co.*, 940 F.2d at 907.

employees who were deprived of lawfully earned wages.[73]

To avoid mandatory liability for liquidated damages, an employer must show that it acted in good faith and that it had reasonable grounds for believing that it was not violating the Act.[74] The good faith requirement is "a subjective one that requires that the employer have an honest intention to ascertain and follow the dictates of the Act."[75] The reasonableness requirement is an objective standard.[76] An employer bears a "plain and substantial" burden to prove it is entitled to discretionary relief from liquidated damages.[77]

Here, Progressive's insufficient efforts to investigate and comply with the FLSA neither satisfy that substantial burden, nor undermine the propriety of the District Court's finding of bad faith. Satell stated that he changed Progressive's policy in 2009 to "ensure that employees across all call centers were being treated equally with respect to breaks, and specifically rebuked the suggestion that the policy change was motivated

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[73] *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) ("These liquidated damages are compensatory rather than punitive in nature; they compensate employees for the losses they may have suffered by reason of not receiving their proper wages at the time they were due.").

[74] 29 U.S.C. § 260; *Selker Bros.*, 949 F.2d at 1299.

[75] *Cooper Elec. Supply*, 940 F.2d at 907 (alterations, citations, and internal quotation marks omitted).

[76] *Id.* at 907-08; *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) ("an employer may not rely on ignorance alone in meeting the objective test.").

[77] *Cooper Elec. Supply*, 940 F.2d at 907 (quoting *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128-29 (3d Cir. 1984).

by the close-in-time increase in the minimum wage."[78] He explains that in fashioning the policy, he reviewed the DOL website, and "'then tr[ied] to get as much guidance as [he] could from the [Department of Labor].'"[79] Satell also obtained legal advice and read several opinions from various courts on the matter.[80] Additionally, he held about a dozen meetings with Progressive's Director of Call Center Operations to discuss the new policy.[81] However, he admits that he was at least "vaguely aware" of 29 C.F.R. § 785.18.[82]

In assessing liquidated damages, the District Court noted that Satell sought advice of counsel, but he refused to waive the attorney-client privilege and disclose this advice to the court. Satell's testimony placed the court in an untenable position of having to assume that counsel's advice was consistent with the adopted policy while ignoring the fact that Satell refused to tell the court what counsel advised. The District Court concluded that, given the unwillingness to share what it was told by counsel, "it is entirely possible that Defendants implemented the new break policy in 2009, despite being told by one or more of its lawyers that the policy violated the FLSA. It would be an absurd result to classify such conduct as 'good faith' . . . ."[83]

Progressive argues that the District Court abused its discretion in finding that it did not act in good faith when setting its break policy simply because Progressive refused to waive its attorney-client

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[78] *Am. Future Sys., Inc.*, 2015 WL 8973055, at *13.

[79] *Id.* (alterations in original).

[80] *Id.*

[81] *Id.*

[82] *Id.*

privilege. It claims that the District Court's decision punishes Progressive for seeking legal advice that was not essential to a good-faith determination, as employers are not required to seek legal advice to demonstrate good faith. Thus, according to Progressive, the District Court's decision will discourage open and confident relationships between clients and attorneys. That may be so, but we, like Judge Restrepo, are incredulous that an employer in this situation would decline to share the legal advice it received when the issue of good faith is raised, and we will not preclude a court from considering this in its thought process.

Further, the District Court's unwillingness to find good faith was not based solely upon Satell's refusal to waive the attorney-client privilege. Rather, it was the logical result of the Court's analysis of the entire record. Even if we ignore the fact that Progressive sought legal advice and refused to disclose the substance of that advice, we would still find that Satell did not have reasonable grounds for believing that he was comporting with the FLSA. Merely reviewing case law and looking at the DOL website does not establish that he acted reasonably because, as we have explained, that case law and website would have informed him of the bright line rule in section 785.18. The DOL has explicitly and repeatedly stated that employees must be paid for breaks of twenty minutes or less. Selective interpretation of its rulings may establish wishful thinking or obstinacy, but it certainly does not establish that the District Court abused its discretion in declining to find good faith and awarding liquidated damages.

## IV. CONCLUSION

For the foregoing reasons, we affirm the District Court's order granting in part the Secretary's partial motion for summary judgment with respect to FLSA minimum wage liability and liquidated damages.

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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The Honorable Mark A. Kearney

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DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that American Future Systems, Inc. and Edward Satell, Defendants in the above-captioned case, hereby appeal to the United States Court of Appeals for the Third Circuit from: (1) the December 16, 2015 Opinion and Order (Dkt. Nos. 73 and 74), granting in part Plaintiff's motion for partial summary judgment and denying Defendants' motion for summary judgment; and (2) the Order of May 11, 2016 (Dkt. No. 88) entering judgment against Defendants and making final the December 16 order.

Dated: June 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah E. Bouchard, hereby certify that on this 1st day of June 2016, I filed via the Court's ECF system, the foregoing document which caused electronic notification upon the following:

Andrea C. Luby
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**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

CIVIL ACTION NO. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A/ PROGRESSIVE BUSINESS PUBLICATIONS, *et al.*

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MEMORANDUM

L. Felipe Restrepo, J. December 16, 2015

Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor ("Plaintiff' or the "Secretary"), filed suit against American Future Systems, Inc. d/b/a/ Progressive Business Solutions ("Progressive") and its principal owner, Edward Satell ("Satell") (collectively, "Defendants") for violations of the minimum wage and recordkeeping provisions of the Fair Labor Standards Act, 29 U.S.0 § 201 *et seq.* The alleged minimum wage violations are the result of Progressive's policy that employees must "log-off' the computer systems, and thus not be paid, during any break taken through the workday, including breaks of 20 minutes or less. The alleged recordkeeping violations are the result of Progressive's failure to maintain and produce employee time records from certain branch locations for various time periods at issue. The parties

have each moved for summary judgment in their favor.[1] The parties have also each moved to exclude the expert testimony of the opposing party's principal expert witness pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

For the reasons that follow, both *Daubert* motions will be denied as moot.[2] Further, the Secretary's summary judgment motion will be granted with respect to FLSA minimum wage liability, FLSA recordkeeping liability, Satell's role as an employer under the FLSA, and liquidated damages. The Secretary's motion for summary judgment will be denied with respect to the willfulness of the violations. Defendants' motion for summary judgment will be denied.

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[1] Plaintiff moved for summary judgment on FLSA minimum wage liability, FLSA recordkeeping liability, Satell's role as an employer under the FLSA, liquidated damages, and willfulness, but not on the actual damages calculation. Defendants moved for complete summary judgment in their favor.

[2] Because the FLSA minimum wage liability issue is resolved by applying §785.18 as a bright-line rule, the Court need not address the merits of the parties' positions as to the "facts and circumstances" of the breaks at issue. Since this approach obviates the need to rely on any of the proffered expert testimony, the parties' respective *Daubert* motions will be denied as moot.

## I. FACTUAL AND PROCEDURAL HISTORY[3]

Progressive is a Pennsylvania corporation, with its principal place of business in Malvern, Pennsylvania. JSSF ¶ 1. Progressive's primary business is creating business information publications and selling those publications to various entities using sales representatives. *Id.* ¶ 2. Progressive's sales representatives' duties consist primarily of selling Progressive's publications to business executives via outbound telephone calls. *Id.* ¶ 12. Those sales representatives currently work in ten call centers operated by Progressive throughout Pennsylvania, Ohio, and New Jersey. *Id.* ¶ 13. During the relevant period, Progressive sales representatives also worked out of four additional call centers in Pennsylvania, which have since been closed. *Id.* ¶ 14. Progressive's sales representatives have been employed in an enterprise engaged in commerce or the production of goods for commerce within the meaning of 29 U.S.C. § 203(s)(1)(a), and Progressive's annual gross revenue meets the jurisdictional threshold in this matter. *Id.* ¶¶ 3, 11. Furthermore, Defendants do not dispute that Progressive is an "Employer" as defined in 29 U.S.C. § 203(d).

Satell is President, Chief Executive Officer, and at least 98% owner of Progressive. JSSF ¶ 4. Satell is responsible for Progressive's policies, operations, and results. *Id.* ¶ 5. Satell makes or approves high level recruitment decisions, large capital expenditures

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[3] In support of their respective motions, the parties have submitted a Joint Statement of Stipulated Facts ("JSSF") (ECF No. 40). Numerical citations to the JSSF will refer to the paragraph number of the stipulated fact. The parties have also submitted in Joint Appendix ("JA") (ECF Nos. 35, 36, 39, 42, and 47) in support of their motions. Numerical citations to the appendix will refer to the page number on which that fact appears.

and/or significant contracts, and major changes of policy. *Id.*

Progressive maintains a timekeeping system that requires its sales representatives to log-on and log-off its computer and telephone systems at certain times. JSSF ¶ 20. When representatives arrive at work during a branch's hours of operation, they log-on to the branch's computer system. *Id.* ¶ 21. Representatives remain logged-on to the computer system while making outbound sales calls, documenting the results of those calls, receiving training, and other approved tasks. *Id.* ¶ 22. Progressive sales representatives are only paid for the time that they are logged into the timekeeping system.[4] 7/14/14 Hr'g Tr. 13:12 — 14:3, 33:17 — 34:14. *See also* JA 850 (setting forth what time is paid and unpaid under the Progressive break policy); JA 194-99 (deposition testimony of Colin Drummond explaining when and why employees should be logged into or out of the computer system).

At some point in 2009, Satell consulted with Colin Drummond, Progressive's Director of Call Center Operations, to develop a uniform break policy across its call centers. JSSF ¶¶ 7, 27. In or around June 2009, the Department of Labor ("DOL") commenced a multi-year investigation of Progressive's break policy. *Id.* ¶ 15. In July 2009, Progressive implemented a written compensation policy stating, among other things, that: "Representatives may take personal breaks at anytime for any reason. Personal break time is NOT paid because it is a disadvantage to the representative to do so." *Id.* ¶ 28; JA 850. After July 2009, if a

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[4] Some representatives recorded additional time on physical timesheets for certain tasks, such as cleaning communal office space. JA 493-94, 552-53; Defs. Summ. J. Mot. (ECF No. 38) 4-5.

Progressive sales representative is not on an active sales call, recording the results of a call, engaged in training or administrative activities, or engaged in other activities that Progressive considers to be work-related, the sales representative is required to log-off on Progressive's computer system. JSSF ¶ 30. The log-on/log-off records after July 2009 produced by Progressive show each time the employee in question logged on an logged off system during the day in question and the amount of time that the employee in question was logged on and logged off the system during the day in question.[5] *Id.* ¶ 33. Progressive was unable to produce log-on/log-off records from the Bensalem, Meadville, Pottsville, Sayre, Uniontown, and Wyomissing call centers for various timespans during the relevant period. *Id.* ¶¶ 44-49. Progressive stated that its inability to produce these log-on/log-off records was due to the records being lost on account of (1) computer server destruction due to *force majeure* (e.g., flood or power outage), or (2) the recycling of computer servers containing the relevant records when the corresponding branch office closed. *Id.* ¶ 50.

On March 16, 2011, the Wage & Hour Division of the DOL informed Progressive that breaks of twenty minutes or less were compensable and that Progressive's policy of not paying for those breaks resulted in

[5] Defendants' counsel has represented to Plaintiffs counsel, and Plaintiff's counsel has apparently conceded, that Progressive sales representatives are compensated for any log-off period of 90 seconds or less. JSSF ¶ 43. Progressive's payment of these log-out periods of 90 seconds or less is apparently the result of a "grace period" built into Progressive's policies. As a result of this "grace period" and the resulting payment to Progressive representatives for breaks of 90 seconds or less, the log-on/log-off records produced by Progressive to do reflect any log-out period of less than 90 seconds. *Id.*

violations of the FLSA's minimum wage requirement. JSSF ¶ 16. The parties agreed to toll all applicable statutes of limitations for the periods from May 2, 2011 through August 1, 2011, and from August 9, 2011 through September 14, 2012. *Id.* ¶ 19.

The Secretary initiated this action against Defendants on November 1, 2012. ECF No. 1. The parties cross-moved for summary judgment on May 23, 2014. ECF Nos. 31-32, 35-36, 38-40. On May 23, 2014, the parties also cross-moved to exclude the expert testimony offered by the opposing side. ECF Nos. 33-34, 37. The parties filed their responses in opposition to the cross-motions for summary judgment on June 13, 2014. ECF Nos. 41-42, 44-45, 47. On June 13, 2014, the parties also filed their responses in opposition to the cross-motions to exclude expert testimony. ECF Nos. 43, 46. The parties filed replies in further support of their cross-motions for summary judgment on June 20, 2014. ECF Nos. 48, 51. On June 20, 2014, the parties also filed their replies in further support of their cross motions to exclude expert testimony. ECF Nos. 49-50. On July 4, 2014, with leave of Court, Defendants filed a sur-reply with respect to Plaintiffs motion to exclude Defendants' expert testimony. ECF No. 54. The Court held oral argument on both sets of cross-motions on July 14, 2014. ECF Nos. 57-58. With leave of Court, the parties submitted supplemental briefing with respect to: (1) a Notice of Supplemental Authority regarding *Ruffin v. MotorCity Casino*, 775 F.3d 807 (6th Cir. 2015) (ECF Nos. 63-65), (2) the appropriate level of deference afforded to certain administrative regulations (ECF Nos. 67-68); and (3) a Notice of Supplemental Authority regarding *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015) (ECF Nos. 71-72).

## II. JURSIDICTION AND LEGAL STANDARD

This court has subject-matter jurisdiction over this matter pursuant to 29 U.S.C. § 217, and 28 U.S.C. §§ 1331, 1345.

In ruling on a motion for summary judgment, the Court must "construe the evidence in the light most favorable" to the non-moving party, *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 176 (3d Cir. 2013), and grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact's "materiality" is determined by the substantive law at issue, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 4778 U.S. 242, 247 (1986). "A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch.*, 480 F.3d 225, 256 (3d Cir. 2007) (citations omitted). This analysis remains unchanged when there are cross-motions for summary judgment. *Lawrence v. City of Philadelphia, PA*, 527.F.3d 299, 310 (3d Cir. 2008). The analysis is unchanged because "[c]ross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist." *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

## III. LEGAL ANALYSIS

### A. Genuine Issues of Material Fact

That the parties have each moved for summary judgment, and thus each represented that there are no material facts in dispute, does not permit the Court to ignore this portion of the summary judgment analysis. See *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 150 (3d Cir. 1993) (citing *Raines*, 402 F.2d at 245). The Court, however, agrees with the parties that this matter is ripe for summary judgment on the issues presented, as there are no genuine issues of material fact. 7/14/14 Hr'g Tr. 7:1-8 ([Counsel for Plaintiff:] "There are facts in dispute, but our legal position is that there are really no material facts in dispute . . . the facts that you need to apply those things, we do not believe are in dispute[.]"); 7/14/14 Hr'g Tr. 37:24 — 38:5 ([Counsel for Defendants:] "And you are absolutely able to rule as a matter of law based on the policy, because that's ultimately what the *Tyson Foods* case was doing, and they would have gotten there if the record had been more developed. *Tyson Food* did not have the wealth of data that we produced in this case[.]").

The factual record in this matter is very well-developed. Plaintiff submitted the declarations of 70 former Progressive employees, while Defendants submitted the declarations of 21 current and former Progressive employees. JA 1004-1253, 2000-89; 7/14/14 Hr'g Tr. 11:9-24. In addition, the parties have engaged in substantial deposition practice, deposing no less than eight fact witnesses throughout the course of this case. JA 103-260, 311-597. Furthermore, the data provided by Progressive's timekeeping system is extensive and undisputed. JS SF ¶¶ 32-42; JA0896-JA0901; Defs. Opp. at 8 ("[T]he data is akin to having

thousands of declarations . . . ."); Defs. Opp. at 18 ("[T]he data provided a detailed factual imprint for each and every class member, and is more reliable than post hoc recollections from former class members. The fact-intensive inquiry required by [the CFR] is easily made through the data, making summary judgment appropriate here, where in other circumstances with other employers, it is not as easily proven."); 7/14/14 Hr'g Tr. 40:8 ([Counsel for Defendants]: "The data is undisputed."). The data delivers a clear and unbiased history of the breaks taken by Progressive sales employees during the relevant period. 7/14/14 Hr'g Tr. 39:10-14 ([Counsel for Defendants]: "You can simply rely on what the data shows . . . what better facts and circumstances for you to look at than a million data points.").

While each party submitted a statement of disputed material facts in opposition to the opposing party's summary judgment motion (ECF Nos. 41-1, 45), upon close inspection it is clear that these alleged disputed material facts are no impediment to summary judgment. Of the thirty-eight disputed material facts submitted by the parties, each fall into one of the following categories: (1) the fact is not material to the analysis required by the court; (2) the dispute is not about the fact itself, but rather is about the characterization or interpretation of the fact;[6] (3) the fact is not in dispute, but one party desired to supply additional detail or context;[7] (4) the dispute about the fact has been resolved;[8] and, (5) the fact is actually an

[6] Plf. Stmt. No. 1, 2, 4-7 ; Def. Stmt. No. 2, 3, 6, 9, 10, 12, 13, 15-18, 20, 22, 24-27.

[7] Plf. Stmt. No. 9; Def. Stmt. No. 1, 4, 5, 7, 8, 19, 21, 23.

[8] Plf. Stmt. No. 10.

argument advanced by the opposing party.[9] In the absence of any genuine issues of material fact, in light of the agreement of the parties, and having considered the extensive evidentiary record comprised of declarations, depositions, documents, and data, the Court concludes that summary judgment on liability issues may be granted on the current record.

B. FLSA Minimum Wage Liability

The Secretary alleges that Defendants have violated the minimum wage provisions of the FLSA, namely 29 U.S.C. § 206(a)(1)(c). Specifically, the Secretary argues all workday breaks of 20 minutes or less are compensable time under 29 C.F.R. § 785.18,[10] and that Progressive's break policy and compensation practices do not comport with that regulation. As a result, the Secretary alleges that many current and former Progressive employees have not been properly credited for all compensable time, and thus have been paid below the minimum wage established by the FLSA. The Secretary argues that Progressive's conduct violates the law whether the court applies § 785.18 as a bright-line rule, or whether the court considers the matter under a "facts and circumstances" test.

Defendants argue that the Secretary is attempting to enforce the wrong regulation, and that the court

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[9] Plf. Stmt. No. 3, 8; Def. Stmt. No. 11, 14, 28.

[10] 29 C.F.R. § 785.18 ("Rest") reads as follows:

> Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

should apply 29 C.F.R. § 785.16[11] to Progressive's break policy instead of § 785.18. Defendants argue § 785.16 is appropriate because Progressive's break policy is completely flexible, allowing Progressive employees to take as many breaks as they want for as long as they want, even though the law does not require an employer to permit any breaks at all. Defendants further argue that § 785.16 is the appropriate regulation here because no matter how long or short the break, the employee is completely relieved of all duties during that time and is under no obligation to return to work. Defendants argue that since the employees use their breaks for their own purposes and not for Progressive's benefit, and the breaks do not increase worker productivity, then none of the breaks are compensable time for purposes of the FLSA.

The Court is persuaded that: (1) § 785.18, and not § 785.16, is the appropriate rule for determining the compensability of the breaks at issue here; (2) § 785.18 warrants substantial *Skidmore* deference; and (3) § 785.18 should be enforced on a bright-line basis to govern the compensability of short workday

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[11] 29 C.F.R. § 785.16 ("Off duty") reads, in relevant part, as follows:

> Periods 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 are not hours worked. He 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. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

rest periods of 20 minutes or less taken by Progressive employees.

1. The Administrative Posture of 785.18

Generally speaking, there are two types of "rules" found within the Code of Federal Regulations: "legislative rules" and "interpretive rules." Rules issued through the notice-and-comment procedure established by Section 4 of the Administrative Procedures Act, 5 U.S.C. § 553, are "legislative rules" that have the force and effect of law. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). On the other hand, "interpretive rules" do not go through the notice-and-comment process, and while there is substantial disagreement about the exact definition, "the critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* (internal quotations marks and citations omitted). Accordingly, "[i]nterpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* (internal quotations marks and citations omitted).

The relevant rules found at 29 CFR Part 785 are properly classified as "interpretive rules," as they have not been promulgated pursuant to notice-and-comment, and instead were created to inform the public of the positions that the Administrator of the Wage and Hour Division would take in enforcing the FLSA. *See* 29 C.F.R § 785.2. Both parties seem to have taken the position that interpretive rules may never be afforded *Chevron* deference. *Compare* ECF No. 67 at 1 *("Skidmore* deference is appropriate where, as here, an agency promulgates interpretive rules outside of the 'notice and comment' rulemaking set forth in the Administrative Procedures Act, 5 U.S.C. § 553."), *with*

ECF No. 68 at 1 ("First, as both the Supreme Court and Third Circuit have made clear, the level of deference, if any, afforded to enforcement guidance and interpretive rules such as those found in 29 C.F.R. §§ 785.16 and 785.18 is evaluated under *Skidmore.").* Both parties, however, appear to have missed the mark. In *United Stated v. Mead Corp*, the Supreme Court said, "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . The fact that the [rule] here was not a product of such formal process does not alone, therefore, bar the application of *Chevron."* 553 U.S. 218, 230-31 (2001) (internal citation omitted). A year later, the Supreme Court reiterated this proposition from *Mead:* "And the fact that the Agency previously reached its interpretation through means less formal than `notice and comment' rulemaking, see 5 U.S.C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen*[] suggested an absolute rule to the contrary, our later opinion in *Mead*[] denied the suggestion." *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (internal citations omitted). Nevertheless, in the absence of a party advocating for its application, the Court will not thrust the possibility of *Chevron* deference upon them.[12] Accordingly, the Court will now turn to the position of the parties, who,

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[12] Because the Court concludes that § 785.18 warrants substantial *Skidmore* deference and is the appropriate rule to govern the breaks at issue here, the application of *Chevron* deference would only increase the strength of the position adopted by the Court.

for whatever reason, both agree that *Skidmore v. Swift*, 323 U.S. 134 (1944), is the proper lens through which to view §§ 785.16 and 785.18.

2. The Level of Skidmore Deference for Section 785.18

Though the parties agree that the level of deference afforded § 785.18 is appropriately determined under the *Skidmore* framework, *compare* ECF No. 67 at 1-2, with ECF No. 68 at 1-2, they strongly disagree about the amount of deference that § 785.18 deserves. Plaintiff argues that the regulation "is due substantial *Skidmore* deference" (ECF No. 67 at 1), while Defendants argue that "[h]ere, no deference is warranted § 785.18" (ECF No. 68 at 2).

In *Skidmore*, the Supreme Court recognized that the rulings, interpretations, and opinions of the Administrator of the Wage and Hour Division under the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. 134, 140 (1944). Furthermore, the Supreme Court held that the weight given to an interpretation or opinion "will depend upon the thoroughness evident it is consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade[.]" *Id.* More recently, the Third Circuit has "adopted *Mead's* conceptualization of the *Skidmore* framework as a 'sliding-scale' test in which the level of weight afforded to an interpretation varies depending on [the] analysis of the enumerated factors." *Hagans v. Commissioner of Social Sec.*, 694 F.3d 287, 304 (3d Cir. 2012) (quoting *United States v. Mead Corp.*, 553 U.S. 218, 228 (2001)). Those factors include whether the interpretation was: (1) issued

contemporaneously with the statute; (2) consistent with other agency pronouncements; (3) reasonable given the language and purposes of the statute; (4) within the expertise of the relevant agency; and (5) part of a longstanding and unchanging policy. *Hagans*, 694 F.3d at 304-05. *See also Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 808 (3d. Cir. 1999) (if an agency has been granted administrative authority by Congress, *Skidmore* deference is warranted "as long as it is consistent with other agency pronouncements and furthers the purposes of the Act.").

As a preliminary matter, there is no dispute that Congress properly delegated authority to the Administrator of the Wage and Hour Division to administer the FLSA. *See* 29 U.S.C. § 204(a) ("There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division . . . The Administrator shall be appointed by the President, by and with the advice and consent of the Senate."). In addition, it cannot be credibly argued that § 785.18 does not fall within the expertise of Department of Labor and the Wage and Hour Division. *See Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) ("In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act"); *see also Townsend v. Mercy Hosp. of Pittsburgh*, 862 F.2d 1009, 1012-13 (3d Cir. 1988) (declaring that "the Administrator's expertise acquired through day-to-day application of the [FLSA] makes us hesitant to contravene such opinions unless the statute plainly requires other-

wise."). Accordingly, both factors favor substantial *Skidmore* deference for § 785.18.

With respect to contemporaneousness, the FLSA was signed into law on June 25, 1938,[13] and did not go into effect until October 24, 1938.[14] Section 785.18 originates from a June 10, 1940 interpretive press release from the Administrator of the Wage and Hour Division. See *Minimum Wages and Maximum Hours*, 51 MONTHLY LAB. REV. 417, 418 (1940) (reporting the issuance of Wage and Hour Division Press Release No. R-837, June 10, 1940, as saying that short rest periods, up to and including 20 minutes, are construed by the Administrator of the Wage and Hour Division as working time); *Mitchell v. Greintz*, 235 F.2d 621, 624 (10th Cir. 1965) ("On June 10, 1940, the Administrator issued an interpretive press release declaring that short rest periods up to and including twenty minutes should be compensated."). The issuance of this interpretive press release predecessor to § 785.18 was part of what could only be described as a flurry of activity by the Wage and Hour Division to effectively administer the FLSA in its infancy. *See*, *e.g.*, U.S. Dep't of Labor, Wage & Hour Div., ANNUAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30 1940 147-48 (U.S Gov't Printing Office, 1941) (describing that during the fiscal year ending June 30, 1940, the Wage and Hour Division, among other things, issued 449 press releases explaining various administrative actions, as "[o]nly a continuous flow of information material can serve to keep all employers adequately and timely informed of the policies, determinations, interpreta-

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[13] Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938).

[14] See 29 U.S.C. § 215(a) (stating that that law will become effective 120 days after June 25, 1938).

tions, certifications and wage orders requisite to intelligence compliance with the act."). Considering the expansive nature of the FLSA, the fact that the Wage and Hour Division was a created by the very act it was then tasked to administer, the large number of inquiries the Wage and Hour Division handled during its infancy,[15] and that the relevant guidance was issued within the first twenty months of the statute's existence, the direct predecessor to § 785.18 was sufficiently contemporaneous with the passage of the FLSA to militate in favor of substantial *Skidmore* deference.[16]

Section 785.18 is a rule that is both longstanding and unchanging. The text of the rule today is identical to the text of the rule when it was implemented in 1961. *See* 26 Fed. Reg. 190 (Jan 11, 1961). In addition, the DOL's consistent application and interpretation of this rule spans many decades and is well-documented. *See* JA0841-0848 (containing Wage and Hour Division and Public Contract Divisions Administrator, U.S. Dep't of Labor (Aug. 13, 1964); Wage and Hour Division and Public Contract Divisions Administrator, U.S. Dep't of Labor (Dec. 19, 1967); Wage and Hour Division Administrator, Opinion Letter FLSA, U.S. Dep't of Labor, FLSA-587 (Oct. 3, 1975); Wage and Hour Division Administrator, Opinion Letter FLSA, U.S. Dep't of Labor, SCA-126 (Mar. 27, 1987); Wage and

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[15] *Id.* at 91 (noting that in the first twenty months since the effective date of the FLSA, the Wage and Hour Division received a total of 56,678 complaints alleging violations of the act).

[16] It is also worth noting that that the initial codification of §785.18 in the CFR was nearly contemporaneous with the passage of the 1961 amendments to FLSA — the two were separated by approximately four months. *See* Pub. L. No. 87-30, 75 Stat. 65.

Hour Division Administrator, Opinion Letter FLSA, U.S. Dep't of Labor, (Feb. 19, 1998)). Perhaps the Wage and Hour Division's position with respect to the applicability of the rule is best summarized by one of its earlier pronouncements:

> Employees have always taken short work breaks, with pay, for a myriad of non-work purposes -- a visit to the bathroom, a drink of coffee, a call to check the children, attending to a medical necessity, a cigarette break, etc. The Department has consistently held for over 46 years that such breaks are hours worked under the FLSA, without evaluating the relative merits of an employee's activities. This position [is] found at 29 C.F.R. 785.18 . . . The compensability of short breaks by workers has seldom, if ever, been questioned . . . The FLSA does not require an employer to provide its employees with rest periods or breaks. If the employer decides to permit short breaks, however, the time is compensable hours worked.

U.S. Dep't of Labor, Wage and Hour Division Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1005233, at *1 (Dec. 2, 1996). Furthermore, other Wage and Hour Division pronouncements are consistent with the rule announced in §785.18. *See* U.S. Dep't of Labor, Field Operations Handbook, ch. 31a01(a) (Dec. 15, 2000) ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked."); U.S. Dep't of Labor, Wage and Hour Division Opinion Letter Fair Labor Standards Act (FLSA), 2001 WL 1869965, at *1 (May 19, 2001) (concluding that when

there has been an unauthorized extension of authorized break, "[o]nly the length of the unauthorized extension of an authorized break will not be considered hours worked . . . not the entire break."). These records clearly show that § 785.18 represents the longstanding and unchanging policy of the Wage and Hour Division, a policy that has been (and continues to be) consistent with other agency pronouncements about the compensability of short rest periods of twenty minutes or less. Accordingly, these factors also favor the application of substantial *Skidmore* deference to § 785.18.

With respect to the language and purposes of the FLSA, it is clear from the plain language of the statute that it was designed as a remedial measure to improve working conditions and reduce unfair treatment of employees. *See*, *e.g.*, 29 U.S.C. § 202(b) ("It is declared to be the policy of this chapter . . . to correct and as rapidly as practicable to eliminate the conditions above referred to . . . ."). Congress deemed the FLSA necessary in the face of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and the general well-being of workers . . . ." 29 U.S.C. § 202(a). By ensuring that employees do not have their wages withheld when they take short breaks of 20 minutes or less to visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work, the regulation undoubtedly protects employee health and general well-being by not dissuading employees from taking such breaks when they are needed. Whether the "efficiency" of Progressive employees is improved by the regulation is the subject of some disagreement between the parties. That disagreement, however, does not impair the conclusion that § 785.18: (1) undoubtedly furthers the other articulated purposes of the FLSA for employees (including Pro-

gressive employees); (2) improves employee efficiency generally;[17] and (3) at least arguably improves the efficiency of Progressive employees, whether efficiency is judged on a micro or macro scale. Clearly, the reasonableness of § 785.18 in light of the language and purposes of the FLSA also favors the application of substantial *Skidmore* deference.

The Court is convinced that § 785.18 should be afforded the most substantial deference permitted under the sliding-scale of *Skidmore.* The Third Circuit has found that "the Administrator's expertise acquired through day-to-day application of the statute makes us hesitant to contravene such opinions unless the statute plainly requires otherwise." *Townsend v. Mercy Hosp. of Pittsburgh*, 862 F.2d 1009, 1012-13 (3d Cir. 1988). This Court is particularly hesitant to contravene the Administrator's opinion here, as the expertise gleaned through day-to-day application of the statute via § 785.18 dates back over 50 years (and dates back over 75 years for the predecessor of § 785.18).

3. The Application of Section 785.18 as a Bright-Line Rule

Though it is clear to the Court that § 785.18 warrants substantial *Skidmore* deference, there is no clear precedent from the Third Circuit applying §

[17] *See*, *e.g.*, U.S. Dep't of Labor, Wage & Hour Div., ANNUAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30 1940 4-22 (U.S Gov't Printing Office, 1941) (discussing, at length, the history of improvements in employee efficiency witnessed by employers who implemented reduced hours per day/week, as the reduction in hours: reduced employee fatigue, allowed for increased effort, resulted in more contented workers with higher morale, reduced loss of time due to illness, and decreased labor turn-over).

785.18 as a bright-line rule.[18] The parties have not provided any controlling Third Circuit precedent for

[18] Defendants, in their most recent Notice of Supplemental Authority, argue that the Third Circuit's decision in *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015), should be interpreted to mean that: (1) "no deference is due to the DOL's rest period regulation . . . in this case;" (2) "the 'predominant benefit' test is the proper framework to determine the compensability of employees' breaks;" and (3) "the Secretary's argument that Progressive's alleged control over breaks changes the predominant benefit calculus" must be rejected. ECF No. 72. The Court does not read *Babcock* in the same manner.

*Babcock* is a case that focuses on meal periods, not rest periods. If this wasn't clear from the first sentence of the second paragraph of the majority's opinion ("This appeal raises the issue of whether a portion of time for the Butler County Prison corrections officers' meal periods is compensable under the FLSA."), it should become clear after reading the majority opinion and the dissent in their entirety – neither of which contain a single reference to § 785.18.

The absence of § 785.18 from *Babcock* does not mean, however, that it had nothing to say about rest periods. In fact, the singular reference to "rest periods" in the entire opinion arises when the Third Circuit quotes, with approval, the following proposition from the Eleventh Circuit: "the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal." *Babcock*, 806 F.3d at 157 (quoting *Kohlheim v. Glynn County*, 915 F.2d 1473, 1477 (11th Cir. 1990)). This reference suggests the Third Circuit's agreement with two key points: (1) short breaks taken to eat a regularly scheduled meal are either "rest periods" or "bona fide meal periods;" and (2) "rest periods" are compensable. In the instant case, since none of the short breaks of 20 minutes or less were taken for the purpose of eating a regularly scheduled meal (Progressive's break policy contains separate provisions about the scheduling of regular meal periods), the Court need not apply the newly adopted predominant benefit test, as that test is used to "determine whether a

this Court to consider, and independent research has yielded none. Fortunately, the decisions of other District Courts provide ample persuasive guidance.

While Progressive's break policy and workplace may be unique, courts considering break periods of 20 minutes or less consistently find such breaks compensable in all types of working environments, relying on § 785.18 as a bright-line rule to do so.[19] Many courts

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meal period is compensable under the FLSA." *Babcock*, 806 F.3d at 155.

[19] Defendants, in their first Notice of Supplemental Authority, urged the Court to consider *Ruffin v. MotorCity Casino*, 775 F.3d 807 (6th Cir. 2015), as standing for two relevant propositions: (1) "it is not impractical or unmanageable for the Court to evaluate the totality of circumstances of breaks as a whole and decide whether they predominantly benefit Progressive or its sales representatives;" and (2) "non-work periods can predominantly benefit employees even where an employer exercises some level of control over those periods." ECF No. 63 at 2. The Court finds the latter proposition to have little bearing on the case now before it. In *Ruffin*, the Sixth Circuit considered the compensability of meal periods, a matter addressed by its own regulation (29 C.F.R. § 785.19) and did not analyze or even mention either § 785.16 or § 785.18. The *Ruffin* Court's holding that the employer's "requirement that [the employees] take their meals on [employer] property does not show that the meal periods predominantly benefited the [employer]" is likely a position that Plaintiff would agree with — after all, the Department of Labor's own regulation recognizes that "Bona fide meal periods are not worktime . . . [and] [i]t is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." 29 C.F.R. § 785.19. However, not all temporary periods of inactivity are created equal, and this Court has been asked to address rest periods of 20 minutes or less in duration, not meal periods, waiting time, or any other type of break. Accordingly, *Ruffin's* conclusions are not only not controlling, they are not persuasive with respect to the type of breaks at issue here. As for the former proposition, the Court is unpersuaded that the Sixth Circuit's logic in *Ruffin* strengthens

have reached this legal conclusion in the aftermath of a trial. *See Solis v. Cindy's Total Care, Inc.*, 2012 WL 28141, at *9, 19 (S.D.N.Y Jan 5, 2012) (comparing § 785.18 (rest) with § 785.19 (meal) to explain why an employer might lie about the length of employee breaks: "unlike shorter breaks, an employer need not compensate employees for longer rest periods;" also citing § 785.18 to support the conclusion that compensable time "also includes work breaks approximately of 20 minutes or less in duration."); *Gomez v. Tyson Foods, Inc.*, 2013 WL 5516277, at *5 (D. Neb. Oct. 2, 2013) (citing § 785.18 to support the conclusion that a fifteen minute break was compensable time); *Reich v. Cole Enterprises, Inc.*, 901 F. Supp. 255, 260 (S.D. Ohio 1993) (concluding that "cigarette breaks" taken by employees are compensable time under § 785.18). Other courts have applied § 785.18 as a bright-line rule at the summary judgment stage. *See Brown v. L&P Industries, LLC*, 2005 WL 3503637, at *6 (E.D. Ark. Dec. 21, 2005) (relying on § 785.18 to find that a "brief break" each morning for 15 minutes "cannot properly be deducted from [employee] work hours"); *DeKeyser v. Thussenkrupp Waupaca, Inc.*, 747 F. Sup. 2d 1043, 1056-1057 (E.D. Wisc. 2010) (citing § 785.18 and § 778.223 to support the conclusion that rest

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Defendants' overall litigation position in the manner they hoped it would. After all, in considering the "facts and circumstances" presented in *Ruffin*, the court seemingly gave determinative weight to an advisory opinion from the Wage and Hour Division of the Department of Labor. 775 F.3d at 815. If this Court gave the advisory opinions of the Wage and Hour Division the same determinative weight that the Sixth Circuit did in *Ruffin*, Defendants would be in an unenviable position. *See*, *e.g.*, 1996 WL 1005233, at *1 ("Employees have always taken short work breaks, with pay, for a myriad of non-work purposes . . . the time is compensable hours worked.).

breaks of five to twenty minutes "taken outside of [the employer's] provided rest breaks should be considered work time under the FLSA." ); *Jones v. C&D Technologies, Inc.*, 2014 WL 1233390, at *11 (S.D. Ind. March 25, 2014 (citing § 785.18 as support for the conclusion that twenty minute lunch break is compensable time); *Lacy v. Reddy Electric Co.*, 2013 WL 3580309, at *14 (S.D. Ohio July 11, 2013) (citing § 785.18 as support for defendant's apparent concession that "employees must be paid for stand-alone breaks of 5-20 minutes."); *Martin v. Waldbaum, Inc.*, 1992 WL 314898, at *1 (E.D.N.Y. Oct. 16, 1992 (citing § 785.18 and concluding as a matter of law that "breaks of less than twenty minutes are compensable" and short employee breaks for personal telephone calls and cigarettes "are commonplace and sensible in any working environment").

This Court is further convinced that § 785.18 should be applied as a bright-line rule by the fact that other courts have repeatedly relied on the regulation when considering claims involving multiple plaintiffs. In *Aboud v. City of Wildwood*, the court granted plaintiffs' motion for conditional certification as a collective action under FLSA, finding that the employees were sufficiently similarly situated and that a factual nexus existed between the treatment of plaintiffs and other employees under the policy in question. 2013 WL 2156248, at *3-7 (D.N.J. May 17, 2013). The court relied on § 785.18 in rejecting defendant's claims that two fifteen minute "coffee breaks" during the course of a shift should be subtracted from the calculation of hours worked for purposes of the FLSA. *Id.* at *5-6 ("Because plaintiffs' two fifteen minute 'coffee breaks' are of short duration the Court rejects [defendant's] arguments and concludes that for present purposes they are compensable."). In *Hawkins v. Alorica, Inc.*,

the court again granted plaintiffs' motion for conditional certification as a collective action under FLSA, though it did so under stricter scrutiny than was applied in *Aboud.* 287 F.R.D. 431, 441-43 (S.D. Ind. 2012). The court was sufficiently satisfied that the employees were sufficiently situated with respect to the company's break policy, because there was some evidence that the company policy required the sales representatives to log-out of the phone system for breaks, even if the breaks lasted less than twenty minutes. *Id.* at 442. The court seemingly adopted § 785.18 as a bright-line rule, citing both the regulation and a 1996 Opinion Letter from the Wage and Hour Division regarding the FLSA in concluding that "[e]ven where a company has provided for scheduled breaks, and the employee takes an unscheduled break in addition to those scheduled breaks, the employer must compensate for the additional unscheduled break if it is less than twenty minutes." *Id.* In yet another case conditionally certifying a collective action under FLSA, the court in *Petrone v. Werner Enterprises, Inc.*, cited § 785.18 as a bright-line rule in support of the conclusion that breaks of less than 20 minutes must be counted under the FLSA as hours worked. 2012 WL 4848900, at *3 (D. Neb. Oct. 11, 2012).

In light of the foregoing, the Court concludes that it is appropriate to apply § 785.18 as a bright-line rule to determine the compensability of short workday rest periods of twenty minutes or less.

4. Inapplicability of § 785.16

Defendants devote many pages of their summary judgment papers to advocate for the application of § 785.16 to Progressive's break policy, in lieu of § 785.18. Ultimately, the Court finds this position to be unavailing.

First, Defendants' argument that "courts have eschewed blind adherence to the type of `length of break' test of which the Secretary relies" is not an accurate summary of the existing caselaw. Numerous courts, all across the country, have done exactly that. *See, e.g.*, *Naylor v. Securiguard, Inc.*, 801 F.3d 501, 504-05 (5th Cir 2015) ("The regulations thus make the duration of the break the key factor in whether it is classified as the shorter, compensable 'rest break' or the longer, noncompensable 'meal period."); *Rother v. Lupenko*, 515 Fed. Appx. 672, 674-75 (9th Cir. 2013) ("It is the general rule under federal law that breaks of less than thirty minutes are compensable."); *Heidbrink v. Thinkdirect Marketing Group, Inc.*, 2015 WL 7253010 (M.D. Fla. Nov 17, 2015) ("The relevant law suggests that break periods consisting of twenty minutes or
less and lunches that are not 'bona fide meal periods' should be compensated regardless of the status the employer requires its employees to select.);

Second, Defendant's argument that Progressive employees "can use breaks effectively for their own purposes because they can make those breaks as long, or short, as they want in order to complete whatever personal task they have at hand" misses the point. The Secretary's position, as embodied in § 785.18, is that breaks of twenty minutes or less are of such short duration that they cannot, by their very nature, be used for "whatever personal task."

The Secretary's regulations cover a wide variety of situations, including rest periods, meal periods, waiting time, travel time, on-call time, training time, and preparatory and concluding time, among others. Defendants efforts to transform a specific situation – that is, a break of 20 minutes or less – which is covered

by a specific regulation, into a more general situation (off duty time), which is covered by a more general regulation is both unpersuasive and contrary to the longstanding cannon of favoring the specific over the general. *See Creque v. Luis*, 803 F.2d 92, 95 (3d Cir. 1986) (explaining that when two statutes are in conflict, the specific statute is favored over the more general statute).

5. Limitations on § 785.18

Though not raised by the parties, the Court notes two exceptions to the bright-line rule embodied in § 785.18: (1) unauthorized extensions of authorized breaks, and (2) breaks taken for the purpose of expressing breast milk.

In *Lillehagen v. Alorica, Inc.*, 2014 WL 698923 (C.D. Cal Dec. 10, 2014), the Honorable David O. Carter analyzed both exceptions. Relying on Chapter 31a01(c) of the Department of Labor's Filed Operations Handbook, dated December 15, 2000,[20] and a 2001 Department of Labor Opinion Letter interpreting Chapter 31a01(c), 2001 WL 1869965,[21] Judge Carter concluded that "if an employer has 'expressly and unambiguously communicated do the employee that : (1) the authorized break may only last for a specific

[20] Chapter 31a01(c) states: "Unauthorized extensions of authorized employer breaks are not counted as hours worked for an employee when the employer has expressly and unambiguously communicated to the employee that: (1) The authorized break may only last for a specific length of time; (2) Any extension of such break is contrary to the employer's rules; and (3) Any extension of such a break will be punished.

[21] The 2001 Opinion Letter stated in relevant part: "Only the length of the unauthorized extension of an authorized break will not be considered hours worked when the three conditions are not, not the entire break."

length of time; (2) Any extension of such break is contrary to the employer's rules; and (3) Any extension of such a break will be punished,' then unauthorized extensions of authorized breaks need not be compensated." *Lillehagen*, 2014 WL 6989230, at *10 (citation omitted). This exception has no bearing on the present case, because it requires the existence of paid authorized breaks and the Progressive break policy does not permit any. See JA 850 ("Personal break time is NOT paid . . . .").

The second exception is relevant to the present case. The comprehensive healthcare reforms enacted by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 110, 577 (2010), included the addition of § 207(r) to the FLSA. In relevant part, § 207(r) states: "(1)(A) An employer shall provide -- a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk . . . (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose." 29 U.S.C. § 207(r)(1)-(2). Section 207(r) became effective on March 23, 2010.[22] Accordingly, any breaks taken by Progressive employees on or after March 23, 2010, for the purpose of expressing breast

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[22] While may sections of the Patient Protection and Affordable Care Act specified their effective date, or provided some means to calculate their effective date, the Act contained no such language for § 4207. Accordingly, the addition § 207(r) to the FLSA became effective on March 23, 2010, the date the Act was signed into law. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." (citations omitted)).

milk for a nursing child within one year after the birth of that child is not a compensable break.[23]

C. Satell as an Employer Under the FLSA

The Secretary argues that Satell is an employer under the FLSA, and should be liable for any FLSA liability attributable to Progressive as a result of the company's break policy. Pl.'s Mot. at 24-26. In response, Defendants do not truly address the merits of the Secretary's legal position, but instead characterize the Secretary's position as "unwarranted and

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[23] The nature of this amendment also demonstrates that § 785.18 warrants substantial *Skidmore* deference. In *Barnhart v. Walton*, the Supreme Court made clear that Congress' frequent amendment or reenactment of the underlying statute can be considered as relevant evidence that Congress agreed with an agency's interpretation of a statute. 535 U.S. 212, 220 (2002).

In the numerous amendments to the FLSA since its enactment, Congress has never disrupted the Department of Labor's interpretation of the FLSA as set forth in §785.18. Congress' inaction in this area for over 50 years can clearly be viewed as acquiescence to the agency's position.

Interestingly, in adding § 207(r) to the FLSA Congress did take specific steps to ensure that these newly provided-for breaks were different from breaks that would otherwise be governed by § 785.18. First, unlike short workday breaks of twenty minutes or less, breaks taken for the purpose of expressing breast milk are required by the statute. Second, unlike short workday breaks of twenty minutes or less, breaks taken for the purpose of expressing breast milk do not require compensation. If FLSA employers were not otherwise required to compensate employees for breaks of 20 minutes or less, then the carve-out in § 207(r) would seem to be meaningless for breast milk breaks of less than 20 minutes. Such surplusage is disfavored. *See Mackey v. Lanier Collection Agency & Service, Inc.*, 468 U.S. 825, 837 (1988) ("As our case have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

vexatious," "unwarranted and harassing," "egregious," and evidence of "unnecessary aggressiveness." Defs.' Opp. at 24-25. The necessity or niceness of the Secretary's position does not dictate the Court's resolution of this issue. The Court instead turns to the language of the FLSA, as well as binding and persuasive authority for guidance. In light of the substantial authority provided by the Secretary in support of its position,[24] and the lack of meaningful authority offered in response by Defendants, the Court is convinced that Satell qualifies as an employer under the FLSA and must be held liable for Progressive's violations of the FLSA.

The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The Third Circuit has recognized that this is an expansive definition. *In re Enter. Rent-A-Car Wage & Hour Practices Litig.*, 683 F.3d 462, 467 (3d. Cir. 2012). To determine whether an individual is an employer under the FLSA, the Third Circuit uses the "economic reality" test. *Haybarger v. Lawrence County Adult Probation and Parole*, 667 F.3d 408, 417-18 (3d Cir. 2012). Under the FLSA, "whether a person functions as an employer depends on the totality of the circumstances rather than on 'technical concepts of the employment

[24] *See*, *e.g.*, *Castellino v. M.I. Friday, Inc.*, 2012 WL 2513500, at *3 (W.D. Pa. June 29, 2012) (finding an individual to be a joint employer for FLSA purposes where, among other things, the individual was the owner and CEO of the company, exerted operational control over the company, had the ability to hire and fire the company's employees, and set the compensation rates and policies for the employees); *Jackson v. Art of Life, Inc.*, 836 F. Supp. 2d 226, 235 (E.D. Pa. 2011) (finding that a corporate officer with operational control of a company, who was personally responsible for setting the compensation policies, was an employer for FLSA purposes).

relationship." *Id.* at 418 (quoting *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 612 (3d Cir. 1971)). More specifically, to determine if Satell is a joint employer of Progressive employees, the Court must apply the *Enterprise* test. 683 F.3d at 469-70. Under the *Enterprise* test, in determining whether a joint employment relationship exists:

> courts should consider: (1) the alleged employer's authority to hire and fire the relevant employees; (2) the alleged employer's authority to promulgate work rules and assignments and to set the employee's conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; (3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) the alleged employer's actual control of employee records, such a payroll, insurance, or taxes.

*Enter. Rent-A-Car*, 683 F.3d at 469. However, these factors "cannot be 'blindly applied' as the sole considerations necessary to determine joint employment . . . [particularly where] other indicia of 'significant control' are present to suggest that a given employer was a joint employer." Id. at 469-70 (quoting *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469-70 (9th Cir. 1983)).

Satell owns 98% of Progressive, and serves as its president and CEO. JA 480-81, 486. In his own words, Satell is responsible for: "primarily strategy, overview of the company, [and] . . . all of the people and all the activities within the company." JA 481. According to Progressive COO Thomas Schubert, Satell "is primarily responsible for strategy and policy. That's what he likes to play and stay involved with, so strategy about

where we're trying to grow and why, and any major policy decisions for the company." JA 546; JA 133-34. Satell is the final authority for the telemarketer compensation policies, the telemarketer break policy, and is "responsible for the budgets and how we perform." JA 482-84; JA 131-32; JA 244-45. While he delegates authority to others to make the day-to-day decisions about hiring and firing individual telemarketers, he retains the final authority with respect to such hiring and firing decisions "on a policy level," that is, for key hires. JA 484, 546. Furthermore, Satell speaks with COO Schubert every day about Progressive's operations. JA 546.

Upon consideration of the economic reality of Satell's role at Progressive, the factors set forth by the *Enterprise* test, and the other indicia of significant control, this Court concludes that Satell is a joint employer of Progressive employees for purposes of the FLSA. Accordingly, the Secretary's motion for summary judgment will be granted with respect Satell's role as an employer.

D. Willfulness

Nowhere in its summary judgment papers does the Secretary address why it is seeking a determination that Defendants' violations of the FLSA were willful. Pl.'s Mot. at 28-29. Independently, the Court has identified two possible motivations for pursuing such relief. First, if a defendant willfully violates the FLSA then the statute of limitations for such violations is extended from two years to three years. 29 U.S.C. § 255(a). Second, a defendant who willfully violates the FLSA may be liable for civil money penalties imposed by the Administrator of the Wage and Hour Division. 29 U.S.C. § 216(e)(2); 29 C.F.R. §§ 578.3, 580.2. Because it appears that neither the statute of

limitations,[25] nor the imposition of civil money penalties[26] are at issue in this action, the Court need not issue an advisory opinion on the question of willfulness. Accordingly, to the extent that the Secretary's summary judgment motion seeks a finding of willfulness, that portion of the motion will be denied.[27]

E. Liquidated Damages

In relevant part, 29 U.S.C. § 216(c) states that: "The Secretary may bring an action in any court of competent jurisdiction to recover the amount of

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[25] The earliest alleged FLSA violation identified in the Complaint occurred on July 24, 2009. Compl. at 5. The Complaint was filed on Nov. 1, 2012. *Id.* Using those dates as outside boundaries for the statute of limitations, the Court calculates that period as spanning 1196 days. The parties, however, entered into a series of tolling agreements that excluded a total of 479 days from that period. JA 100-02. As a result, 717 non-excluded days remain at issue. When taking into account the excluded time, all of those 717 days would fall within the shortest possible limitations period that could apply — 2 years (or 730 days). Since expanding the statute of limitations to three years would bring no additional conduct within the jurisdiction of this Court, the Court need not determine whether a two-year or three-year statute of limitations applies.

[26] First, civil money penalties are not a form of relief sought in the present action. *See* Compl. at 6-7 (seeking only: (1) a permanent injunction, (2) a "judgment in the amount of back wage compensation due together with an equal amount in liquidated damages," and (3) costs). Second, it appears that a Court cannot impose civil money penalties in an action such as this, as any such penalties must be pursued in the first instance by the Administrator of the Wage and Hour Division through a dedicated administrative process. *See* 29 C.F.R § 580.1 et seq.

[27] It is also worth noting that the pleadings in this action do not invoke jurisdiction on the basis of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and no party has plead relief under the Declaratory Judgment Act.

unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." Such liquidated damages are compensatory — to ease any hardship endured by employees who were deprived of lawfully earned wages; they are not regarded as a way to punish the company for violating the statute. *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) ("These liquidated damages are compensatory rather than punitive in nature; they compensate employees for the losses they may have suffered by reason of not receiving their proper wages at the time they were due."). Accordingly, "[d]ouble damages are the norm, single damages the exception[.]" *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

A court, in its sound discretion, may award no liquidated damages or may award less than the maximum permitted by the statute if the employer shows to the satisfaction of the court that it acted in good faith and had reasonable grounds for believing that it was not violating the FLSA. 29 U.S.C. § 260. "[A] defendant employer bears the 'plain and substantial' burden of proving he is entitled to discretionary relief from the FLSA's mandatory liquidated damages provision." *Martin v. Cooper Elec. Supply Co.*, 940F.2d 896, 907 (3d Cir. 1991) (quoting *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128-29 (3d Cir. 1984)). Thus, "[t]o avoid liability for liquidated damages, the employer must make a showing of good faith and reasonable grounds for its conduct. If the employer fails to carry its burden of demonstrating good faith and reasonable grounds, the award of liquidated damages is mandatory." *Selker Bros.*, 949 F.2d at 1299 (citations omitted); *see also Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) (holding that in the absence of a showing of good faith and that

reasonable grounds existed for the employer's belief that the FLSA did not apply, "the district court has no discretion to mitigate an employer's statutory liability for liquidated damages").

At his deposition, Satell stated that his motivation for changing Progressive's break policy was to ensure that employees across all call centers were being treated equally with respect to breaks, and specifically rebuked the suggestion that the policy change was motivated by the close-in-time increase in the minimum wage. JA 522-26. Satell testified that he consulted the Department of Labor website, and "then tried] to get as much guidance as [he] could from the [Department of Labor]." JA 518-19. He became at least "vaguely aware" of the existence and content of 29 C.F.R. § 785.18. JA 531-32. Satell sought and obtained the advice of legal counsel on the subject. JA 519-20, 531-36. He also read a number of legal opinions from various courts on the subject. JA 532-33, 536. In total, Satell and Drummond, held about a dozen meetings to discuss the change to the company-wide break policy. JA 229.

Defendants argue that Staell's "intensive review of the FLSA, relevant regulations, and case law is more than sufficient to establish good faith." Defs' Opp. at 27. And while Defendants have cited a number of cases in which courts have found similar efforts sufficient to establish good faith, *Id.* at 26-27, Defendants have not identified any cases where the defendant: (1) obtained legal advice from several lawyers; (2) refused to disclose the substance of that legal advice; and (3) was found to have acted in good faith. This Court recognizes that a large number of courts have found that "the FLSA . . . does not require an employer to seek a legal opinion." *Grant*, 2012 WL 124399, at *14. Where

such a legal opinion has been sought and obtained, however, this Court is of the opinion that a defendant cannot demonstrate that it has acted in good faith unless it comes forward with at least some evidence that it acted in conformance with that legal advice (or, at the very least, that it has not contravened the legal advice). "The good faith requirement is a subjective one that 'requires the employer have an honest intention to ascertain and follow the dictates of the Act.' *Cooper Elec.*, 940 F.2d at 907 (emphasis added) (quoting *Tri-County Growlers, Inc.*, 747 F.2d at 129). Here, it is entirely possible that Defendants implemented the new break policy in 2009, despite being told by one or more of its lawyers that the policy violated the FLSA. It would be an absurd result to classify such conduct as "good faith," but Defendants have refused to take action to eliminate that scenario from the realm of very real possibilities. Accordingly, Defendants are unable to demonstrate that they had an honest intention to ascertain and follow the dictates of the FLSA, so they have failed to meet their plain and substantial burden of proving an exception to the otherwise mandatory award of liquidated damages. The Secretary's motion for summary judgment with respect to liquidated damages will be granted, and liquidated damages will be awarded in an amount equal to the yet-to-be-determined back wage compensation award.

F. Recordkeeping

The FLSA imposes recordkeeping requirements on employers. See 29 U.S.C. § 211(c). As summarized by the Third Circuit, the FLSA "requires employers to maintain accurate records to ensure that all workers are paid the minimum wage for every hour worked." *Tri-County Growers, Inc.*, 747 F.2d at 128 (citing *Wirtz*

*v. Williams*, 369 F.2d 783, 785 (5th Cir. 1966)). The burden to keep accurate wage and time records lies with the employer. *Dole v. Solid Waste Serv., Inc.*, 733 F. Supp. 895, 924 (E.D. Pa. 1989). Under the applicable regulations, the wage and time records must be preserved for a period of at least two years, and must include, *inter alia*, the hours worked per day and week, as well as the daily starting and stopping time of individual employees. 29 C.F. R. §§516.2(7), 516.6(a)(1).

Defendants argue that "[t]he Secretary's allegation that Progressive violated the recordkeeping requirement of the FLSA should be dismissed as non-justiciable." Defs. Opp. at 29. Defendants, however, have offered no relevant and applicable case law that supports their unspecified justiciability objection. To the contrary, one of the cases cited by Defendants demonstrates that disputes over compliance with the FLSA's recordkeeping provisions are justiciable. *See Lugo v. Framer's Pride Inc.*, 737 F. Supp. 2d 291, 311-12 (E.D. Pa. 2010) (addressing the impact of FLSA recordkeeping violations on the applicable burden of proof, and not avoiding the recordkeeping violations on justiciability grounds); *see also Tri-County Growers, Inc.*, 747 F.2d at 127-28 (fully evaluating the impact of the employer's failure to satisfy the FLSA's recordkeeping requirements, and not avoiding the recordkeeping violations on justiciability grounds). In addition, Defendants appear to argue that any recordkeeping violations are de minimus and the result of "circumstances beyond Progressive's control." Defs. Opp. at 29. Even if this Court adjudged the alleged recordkeeping violations here to be de minimus and/or the result of circumstances beyond Defendants' control, Defendants have not provided the Court with any authority to support the proposition that either

circumstance would excuse or constitute a defense to the alleged violations.

Plaintiff, in its reply, argues that the recordkeeping violations are relevant to this case because "the compensable breaks in the missing records will have to be reconstructed . . . [and] [t]he existence of the recordkeeping violation means that the Secretary need only prove the amount of that uncompensated time through 'a just and reasonable inference.'" Pl.'s Reply at 910 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-688 (1946)). The impact of recordkeeping violations in a case such as this was clearly recognized by the Third Circuit in *Tri-County Growlers, Inc.*: "Once an employee establishes that the employer's records are inadequate, the employee need only introduce enough evidence to support a reasonable inference of hours worked. The burden then shifts to the employer to come forward with evidence to negate the inference to be drawn from the employee's evidence." 747 F.2d at 128 (internal citations and quotation marks omitted).

In light of the relevant authority presented to the Court, the Court finds that the alleged recordkeeping violations are clearly justiciable. Furthermore, in light of Defendants' concessions in the Joint Statement of Stipulated Facts, JSSF 44-50,[28] Defendants have clearly violated the recording keeping requirements of the FLSA. Accordingly, the Secretary's Motion for Summary Judgment with respect to the recordkeeping violations will be granted.

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[28] These stipulated facts evidence Progressive's failure to preserve log-on/log-off records for various periods from the Bensalem, Meadville, Pottsville, Sayre, Uniontown, and Wyomissing call center locations.

## IV. CONCLUSION

For the reasons set forth above, the parties *Daubert* motions will be denied. Plaintiff s partial motion for summary judgment will be granted with respect to FLSA minimum wage liability, FLSA recordkeeping liability, Satell's role as an employer under the FLSA, and liquidated damages. Plaintiffs partial motion for summary judgment will be denied with respect to the willfulness of the FLSA violations. Defendants' motion for summary judgment will be denied.

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

CIVIL ACTION NO. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A/ PROGRESSIVE BUSINESS PUBLICATIONS, *et al.*

---

ORDER

AND NOW, on this 16th day of December, 2015, upon consideration of Plaintiffs Motion for Partial Summary Judgment (ECF No. 31), Defendants' Motion for Summary Judgment (ECF No. 38), the parties' *Daubert* Motions (ECF Nos. 33, 37), all of the responses, replies, notices and other submissions related to these motions, and the oral argument held on said motions (ECF No. 58), for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Plaintiffs Motion for Partial Summary Judgment (ECF No. 31) is GRANTED IN PART AND DENIED IN PART. The motion is granted with respect to: (a) FLSA minimum wage liability, (b) Defendant Satell's role as an employer under the FLSA, (c) entitlement to liquidated damages, and (d) FLSA recordkeeping liability. The motion is denied with respect to a finding of willfulness as to the FLSA violations.

2. Defendants' Motion for Summary Judgment (ECF No. 38) is DENIED.

3. The parties' *Daubert* Motions (ECF Nos. 33, 37) are DENIED AS MOOT.

IT IS FURTHER ORDERED that, on or before December 22, 2015, the parties shall each submit a brief letter (1-2 pages) to my chambers via facsimile, outlining their proposal as to how to proceed in this matter.[1]

BY THE COURT:

/s/ L. Felipe Restrepo
L. FELIPE RESTREPO
UNITED STATES DISTRICT JUDGE

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[1] The parties are encouraged to confer prior to December 22, 2015, as joint proposals are always favored.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

CIVIL ACTION NO. 12-6171

---

THOMES E. PEREZ

v.

AMERICAN FUTURE SYSTEMS, INC., *et al*

---

ORDER

AND NOW, this 11th day of May 2016, after conferences with counsel and consideration of the Parties' joint stipulation regarding damages (ECF Doc. No. 87), it is ORDERED:

1. JUDGMENT is entered in favor of Plaintiff and against Defendants in the amount of $1,916,000.00 comprised of $958,000.00 for unpaid minimum wages and $958,000.00 in liquidated damages under 29 U.S.C. § 216(c);

2. The Stipulation (ECF Doc. No. 87) is approved allowing each party to now timely appeal the December 16, 2015 Opinion and Order (ECF Doc. Nos. 73, 74) as all claims are now dismissed with prejudice; and,

3. The Clerk of Court shall mark this case closed.

/s/ Kearney, J.
KEARNEY, J.

# APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

---

JOINT STATEMENT OF STIPULATED FACTS

1. Defendant American Future Systems, Inc., doing business as Progressive Business Publications ("Progressive"), is a Pennsylvania corporation with its principal place of business at 370 Technology Drive, Malvern, Pennsylvania, within the jurisdiction of this Court.

2. Progressive is in the business of, among other things, creating business information publications and selling those publications to various entities using sales representatives.

3. Progressive's annual gross revenue meets the jurisdictional threshold for this matter.

4. Defendant Edward Satell is President, Chief Executive Officer ("CEO"), and at least 98% owner of Progressive.

5. Mr. Satell is responsible for the policies, operations, and results of the Company, though he regularly delegates duties to senior management. In addition, Mr. Satell makes or approves high level recruitment decisions, large capital expenditures and/or significant contracts, and major changes of policy.

6. Tom Schubert is Progressive's Chief Operating Officer ("COO") and Chief Financial Officer ("CFO").

7. Colin Drummond is Director of Call Center Operations.

8. As Director of Call Center Operations, Mr. Drummond regularly visits Progressive's various branches.

9. The individuals listed on Schedule A to the Secretary's Complaint all worked as sales representatives for Progressive during some period of time between August 1, 2009 and the present.

10. Additional individuals not listed on Schedule A to the Complaint worked as sales representatives for Progressive during some period of time between August 1, 2009 and the present.

11. Progressive's sales representatives have been employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1)(A) of the Act, 29 U.S.C. § 203(s)(1)(A).

12. Progressive's sales representatives' duties consist primarily of selling Progressive's publications to business executives via outbound telephone calls.

13. Progressive's sales representatives work at ten branch offices operated by Progressive within the jurisdiction of this Court and at other locations in Pennsylvania, Ohio, and New Jersey. Specifically, Progressive currently operates branch offices in Altoona, Pennsylvania; Bensalem, Pennsylvania; Boardman, Ohio; Clearfield, Pennsylvania; Meadville, Pennsylvania; Pottsville, Pennsylvania; Warren, Ohio; Williamsport, Pennsylvania; Woodbury, New Jersey; and Wyomissing, Pennsylvania.

14. In addition, during the time period relevant to this case, Progressive previously operated branch offices in Bensalem, Pennsylvania (closed October 2012); DuBois, Pennsylvania (closed June 2013); Sayre, Pennsylvania (closed June 2011); and Uniontown, Pennsylvania (closed July 2012).

15. In or around June 2009, the Department of Labor commenced a multi-year investigation of Progressive's break policy.

16. On March 16, 2011, the Wage & Hour Division of the U.S. Department of Labor informed Progressive that breaks of twenty minutes or less were compensable and that Progressive's policy of not paying for those breaks resulted in violations of the FLSA's minimum wage requirement.

17. The Secretary of Labor (the "Secretary") instituted this suit against Progressive on November 1, 2012.

18. The primary allegation in the Secretary's Complaint is that Progressive's break policy results in Progressive failing to pay the minimum wage to certain representatives.

19. Pursuant to tolling agreements executed by the parties to this matter while they were engaged in efforts to resolve this matter, the statute of limitations set forth in Section 6 of the Portal-to-Portal Act, 29 U.S.C. 255, or any other statute of limitations that may apply to this action, was and remains tolled for the time period from May 2, 2011 through August 1, 2011, and from August 9, 2011 through September 14, 2012.

20. Progressive maintains a timekeeping system that requires its sales representatives to log-on and log-off of its computer and telephone system at certain times.

21. When representatives arrive at work during a branch's hours of operation, they log-on to the branch's computer system.

22. Representatives remain logged-on to the computer system while performing a number of tasks such as making outbound calls, documenting the results of calls, and receiving training.

23. From July 2009 to the present, Progressive's sales representatives were paid at a base rate established by Progressive's compensation policies.

24. From July 2009 to the present, Progressive's sales representatives were also eligible for performance bonuses based on reaching certain sales per hour levels.

25. From July 2009 to the present, many Progressive sales representatives set a "committed hours" level of the minimum number of paid hours they intended to work each pay period.

26. From July 2009 to the present, many Progressive sales representatives were eligible to earn

additional compensation by meeting their "committed hours" level.

27. Mr. Satell in consultation with Mr. Drummond examined developing a uniform break policy in 2009.

28. In July 2009, Progressive implemented a written compensation policy stating that "Representatives may take personal breaks at anytime for any reason. Personal break time is NOT paid because it is a disadvantage to the representative to do so."

29. The parties stipulate as to the authenticity of the compensation policies, and other documents, produced by Progressive included in the parties' joint appendix.

30. After July 2009, if a Progressive sales representative is not on an active sales call, recording the results of a call, engaged in training or administrative activities, or engaged in other activities that Progressive considers to be work-related, the sales representative is required to log-off of Progressive's computer system.

31. Progressive's compensation policy also states that "in the rare occurrences that the computer or telephone systems are inoperable due to external causes or loading of customer lists, reps are free to leave or they can wait for systems to become operational. However reps are not paid during this downtime if they choose to wait."

32. During the relevant time period, Progressive's log-on/log-off records, examples of which are in the Joint Appendix at JA0896-JA0901, show how sales representatives logged-on and logged-off Progressive's computer and telephone system.

33. The log-on/log-off records after July 2009 produced by Progressive show each time the employee in

question logged on and logged off the system during the day in question and the amount of time that the employee in question was logged on and logged off of the system during the day in question.

34. The "Daily Start Time" column in the log-on/log-off records during the relevant time period shows the first time that the sales representative logged on to Progressive's computer and telephone system that workday.

35. The "Daily End Time" column in the log-on/log-off records during the relevant time period shows the final time that the sales representative logged off that workday.

36. The "Daily Total" column in the log-on/log-off records during the relevant time period shows the total amount of time between the sales representative's first log on and last log off, inclusive of all breaks, for that workday.

37. The "Row Logged On" column in the log-on/log-off records during the relevant time period shows the time the sales representative logged on to begin that particular period of paid time.

38. The "Row Logged Off" column in the log-on/log-off records during the relevant time period shows the time the sales representative logged off to end that particular period of paid time.

39. The "Total Row Logged On" column in the log-on/log-off records during the relevant time period shows the total amount of time that a sales representative was logged on for a particular period of paid time.

40. The "Total Row Logged Off' column in the log-on/log-off records during the relevant time period shows the total amount of time during which a sales

representative was logged off before they logged on again. If the sales representative did not log on again that workday, the column has a value of 0:00:00.

41. The "Daily Paid Time" column in the log-on/log-off records during the relevant time period shows the total amount of time the sales representative was logged on to the computer and telephone system (and paid) during that particular workday.

42. The "Daily Logged Out Time" column in the log-on/log-off records during the relevant time period shows the total amount of time the sales representative was logged off of the computer and telephone system (and not paid) during that particular workday.

43. On May 13, 2014, in response to an inquiry from the Secretary's counsel, Defendants' counsel represented to the Secretary's counsel that all log-off periods of 90 seconds or less are compensated and are not shown on the log-on/log-off records produced by Defendants. With that caveat, Defendants agree that stipulations 32-42 are accurate.

44. Progressive was unable to produce log-on/log-off records for the Bensalem location for the periods 8/10/09-8/23/09, 9/7/09-9/20/09, 10/5/09-10/18/09, 11/2/09-1/10/10, 1/25/10-2/7/10, 2/22/10-4/4/10, 4/19/10-5/30/10, 6/14/10-6/27/10, 8/9/10-10/17/10, 11/1/10-11/14/10, 12/13/10-12/26/10, 8/22/11-9/18/11, and 10/3/11-11/27/11

45. Progressive was unable to produce log-on/log-off records for the Meadville location for the periods 8/10/09-5/2/10.

46. Progressive was unable to produce log-on/log-off records for the Pottsville location for the periods 8/10/09-9/5/10.

47. Progressive was unable to produce log-on/log-off records for the Sayre location for the periods 8/10/09-8/23/09, 9/7/09-9/6/09, 10/5/09-10/18/09, 11/2/09-1/10/10, 1/25/10-2/7/10, 2/22/10-4/4/10, 4/19/10-5/30/10, 6/14/10-6/27/10, 7/12/10-7/25/10, 8/9/10- 10/17/10, 11/29/10--5/27/2011.

48. Progressive was unable to produce -on/log-off records for the Uniontown location for the periods 8/10/09-8/23/09, 9/7/09-9/20/09, 10/5/09-10/18/09, 11/2/09-1/10/10, 2/22/10-4/4/10, 4/19/10-5/30/10, 6/14/10-6/27/10, 7/12/10-7/25/10, 8/9/10-10/17/10, 8/22/11-11/27/11, 12/26/11-2/5/12, 6/11/12-7/20/2012.

49. Progressive was unable to produce -on/log-off records for Wyommising location for the periods 8/10/09-4/4/10, 4/19/10-5/30/10, 6/14/10-6/27/10, 8/9/10-10/17/10, 11/1/10-11/14/10, 12/13/10-12/26/10, 8/22/11-11/27/11.

50. Progressive's witness testified that Progressive was unable to produce the log-on/log-off records detailed above because those records were lost when either: (1) a *force majeure* (e.g., a flood or power outage) destroyed the server on which the records were stored, or (2) the server on which the record were stored was recycled when a branch office closed.

Dated: May 23, 2014

/s/ Sarah E. Bouchard

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## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No.

---

HILDA L. SOLIS, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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COMPLAINT

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor ("Plaintiff") brings this action to enjoin Defendants AMERICAN FUTURE SYSTEMS, INC. doing business as PROGRESSIVE BUSINESS PUBLICATIONS, a corporation, and EDWARD SATELL, Individually and as President of the above-referenced corporation (hereinafter collectively referred to as "Defendants"), from violating the provisions of Sections 6, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.0 § 201, *et seq.*), hereinafter referred to as "the Act," and for a judgment against Defendants in the total amount of backwage compensation found by the

Court to be due to any of the employees of Defendants pursuant to the Act and for liquidated damages in an amount equal to the back wages found due to the employees.

I.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act, 29 § 217, and by 28 U.S.C. §§ 1331 and 1345.

II.

Defendant American Future Systems, Inc., doing business as Progressive Business Publications ("Progressive"), is a Pennsylvania corporation with its principal place of business at 370 Technology Drive, Malvern, Pennsylvania, within the jurisdiction of this Court. Progressive is in the business of, among other things, creating business information publications and selling those publications to various entities using telemarketers.

III.

Defendant Edward Satell ("Satell") is the President and Chief Executive Officer of Progressive, and resides at 4443 Gradyville Road, Newtown Square, Pennsylvania, which is within the jurisdiction of this Court. Satell has actively supervised and directed employment practices and has acted directly or indirectly in the interest of Progressive in relation to its employees at all times relevant herein. Satell is responsible for controlling and setting the company's compensation policies, including the company's specific policies regarding whether time worked by its employees is compensated by Progressive. In particular, Satell made the decision not to compensate employees for the unpaid short periods of time described herein.

IV.

The business activities of Defendants, as described herein, are and were related and performed through unified operation or common control for a common business purpose and constitute an enterprise within the meaning of Section 3(r) of the Act.

V.

At all times hereinafter mentioned, Defendants have employed employees in and about their places of business in the activities of said enterprise engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Said enterprise, at all time hereinafter mentioned, has had an annual gross volume of sales made or business done in an amount not less than $500,000.00 per year. Therefore, Defendants' employees have been employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1)(A) of the Act, 29 U.S.C. § 203(s)(1)(A.).

VI.

Progressive's employees work as sales representatives at call centers within the jurisdiction of this Court and at other locations in Pennsylvania, Ohio and New Jersey operated by Progressive. The employees' duties consist primarily of selling defendants' publications to businesses, individuals and other entities via telephone.

VII.

Progressive maintains a timekeeping system that requires its sales representative employees to log in and out of its computer and telephone system. Pursuant

to Progressive's policies and the manner in which the system works, employees who are performing sales representative work are required to log off of that system when they are not engaged in either an active telephone call, recording the results of that call on the computer system, or certain training activities, As a result of Progressive's system and its internal policy, with limited exceptions, employees performing sales representative work are "logged out" of the computer and telephone system whenever the employees are not engaged in an active sales call.

VIII.

With the exception of certain employees who have duties other than selling publications via telephone, Progressive's call center employees are not compensated for any period of time during which they are "logged out" of Progressive's computer and telephone system, including short periods of time lasting twenty minutes or less. As a result of this system and Progressive's policy, Progressive employees are not compensated for any breaks taken during the employees' work shift, regardless of length, including but not limited to breaks of one, two or three minutes in length, and for any work activities they may have performed during that log-out time,

IX.

The uncompensated log-out periods that last twenty minutes or less are used for purposes including but not limited to bathroom visits, short rests between calls, water or snack breaks, and other short breaks of twenty minutes or less. The duration of these log-out periods, and the manner in which the employees use them, make them time for which the employees should be compensated.

X

As a result of their knowing and reckless decision to not pay employees for break or log-out time lasting twenty minutes or less in length, Defendants have, in many workweeks, repeatedly and willfully violated and are willfully violating the provisions of Sections 6 and 15(0(2) of the Act by paying many of their employees engaged in commerce or the production of goods for commerce, within the meaning of the Act as aforesaid, wages at rates less than $7.25 per hour after July 24, 2009.

XI.

Defendants have, in many workweeks, violated the provisions of Sections 11(c) and 15(a)(5) of the Act by failing to make, keep, and preserve adequate and accurate records of many of their employees of the hours and other conditions of their employment, which they maintain, as prescribed by the regulations issued and found at 29 C F.R. Part 516, in that Defendants did not keep and preserve employee time records for certain call center facilities during certain relevant time periods.

XII.

Since at least August 2009, Defendants have repeatedly and willfully violated the minimum wage and monetary provisions of the Act as alleged in paragraph IX above. A judgment permanently enjoining and restraining the violations herein alleged is specifically authorized by Section 17 of the Act.

XIII

As: a result of the violations alleged in paragraph X above, amounts are owing for

* * *

## APPENDIX H

* * *

[54] That's not what we were investigating. were asking whether or not Mr. Satell's business was in compliance with the Fair Labor Standards Act.

Q. So it was only the duration of the log-out periods that was dispositive for you?

MR. WELSH: Again, the same objection.

And I don't think when you say, "What was investigated" – it's not clear whether there was any such information that was obtained during the investigation.

Was it asked for?

I still don't that think that it's clear to the witness what you mean by, "What was investigated?" Was it asked for?

I still don't think it's clear to the witness what you mean by, "What was investigated?"

BY MS. BOUCHARD:

Q. Did it matter to whether there was a violation the manner in which the employees used breaks?

MR. WELSH: The same objection.

[55] It's legal question as well.

But go ahead.

THE WITNESS: For our investigators determining whether or not the employers are in compliance with the Fair Labor Standards Act, 785.18 the reasoning for them taking breaks would not matter to them.

That were told to cite that as a violation if they find that employees are not being paid for breaks for less than 20 minutes.

BY MS. BOUCHARD:

Q. Maybe this is a silly question.

But why are the words: "And manner in which the employees use them," even included in the Complaint if it doesn't matter?

A. I don't know. I didn't write the Complaint, so I don't know.

Q. So you don't know why: "And the manner in which the employees use them," wouldn't be relevant to the litigation?

A. It wouldn't matter to wage and hour.

We would cite the violation and not the reason why the employees wouldn't use those breaks.

Q. And just to clarify this: If an employee [56] went outside and took a smoke break for ten minutes, you would say that that should be compensated, correct?

MR. WELSH: Same objection.

It's a legal question.

Go ahead.

THE WITNESS: That's correct.

BY MS. BOUCHARD:

Q. That's because that person is taking a break of less than 20 minutes?

A. That's correct.

Q. And it's not whether that break is for the benefit of the employer or the employees?

A. It's the Department's position as outlined in 785.18 that breaks of less than 20 minutes improve the efficiency of the employee, and therefore, are beneficial to the employer, and therefore, they must be compensated for.

Q. So it's the Department of Labor's position that all breaks benefit the productivity of the employer and the employee and should be compensated?

A. For less than 20 minutes.

MR. WELSH: Same objection.

You're asking about Department of Labor policy.

[57] MS. BOUCHARD: All types of breaks, no matter what the break is taken for.

THE WITNESS: Breaks of less than 20 minutes.

BY MS. BOUCHARD:

Q. Right.

Let me give you another hypothetical.

A. Okay.

Q. Suppose another employee didn't go out and smoke a cigarette, but instead they took a flask of whiskey and drank the equivalent of three shots of whiskey in basically less than 20 minutes.

Should that person be compensated for their break, if it was less than 20 minutes?

MR. WELSH: Same objection. This is a legal question.

THE WITNESS: In the Secretary's regulations, it does not address that type of situation.

And if that person comes back to work and is able to work after, you know, 15 minutes or 19 minutes, then it has to be compensated for.

BY MS. BOUCHARD:

Q. Then is it the Department of Labor's position [58] that that employee has to be more productive because they took that 19-minute break?

MR. WELSH: The same objection about the questions about the Department of Labor's position.

THE WITNESS: To my knowledge, the Secretary's never opined about whether or not who is under the influence of alcohol is more or less productive.

That's not addressed in our regulations, and that's not addressed in our policies.

BY MS. BOUCHARD:

Q. But that would be cited as a violation if an employer chose not to pay someone for that time.

MR. WELSH: Same objection.

I also don't understand what you mean by "Cited as a violation."

BY MS. BOUCHARD:

Q. Would you cite that as a violation if the employer did not pay the employee for that time that they were on break drinking three shots of whiskey during a 19-minute period of time?

MR. WELSH: Same objection.

THE WITNESS: Our investigators are [59] not instructed to not cite as violations breaks where people go out drinking.

BY MS. BOUCHARD:

Q. So the answer is "Yes."

That would be considered a violation of the Fair Labor and Standards Act, according to the Department of Labor?

A. Yes.

Q. Were you aware of a statistical analysis that was conducted by Progressive as part of the investigation?

A. I'm aware that – are you referencing the expert reports that were –

MS. BOUCHARD: No.

Let me show you the document.

(Whereupon, Deposition Exhibit No. Johnson-3 was marked for identification.)

(Whereupon, a discussion was held off the record.)

THE WITNESS: Okay. Yes, I've seen this.

BY MS. BOUCHARD:

[60] Q. When did you first see this –

Do you need some time to review it, or are you familiar with it?

A. I seen it.

I can't say that I'm thoroughly familiar with it.

Q. What's been marked as Exhibit 3 is an e-mail from Howard Radezly, a former partner at our firm, to Alfred Fisher and Adam Welsh, and its subject is "Productivity Analysis."

Do you recall how this analysis came to be presented to the Department of Labor?

A. I don't recall, but I can tell you it was sent via e-mail.

Q. Do you recall having a discussion with Progressive about the issues of productivity of employees?

A. I think it may have come up with them when I met with Mr. Satell and Mr. Goldberg back then about –you know, about his opinions on productivity and so on.

But as far as this, I don't remember discussing this.

Q. Was this requested by the Department of Labor, or did Progressive offer to produce it on its

* * *

[132] by your question.

I can't go with that assumption.

BY MS. BOUCHARD:

Q. You have no opinion as to whether that would be an economically viable practice for an employer?

MR. WELSH: Again, the same objection, assuming that the employer allows the practice to continually happen.

BY MS. BOUCHARD:

Q. Let me ask you another question.

How does the Department of Labor expect employers to handle employees who take breaks in that manner?

A. We expect the employer to control the workplace and make sure that the employees are not abusing, you know, the break policy that they have in place.

But that doesn't mean not paying them for it.

BY MS. BOUCHARD:

Q. So is the only alternative discipline?

A. That would be my recommended alternative.

Q. So the Department of Labor does not take a different enforcement position for the abuse of break time?

* * *

[143] Q. So you're not aware of any person that did not meet their committed hours and that was subsequently disciplined?

A. You know, the only thing that I gleaned from the interviews is that there were secondhand stories of – I heard stories of people getting disciplined. And this is the process, and it's a warning, and then it's a suspension, and then it was termination.

But of the people that our investigators spoke to, none of them reported being disciplined, that I recall.

Q. And I believe that you testified that the investigation made no conclusions as to whether the break policy comported with Section 785.16?

A. That's correct.

Q. Did the investigation make any findings as to

whether people felt discouraged from taking breaks?

A. Can you rope that?

Q. Sure.

Did the investigation make any conclusions as to whether employees felt discouraged from taking breaks?

A. The conclusions were that, yes, certainly, the practice discouraged employees from taking breaks

[144] because they knew that they weren't going to get paid for that time. And that it was – you know, it was going to affect their ability to meet the committed hours.

Q. So you felt after – let's go back.

You testified from the data that you had gleaned from your sampling of records that, on average, people worked approximately a five-hour day.

And in that five hours or that five hours of paid time, and that there were breaks was less than 20 minutes that occurred approximately five times per shift?

MR. WELSH: I'm going to object.

I'm not sure whether if it clear from that previous colloquoy whether that data in that sheet only referred to basically 20 minutes or less.

THE WITNESS: Could I see it?

MS. BOUCHARD: I don't have it with me.

But I think we can stipulate that breaks of less than 20 minutes occurred approximately five times per shift, and that the average time per shift is approximately five.

* * *

[150] And I believe the way you asked the question was whether the employer allowed for a policy that allowed for a very short breaks?

MS. BOUCHARD: Yes.

THE WITNESS: No. I'm not aware of any way it could be done and be in compliance with regulation 785.

BY MS. BOUCHARD:

Q. Let me give you the following hypothetical:

Suppose Sally leaves her work station and logs out and calls her second employer, and she is on the clock with her second employer for ten minutes.

And she's paid by the second employer for those ten minutes of time because they're work time.

She then goes back and logs in.

Is Progressive required to pay her salary under those circumstances?

A. Again, that kind of situation is not addressed as an exception in 785.18.

So my direction to an investigator if they ask me how they would be to enforce that as it is to enforce that as to paid time.

Q. So Sally would be getting paid twice for the same ten minutes in that situation?

* * *

Errata

Page Line Change

6 19 "Bassett case" should be "facts of the case."

Reason for Change:

Error in transcription

7 21 "58" should be "958."

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 14 | 20 | "but there are already" should be "but they are really." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 15 | 8 | "generally asked a" should be replaced with "I'm the." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 16 | 13 and 20 | "director's" should be replaced with "district." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 20 | 11 | "permanent' should be replaced with "payroll." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 24 | 17 | "Vis-a-vis" should be replaced with "on." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 31 | 19 | Insert "it" between "manager" and "was." |

Reason for Change:

Error in transcription

| | | |
|---|---|---|
| 31 | 22 | The first "assistant" should be replaced with "district." |

Reason for Change:

Error in transcription

38 11+12 "It's" should be replaced with "…,or..."

Reason for Change:

Error in transcription

39 3 The second "that" should be "there."

Reason for Change:

Error in transcription

41 17 "Accuracy" should be "increase."

Reason for Change:

Error in transcription

50 20 "758.18" should be "785.18."

Reason for Change:

Error in transcription

54 2 "Asking" should be "investigating."

Reason for Change:

Error in transcription

55 23 "Wouldn't" should be "would".

Reason for Change:

Error in transcription

58 7 Insert "an employee" after "not."

Reason for Change:

Error in transcription

68 11 Should read: "Column C was a formula where it multiplied Column B, which is a percentage of an hour, times $7.25."

Reason for Change:

Error in transcription

82 11 "Conduction" should be "conclusion."

Reason for Change:

Error in transcription

## APPENDIX I

* * *

[160] Q. Okay.

A. – their work session to take a break it is not compensated.

Q. Okay. What happens – under the company policy, as you understand it, what happens to an employee who steps away and takes a break without logging out?

A. If we know about it, we ask them to log out.

Q. Okay.

A. That's the rules. They've got to follow the rules.

Q. And if they don't follow the rule they would eventually be subject to termination?

A. Yeah, I would think so. Why have the rule?

MR. WELSH: -12.

(At this time, a document was marked for identification as Exhibit No. Satell-12)

THE WITNESS: Thank you.

BY MR. WELSH:

Q. -12 – Satell-12 is an e-mail from Howard Radzely, myself, and a colleague of mine. Does that appear accurate?

* * *

[166] A. I already testified, they can take as many breaks as they want as often as they want.

Q. Okay. For as long as they want?

A. For as long as they want.

Q. Okay. Did it ever have rules about how many breaks an employee is allowed to take?

A. We had a different structure at another point in time.

Q. And what point in time was that?

A. Prior to 2009 I suspect.

Q. Okay. And under the old structure there were rules about how many breaks you could take?

A. I believe there was a break in the morning and a break in the afternoon.

Q. And there were rules about how long those breaks could be?

A. 15 minutes.

Q. Okay. And were there rules about – so, there were rules about how long it could be and how many there were, and rules about when they were taken I think you just said; is that also correct?

A. There were some rules, it varied from office to office. But, yes, there were some rules on that.

[167] Q. And that policy – those policies were in place – when those policies were in place was Progressive actually paying for breaks?

A. Well, we're timing a paid break, they had a paid break.

Q. Okay. Was there ever a period of time when those policies were in place but Progressive wasn't paying for breaks?

A. Not that I know of.

Q. Okay. Do you know of any documents that have been given to any employees in this sort of unpaid

break time period where employees, despite the fact that breaks were not paid, were given documents instructing them about break plans, break times?

A. I have two problems. I can't hear you, you start to mumble.

Q. I'm sorry, I can speak up.

A. And the second thing is – go ahead, sir.

Q. My question was, during the period of time where you stopped paying for breaks.

A. So, you are talking about after 2009?

Q. After 2009.

A. Yes.

* * *

[175] Q. And this is the policy, right, and that's – under the policy –

A. Yeah.

Q. – it is not permitted, right?

A. This is the policy, the basic policy. And if a manager is not to permit it at the desk, it wouldn't trouble me.

Q. Also – the policy also says, you know, no eating food at the desk, correct?

A. That's certainly correct, yeah.

Q. Okay.

A. We don't want that, that could hurt the computer.

Q. Okay. When an employee actually does take a break, they are never told by their manager or

anybody that they need to be back at a specific time, correct?

A. No, it's up to them.

Q. Okay. So, if an employee came into work, worked for 20 minutes, left for 5 hours, and then came back, that would be completely consistent with the policy?

A. Absolutely. They are free to do that.

MR. WELSH: Okay. Can we go off

* * *

[185] 2009 document, Satell-11, which I'm showing you, if you look at, again, Rules, Standards Number 5, why does that talk about lunch being limited to a maximum of 45 minutes?

A. It was a legacy thing. If you look at our time sheets you'll see there's no adherence to that. It was just overlooked.

Q. Okay. And then that was also overlooked when the July 2010 document was issued, that line was left in?

A. Yes, we caught up to it recently.

Q. Okay.

A. And I think you may have even brought it to our attention, and it's wrong. So, that's not our practice, that's a legacy kind of thing. And there it is.

Q. Was –

A. We don't have any lunch periods anymore.

Q. Okay. And there's been –

A. Excuse me. A schedule, people can take a lunch any time they want.

Q. And there's been at least three versions of the document since you went to the unpaid break policy where that line has been included; is that [186] right?

A. Yeah, it was overlooked. There's no question about that.

Q. Okay.

A. We –

Q. And the document was circu – this is a document that is given to every telemarketer that works at Progressive, right?

A. Yeah.

Q. So, since you recently changed it and when you say recent, was that in the September 2013 document?

A. Yeah, yeah.

Q. Prior to that time it was the understanding of every telemarketer, if they read that document, that they had to limit their lunch to 45 minutes, right?

A. Absolutely wrong.

Q. Even though they are given an official document from the document that says –

A. Absolutely wrong.

Q. Okay. So, why – how do they know if they are given the document?

A. The practice is the office. Where the

* * *

[218] What the heck are you doing, it's not the policy, we haven't been doing it, it's not there, why is it there?

Q. Okay. And my question is – and if you need to look at these documents more, if you need to –

anything else that you know of that was changed between that August 2013 and September 2013?

A. Not that I recall at this moment. I mean, our policy pretty much stayed in place. The only changes that we made has to do with the performance standard. And the bonus standard since the marketplace has changed we changed those. But in terms of our policy, the policy has stayed the same, as best as I know.

Q. I want to go back to when we were talking about – we were talking about that one manager and I think you thought it was Bensalem who had some form or another advising employees that their breaks were limited; do you recall that?

A. Well, I probably choose to say, I understand they are going out at the same time, similar time, and that he encouraged them to do that, and we told him he can't do that.

Q. Did you ever for – so, there were – there

* * *

[222] we've checked and concluded was doing it the way within the law. So, we were comfortable that both it fit with what we wanted to do and it fit with the law.

Q. And I want to go back again to the period of time before July 2009 when there were paid breaks. Okay?

The previous policy before July 2009, am I correct that employees were limited on the number of breaks they could take, but those breaks were paid?

A. You know, I can't testify to that.

Q. Okay. Let me show you the –

A. I don't know – I can – I can testify what was written in the policy. How it actually played out I was – it would not have been an area that I would have paid attention to back then.

Q. Okay. Well, yeah, and I want to know is, what – to your recollection, what the actual policy –

A. I don't have any recollection. The policy is only what is written on the piece of paper.

Q. Okay. Well, let's – let's go back. You already have this one, it is Satell-14. Can you pull up Satell-14, please?

* * *

[227] Q. Does that say – is that said explicitly in this document?

A. Well, it doesn't matter. We would never have paid people for lunch.

Q. Okay. So, they wouldn't –

A. For taking a lunch period, we always had people that took lunches.

Q. Okay. So, you know they weren't paid for lunches, we know they were paid for two 15-minute breaks because it's on this document, anything else you can testify to?

A. That's correct.

Q. Okay.

A. I don't even know how the computer policy worked. I don't know how it was documented back then.

Q. Do you know if under the old policy if somebody stepped away from their computer to run to the

bathroom and came back, would they be paid for that time?

A. I don't know. You may be able to write a book when we are finished, you'll have the answers I hope. And just so I can add one thing to be absolutely clear. I was involved in this change of

* * *

[235] A. That's right.

Q. Okay. And you don't know how many people were complaining?

A. No, but it was an issue.

Q. Okay.

A. When I hear issues like that, our objective is to be fair, and right, and lawful.

Q. Did Sayre actually stop paying for breaks before you looked at the policy before that?

A. You are asking me a level of details that I don't know.

Q. Okay. You had testified that different things were happening. So, my question is, is one of those different things that were happening – is one of those things, to your recollection, and if you don't remember, you don't remember, Sayre – had somebody at Sayre made a decision to stop paying for breaks before the company put the policy in?

A. How many times do I have to tell you, I do not know.

Q. Okay. Besides Sayre are you familiar with any other call centers where employees were compaining – complaining about being paid for breaks?

[236] A. It crystalized in Sayre, and Sayre did not have the memory of that.

Q. Who was – do you remember who the manager was in Sayre at that point in time?

A. I don't remember his name. I did know who he was though, but I don't remember his name.

Q. Did he tell you directly about this or did you hear it through somebody else?

A. I heard it, I believe, through Colin.

Q. Okay. And that – and is it fair to say that's what caused you to start thinking about changing the policy company-wide?

A. Yeah, I was concerned. First of all, I didn't think it was fair to the reps. And second of all, it was incongruous situation, we had to deal with it. We have to develop something that – that was responsive –

Q. Were there meeting –

A. – with the law and with our practices.

Q. Did you have meetings with Colin about this issue?

A. How would I have known about it if I didn't have a meeting with him? I mean, it was either telephone or in person.

[237] Q. Okay. Was anybody else part of those discussions?

A. No, not that I recall, no.

Q. Okay. Was Mr. Schubert involved in those discussions at all?

A. No.

Q. Okay.

A. No, no. This was a policy issue for telemarketers.

Q. Okay. Would Mike Gordon have been involved in those discussions?

A. No, no. He's not part of the policy.

Q. Would you have regional managers be involved in those discussions?

A. No.

Q. Okay.

A. No.

Q. And do you know the exact date when the company – company-wide you decided to change the policy from paid breaks to no paid breaks?

A. I don't know the exact dates of anything.

Q. Is there any document that exists that would be able to tell you when the exact date was?

A. Well, we would have put out – we would [238] have put out a change. I don't remember what happened during the few weeks that we were discussing it. I know I moved very quickly to find out where we stood on the law and what was the right thing to do.

Q. Okay.

A. I know I moved very quickly to look at your website and then try to get as much guidance as I could from your department.

Q. Okay.

A. I know I moved very quickly to seek advice of legal counsel.

Q. And so, the document – the document you were just referring to, it just has that sort of July 2009 date on it. What I'm trying to figure out is, is there any way we can pinpoint the day when it changed in July?

A. I don't know the answer to that.

Q. Okay. Would you be able to look at, for example, the payroll records to see when you stopped paying for breaks?

A. I don't know the answer to that.

Q. Okay. Do you know if different call centers put the policy at different times or did it [239] happen for everybody on the same day?

A. When we issued our policy it would have hit everybody the same day.

Q. Okay. And when you say when we issued your policy are you contrasting that to something else?

A. Yeah, when we made the change.

Q. Okay. Are you suggesting that there may have been specific call centers that instituted the policy before it went company-wide?

A. It's possible it happened in Sayre.

Q. Okay. Did you – is there anything in writing about this policy change that you're aware of, other than these policy documents?

A. Yeah, we would put out the policy. No, we put it out.

Q. No memos about it?

A. No, we discussed it with attorneys, we made the decision, put it out. It's not up for debate. Which

we were looking for the legal answer, that's not a debatable question.

Q. Okay. And I mean, I'm not talking about debating. I'm talking about other than these policy documents anyway in which you communicated it to anybody like a memo, or an e-mail, or anything like [240] that?

A. Why would we do that? We have the policy.

Q. Okay.

A. That's what the policy is for –

Q. Okay.

A. – to communicate.

Q. I assume the answer is no then to my question?

A. Yeah, that's what this is for, to com – that is exactly what it is for to communicate. Are you paid by the hour?

Q. I am not paid by the hour.

(At this time, a document was marked for identification as Exhibit No. Satell-19)

BY MR. WELSH:

Q. Satell-19 is an e-mail that was produced in this case from Colin Drummond to, it looks like, yourself; is that correct?

A. It appears to be that, yeah.

Q. Do you remember – have you seen this document before?

A. Not that I know of.

Q. Okay. Do you – you don't know what would [241] have been attached to this document?

A. It says a rep – Colin must have been sending me a draft. I don't know. I have no idea.

Q. Does it look like it was probably one of these policy documents that we've been looking at?

A. This is 2012?

Q. Correct.

A. I don't know what he is – it doesn't ring any bells for me.

Q. Okay. You don't remember what conversation you had that prompted him to send this?

A. April, a year ago? It was a year-and-a-half ago, no, no idea.

Q. Okay.

A. I don't even know if it was sent.

Q. Other than all of the reasons you just testified about before, are there any other reasons why you decided to make this policy change in July 2009?

A. Well, I listed that I think. If there was any, it doesn't come to mind at the moment. You may have reminded me of something, but we wanted to comply with the law and we wanted to go ahead and deal with the situation that we deal with. So, the

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## APPENDIX J

Department of Labor vs.
Progressive Business Publications

January 6, 2014
Charles River Associates

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To summarize the empirical results, the analyses suggest that neither additional breaks nor longer breaks make sales representatives more productive at making sales at PBP. I set out to analyze whether breaks make sales representatives at PBP more productive. Sales representatives naturally vary in their sales skills. To control for these hard to measure differences across sales representatives, I included representative fixed effects in my statistical models. This is a method that focuses the analysis on comparisons within a representative over time. Essentially, the analysis asks whether a given representative is more productive on the days she takes more breaks than on the days she takes fewer breaks. The data clearly indicate that on average representatives are not more productive on the days they take more breaks. Breaks do not appear to cause representatives to be more productive. In fact, my analysis suggests that breaks may cause representatives to be less productive, and this relationship is statistically significant when break time is included in the measure of sales per hour.

5. Economic Theory Predicts Forcing Short Breaks to be Paid Would Have Unintended Consequences

It is my understanding that the U.S. Department of Labor argues that PBP must pay its sales representa-

tives for all breaks 20 or less minutes in duration. I have no expert opinion on whether such payment is legally required. However, as a labor economist, I believe a requirement that PBP pay an hourly rate for all breaks 20 minutes or less would be likely to have consequences that would be viewed negatively by at least some and possibly many of PBP's sales representatives.

Consider what would happen if PBP were to pay for all breaks 20 minutes or less, while keeping its current break policy in place allowing representatives to take as many breaks as they choose, at any time, for any reason. A basic tenet of economics is that people respond to incentives. Based on this idea, economic theory predicts that the sales representatives would increase the number of 20 minute or less breaks they take. It is clear that a policy of paying workers for breaks 20 minutes or less while placing no restriction at all on the number or timing of those breaks would not be economically sustainable.

To remain economically viable, PBP would have to place some limitation on the sales representatives' ability to take paid breaks. As the theory of equalizing differences suggests, the current flexible scheduling and break policy that PBP offers is likely to attract workers who value flexibility. My interviews with PBP representatives revealed specific examples of workers who value the ability to set their schedule and to take breaks when they choose. If PBP were to place a limit on the number of breaks workers can take, at least some of the current sales representatives and possibly many would view this change negatively.

It is my opinion that if PBP is forced to pay for all breaks 20 minutes or less, the current unlimited and flexible break policy would not be economically sus-

tainable, and it would be necessary from an economic perspective to place some limitation on sales representatives' ability to take breaks. This change in policy would likely make at least some and possibly many of the sales representatives at PBP worse off.

* * *

# APPENDIX K

**Crawford's Table 2**
**Variable Means by Location**

| LOCATION | Number of Sales | Number of Sales per Hour | Number of 0-20 Min Breaks | Number of Breaks per Hour | Worktime in Hours | Ratio of Break Hours to Work Hours |
|---|---|---|---|---|---|---|
| ALTOONA | 4.89 | 0.84 | 4.03 | 0.74 | 5.71 | 0.09 |
| BENSALEM | 5.17 | 0.97 | 5.30 | 1.07 | 5.44 | 0.13 |
| BOARDMAN | 5.37 | 1.02 | 4.77 | 0.97 | 5.25 | 0.12 |
| CLEARFIELD | 3.86 | 0.74 | 4.10 | 0.84 | 5.11 | 0.11 |
| DUBOIS | 4.19 | 0.82 | 4.56 | 0.96 | 5.06 | 0.12 |
| MEADVILLE | 5.13 | 0.93 | 4.74 | 0.91 | 5.48 | 0.11 |
| NE PHILLY | 5.96 | 1.26 | 4.59 | 0.97 | 5.46 | 0.12 |
| POTTSVILLE | 3.64 | 0.76 | 4.08 | 0.91 | 4.78 | 0.11 |
| SAYRE | 4.04 | 0.75 | 4.95 | 1.00 | 5.36 | 0.12 |
| UNIONTOWN | 4.19 | 0.78 | 4.85 | 0.96 | 5.29 | 0.11 |
| WARREN | 4.65 | 0.90 | 4.47 | 0.90 | 5.14 | 0.11 |
| WILLIAMSPORT | 4.62 | 0.82 | 5.46 | 1.01 | 5.60 | 0.11 |
| WOODBURY | 4.55 | 0.94 | 3.77 | 0.82 | 4.85 | 0.10 |
| WYOMISSING | 4.54 | 0.95 | 3.54 | 0.81 | 4.78 | 0.11 |
| Total | 4.63 | 0.89 | 4.50 | 0.91 | 5.22 | 0.11 |

# APPENDIX L

PROGRESSIVE ANALYSIS MASTER SUMMARY

308,274 Unique Timecards & 1,589,809 Breaks Analyzed

ALL BREAKS INCLUDED:

| | |
|---|---|
| 5.15 | Average Number of Breaks Per Day (including Breaks over 20 Min.) |
| 1:04:33 | Average Total Break Time Per Day (including Breaks over 20 Min.) |
| 5:10:11 | Average Hours Paid Per Day |

*Source Data:*

| | | | |
|---|---|---|---|
| 331626:42:00 | 1,589,809 | 308,274 | 1593702:36:00 |
| Total Break Time | Total Breaks | Total Days | Total Hours Paid |

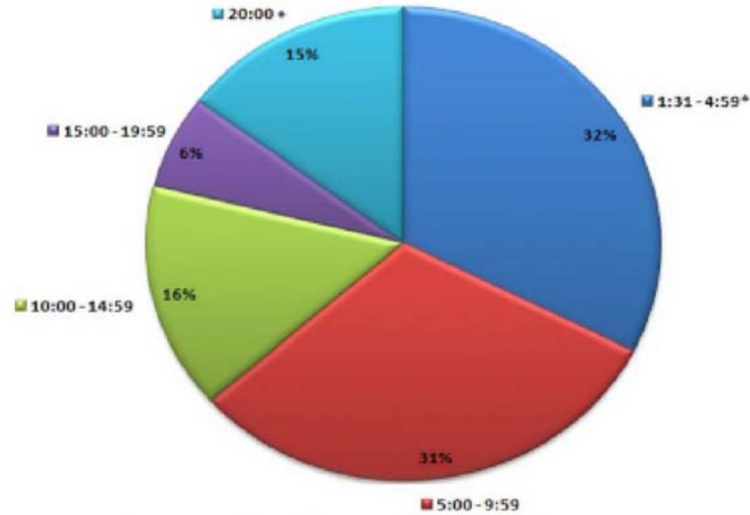
BREAKS OVER 20 MINUTES REMOVED:

| | |
|---|---|
| 4.40 | Average Number of Breaks Per Day (Breaks over 20 Min. Removed) |
| 0:32:15 | Average Total Break Time Per Day (Breaks Over 20 Min. Removed) |
| 5:10:11 | Average Hours Paid Per Day |

*Source Data*

| | | | |
|---|---|---|---|
| 165668:47:38 | 1,357,483 | 308,274 | 1593702:36:00 |
| Total Break Time | Total Breaks | Total Days | Total Hours Paid |

**BREAK LENGTHS**




*(*Progressive Login/ Logout Records only show breaks beginning at 1:31)*

*Source Data:*

| Break Length | Number of Entries | Percent of Total | Percentile of Total Breaks | Percentile of Breaks < 20 Min. |
|---|---|---|---|---|
| 1:31 – 1:59 | 98,403 | 6.19% | 6.19% | 7.25% |
| 02:00 – 02:59 | 164,103 | 10.32% | 16.51% | 19.34% |
| 03:00 – 03:59 | 137,403 | 8.64% | 25.15% | 29.46% |
| 04:00 – 04:59 | 117,215 | 7.37% | 32.56% | 38.10% |
| 05:00 – 05:59 | 108,575 | 6.83% | 39.39% | 46.10% |
| 06:00 – 06:59 | 105,364 | 6.63% | 46.01% | 53.86% |

| | | | | |
|---|---|---|---|---|
| 07:00 – 07:59 | 101,185 | 6.36% | 52.38% | 61.32% |
| 08:00 – 08:59 | 93,613 | 5.89% | 58.25% | 68.21% |
| 09:00 – 09:59 | 82,427 | 5.18% | 63.43% | 74.29% |
| 10:00 – 10:59 | 69,670 | 4.38% | 67.82% | 79.42% |
| 11:00 – 11:59 | 57,573 | 3.62% | 71.44% | 83.66% |
| 12:00 – 12:59 | 47,466 | 2.99% | 76.90% | 87.16% |
| 13:00 – 13:59 | 39,338 | 2.47% | 78.97% | 90.06% |
| 14:00 – 14:59 | 32,927 | 2.07% | 80.69% | 92.48% |
| 15:00 – 15:59 | 27,327 | 1.72% | 82.14% | 94.50% |
| 16:00 – 16:59 | 23,140 | 1.46% | 83.39% | 96.20% |
| 17:00 – 17:59 | 19,769 | 1.24% | 84.45% | 97.66% |
| 18:00 – 18:59 | 16,958 | 1.07% | 85.38% | 98.91% |
| 19:00 – 19:59 | 14,817 | 0.93% | | 100.00% |
| >20:00 | 232,536 | 14.63% | | |

103 Biweekly Pay Periods Analyzed:

Date Range: 8/10/2009 – 6/23/2013

| Location | Date Range |
|---|---|
| Altoona | 08/10/2009 – 06/23/2013 |
| Bensalem | 08/24/2009 – 06/23/2013 |
| Boardman | 08/10/2009 – 06/23/2013 |
| Clearfield | 08/10/2009 – 06/23/2013 |
| Dubois | 08/10/2009 – 06/23/2013 |
| Malvern* | 09/06/2009 – 04/29/2012 |
| Meadville | 04/19/2010 – 06/23/2013 |
| Ne Philly | 05/02/2011 – 09/30/2012 |
| Pottsville | 09/06/2010 – 06/23/2013 |
| Sayre | 08/24/2009 – 11/28/2010 |
| Uniontown | 08/24/2009 – 06/23/2013 |
| Warren | 08/10/2009 – 06/23/2013 |
| Williamsport | 08/10/2009 – 06/23/2013 |
| Woodbury | 08/10/2009 – 06/23/2013 |
| Wyomissing | 04/05/2010 – 06/23/2013 |

**only three employees at this location on login/out records*

## APPENDIX M

*Progressive Business Publications*

Date: July, 2009, NJ/PA

TYPE: BASE SALARY PLUS PERFORMANCE BONUS UP TO $18 PER HOUR!

BASE SALARIES: There are various base salaries to reward you for working your scheduled hours and being above minimum performance standards.

| TWO WEEK HOURS COMMITMENT | BASE SALARY |
|---|---|
| 70 Hours | $8.00 |
| 60 Hours | $7.75 |
| 50 Hours | $7.50 |
| 40 Hours | $7.30 |
| Minimum | $7.25 |

How do you earn higher base salary?

1.) Work the number of hours you committed to in the two week pay period.

2.) Maintain an over-all average of at least 1.00 sale per paid hour.

3.) Send out at least two free electronic newsletters (REMS) to a customer per day.

*If all 3 goals are achieved, you receive the corresponding base salary shown above. If these goals are not achieved, you earn the minimum base salary.*

YOU GET ADDITIONAL PERFORMANCE BONUSES.

You get performance bonuses based upon achieving a certain sales per paid hour. Sales per paid hour is simply your number of orders divided by the total hours worked. *Example: When you get sixty orders in a forty hour work period, you have achieved an orders per hour rate of 1.50.*

The levels are below:

| Orders per hour Level | 1.05 | 1.15 | 1.25 | 1.35 | 1.50 | 1.65 | 1.85 | 2.05 | 2.25 | 2.45 | 2.75 | 3.00 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Two week hourly bonus order rate this period | $.10 | $.20 | $.40 | $.70 | $1.20 | $1.80 | $2.40 | $3.00 | $3.50 | $4.00 | $4.50 | $5.00 | |
| Two week hourly bonus for cumulative order rate | $.20 | $.40 | $.60 | $.90 | $1.40 | $2.00 | $2.40 | $3.00 | $3.50 | $4.00 | $4.50 | $5.00 | |
| Total Bonus Per Hour | $.30 | $.60 | $1.00 | $1.60 | $2.60 | $3.80 | $4.80 | $6.00 | $7.00 | $8.00 | $9.00 | $10.00 | |

*Actual pay examples:*

| Hours Committed | Base Salary | Orders per hour achieved | Bonus Order rate | Cum. Order rate | Total pay per hr. |
|---|---|---|---|---|---|
| 50 | $7.50 | 1.25 orders per hour | $.40 | $.60 | $8.50 per hour |
| 60 | $7.75 | 1.50 orders per hour | $1.20 | $1.40 | $10.35 per hour |
| 70 | $8.00 | 2.25 orders per hour | $3.50 | $3.50 | $15.00 per hour |

*PROGRESSIVE BUSINESS PUBLICATIONS*

EXPLANATION AND RULES OF PERFORMANCE BONUSES:

1) To earn cumulative bonus one must have worked at least six weeks. A week is 12 hours or more.

2) Cumulative is the average of the past 12 weeks, including the present two-week period, but excludes training week.

2) No performance bonuses are paid if you've worked less than 24 hours in the two week pay period.

4) Orders canceled by fax or e-mail, within three business days following the date of the sale or fax, will not be counted for performance bonus purposes.

5) Free Electronic newsletters must reach customer's email box to count toward earning increased base salary. (It is important to repeat back the customer's email address to make sure it is delivered properly).

EXPLANATION AND RULES OF BASE SALARY:

1. *Committed hours are permanent until changed by the representative.* Any change must be in writing on the change in committed hours form and must be for a minimum of two weeks. For example, if one is committed to 70 hours every two weeks and works 70 hours, one is paid the minimum base rate of $7.25 per hour. One of the reasons for this is so the company can count upon its sales stations being filled. If so, the company is willing to pay more through higher base salary if hours commitments are satisfied.

2. *Holidays don't count against those committed for 40 hours or more.* For holidays of Memorial Day, July 4, Labor Day, Thanksgiving and the day after Thanksgiving, Christmas and New Years, the committed hours will be adjusted to reflect these are not work days.

   *Example:* If you are scheduled to work 60 hours in two weeks (which averages six hours a day), and one holiday falls in that two-week period, then the hours commitment will be based on 54 hours, rather than 60 hours.

3. *Schedule changes* can be made every two weeks: All changes must be made in writing and submitted by the rep no later than the Friday before the upcoming start of the pay period.

4. A cumulative of 1.00 sale per paid hour must be maintained to receive higher salary based on committed hours.

5. An average of two free electronic newsletter must be sent out per day to receive higher salary based on committed hours.

RULES, STANDARDS, PERSONAL BREAKS, PAID TRAINING, & WORKING HOURS

1. PBP branch offices are generally open from Monday – Friday, 8:30 am – 5:00 pm.

2. Representatives will be paid for a maximum of 7.75 hours per day and 38.75 hours per week.

3. Representatives may take personal breaks at anytime for any reason. Personal break time is NOT paid because it is a disadvantage to the

representative to do so. Personal break time is not paid because:

A.) Representatives earn higher hourly salary when they exceed one sale per paid hour.

B.) Representatives receive added performance bonuses when they exceed one sale per paid hour.

C.) Representatives are generally expected to maintain a level of one sale per paid hour to maintain employment with the company. However, managers have the discretion to retain a representative who is not generating one sale per paid hour if they believe the representative will improve their performance and soon reach the desired minimum rate.

4. All training time is paid. Training time is authorized by managers when deemed necessary. Reps may not log into training time without permission from a supervisor. Training includes classroom time, tape reviews, scheduled sales meetings, performance reviews, and coaching sessions with managers.

5. Lunch can be taken for up to a maximum of 45 minutes and is generally taken between 12:15 PM and 1:00 PM. Lunch break is not paid. Representatives who choose to work during lunch break will be paid.

6. Payday is every other Friday, for the previous two weeks' work,

7. No radio playing, or cell phones, text messaging at desks.

8. No personal phone calls. Emergency calls can be made with the permission of the manager.
9. Other than soda, coffee or similar beverages, no eating food at desk. All liquids must be kept in a closed container.
10. No smoking in the work area.
11. Sales are subject to company quality control standards being met.
12. Performance standard is a minimum of 1.00 sales per paid hour.

*Progressive Business Publications*

TRAINING SCHEDULE AND PROMOTIONS

TRAINING PERIOD – First week on the job – up to $7.50 per hour

Your initial training period will be the first week on the job. During this period you will earn your base pay of $7.25 per hour and have an opportunity to earn an extra $0.25 per hour learning bonus. The learning bonus is earned for exceptional achievement during your first week which is an average of 1.00 or higher sales per paid hour. The learning bonus will be paid when you have completed 2 weeks with the company and are promoted to Permanent Marketing Rep.

*AFTER PROMOTION FROM TRAINING – up to $13 per hour.

*AFTER 6 COMPLETE WEEKS – up to $18 per hour.

When you complete the training period, you will be promoted to Permanent Marketing Rep. To successfully complete the training period you must achieve .60 sales per paid hour or higher. Managers have the discretion to promote a trainee who has not generated .60 or higher, if the manager determines that the trainee's attitude, effort, and skills are such that they believe they will improve their performance and soon reach desired minimum rate. Otherwise, the trainee will not maintain their employment with the company.

## APPENDIX N

*Progressive Business Publications*

July 2007

TYPE: BASE SALARY PLUS PERFORMANCE BONUS UP TO $18 PER HOUR!

BASE SALARIES: There are various base salaries to reward you for working your scheduled hours and being above minimum performance standards.

| TWO WEEK HOURS COMMITMENT | BASE SALARY |
|---|---|
| 70 Hours | $8.00 |
| 60 Hours | $7.75 |
| 50 Hours | $7.50 |
| 40 Hours | $7.30 |
| Minimum | $7.25 |

How do you earn higher base salary?

1.) Work the number of hours you committed to in the two week pay period.

2.) Maintain an over-all average of at least 1.00 sale per paid hour.

3.) Send out at least two free electronic newsletters (REMS) to a customer per day.

*If all 3 goals are achieved, you receive the corresponding base salary shown above. If these goals are not achieved, you earn the minimum base salary.*

YOU GET ADDITIONAL PERFORMANCE BONUSES.

You get performance bonuses based upon achieving a certain sales per paid hour. Sales per paid hour is simply your number of orders divided by the total hours worked. *Example: When you get sixty orders in a forty hour work period, you have achieved an orders per hour rate of 1.50.*

The levels are below:

| Orders per hour Level | 1.05 | 1.15 | 1.25 | 1.35 | 1.50 | 1.65 | 1.85 | 2.05 | 2.25 | 2.45 | 2.75 | 3.00 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Two week hourly bonus order rate this period | \$.10 | \$.20 | \$.40 | \$.70 | \$1.20 | \$1.80 | \$2.40 | \$3.00 | \$3.50 | \$4.00 | \$4.50 | \$5.00 | |
| Two week hourly bonus for cumulative order rate | \$.20 | \$.40 | \$.60 | \$.90 | \$1.40 | \$2.00 | \$2.40 | \$3.00 | \$3.50 | \$4.00 | \$4.50 | \$5.00 | |
| Total Bonus Per Hour | \$.30 | \$.60 | \$1.00 | \$1.60 | \$2.60 | \$3.80 | \$4.80 | \$6.00 | \$7.00 | \$8.00 | \$9.00 | \$10.00 | |

*Actual pay examples:*

| Hours Committed | Base Salary | Orders per hour achieved | Bonus Order rate | Cum. Order rate | Total pay per hr. |
|---|---|---|---|---|---|
| 50 | \$7.50 | 1.25 orders per hour | \$.40 | \$.60 | \$8.50 per hour |
| 60 | \$7.75 | 1.50 orders per hour | \$1.20 | \$1.40 | \$10.35 per hour |
| 70 | \$8.00 | 2.25 orders per hour | \$3.50 | \$3.50 | \$15.00 per hour |

*Progressive Business Publications*

EXPLANATION AND RULES OF PERFORMANCE BONUSES:

1) To earn cumulative bonus one must have worked at least six weeks. A week is 12 hours or more.
2) Cumulative is the average of the past 12 weeks, including the present two-week period, but excludes training.
3) No performance bonuses are paid if you've worked less than 24 hours in the two week pay period.
4) Orders canceled by fax or e-mail, within three business days following the date of the sale or fax, will not be counted for performance bonus purposes.
5) Free Electronic newsletters must reach customer's email box to count toward earning increased base salary (It is important to repeat back the customer's email address to be sure it is delivered properly).

EXPLANATION AND RULES OF BASE SALARY:

1. *Committed hours are permanent until changed*. Any change must be in writing on the change in committed hours form and must be for a minimum of four weeks. For example, if one is committed to 70 hours every two weeks and works 70 hours, they receive commitment income base salary of $8.00 per hour. If they work 68 hours and were committed to 70 hours, one is paid at the minimum base rate of $7.15 per hour. One of the reasons for this is so the company can count upon its sales stations being filled. If so, the company is willing to pay

more through higher base salary if hours commitments are satisfied.

2. *Holidays don't count against those committed for 40 hours or more*. For holidays of Memorial Day, July 4, Labor Day, Thanksgiving and the day after Thanksgiving, Christmas and New Years, the committed hours will be adjusted to reflect those are not work days.

*Example:* If you are scheduled to work 60 hours in two weeks (which averages six hours a day), and one holiday falls in that two-week period, then the hours commitment will be based on 54 hours, rather than 60 hours.

3. *Schedule Changes* can be made every two weeks: All changes must be made in writing and submitted by the rep no later than the Friday before the upcoming start of the pay period.

4. A cumulative sph of 1.0 must be maintained to receive higher salary based on committed hours.

5. An average of two free electronic newsletter must be sent out per day to receive higher salary based on committed hours.

RULES, STANDARDS AND WORKING HOURS:

1. PBP is open from Monday – Friday, 8:30 am – 5:00 pm.

2. Representatives will be paid for a maximum of 7.75 hours per day and 38.75 hours per week.

3. Each person must take a break of up to 15 minutes in the morning and 15 minutes in the afternoon. These two 15-minute breaks are paid.

4. Payday is every other Thursday, for the previous two weeks' work.
5. No radio playing or cell phones at desks.
6. No personal calls. Emergency calls can be made with the permission of the manager.
7. Other than soda, tea or similar beverages, no eating food at desk. All liquids must be kept in closed container.
8. No smoking in work area.
9. Orders are subject to company quality control standards being met.
10. Performance standard is a minimum of 1.0 orders per hour.

Progressive Business Publications

TRAINING SCHEDULE AND PROMOTIONS

TRAINING PERIOD – First week on the job – up to $7.50 per hour

Your initial training period will be the first week on the job. During this period you will earn your base pay of $7.15 per hour and have an opportunity to earn an extra $0.35 per hour learning bonus. The learning bonus is earned for exceptional achievement during your first week which is an average of 1.25 or higher sales per paid hour. The learning bonus will be paid when you have completed 2 weeks with the company and are promoted to Permanent Marketing Rep.

*AFTER PROMOTION FROM TRAINING – up to $13 per hour.

*AFTER 6 COMPLETE WEEKS – up to $18 per hour.

When you complete the training period, you will be promoted to Permanent Marketing Rep.

*To earn your promotion, you need only achieve a 1.0 orders per hour or higher.

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# APPENDIX O

[Insert Fold-In]

| Pay Period | Start Day | End Day | Location | Rep Last Name | Rep First Name | Date | Employee Id | Daily Start Time | Daily End Time | Daily Total | Row Logged On | Row Logged Off | Total Row Logged On | Total Row Logged Off | Daily Paid Time | Daily Logged Out Time |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120625 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 8:15:00 | 9:39:23 | 1:24:23 | 0:02:37 | 6:49 | 0:26:19 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120625 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 9:42:00 | 10:29:47 | 0:47:47 | 0:08:13 | 6:49 | 0:26:19 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120625 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 10:38:00 | 12:14:31 | 1:36:31 | 0:15:29 | 6:49 | 0:26:19 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120625 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 12:30:00 | 15:29:57 | 2:59:57 | 0:00:00 | 6:49 | 0:26:19 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120626 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 8:15:00 | 10:29:58 | 2:14:58 | 0:10:02 | 6:51 | 0:23:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120626 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 10:40:00 | 12:17:50 | 1:37:50 | 0:13:10 | 6:51 | 0:23:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120626 | HBURENR01 | 8:15 AM | 3:29 PM | 7:14 | 12:31:00 | 15:29:15 | 2:58:15 | 0:00:00 | 6:51 | 0:23:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120627 | HBURENR01 | 8:15 AM | 3:14 PM | 6:59 | 8:15:00 | 10:30:04 | 2:15:04 | 0:07:56 | 6:38 | 0:21:16 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120627 | HBURENR01 | 8:15 AM | 3:14 PM | 6:59 | 10:38:00 | 12:16:40 | 1:38:40 | 0:13:20 | 6:38 | 0:21:16 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120627 | HBURENR01 | 8:15 AM | 3:14 PM | 6:59 | 12:30:00 | 15:14:12 | 2:44:12 | 0:00:00 | 6:38 | 0:21:16 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120629 | HBURENR01 | 8:15 AM | 12:23 PM | 4:08 | 8:15:00 | 10:29:58 | 2:14:58 | 0:08:02 | 4:01 | 0:08:02 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120629 | HBURENR01 | 8:15 AM | 12:23 PM | 4:08 | 10:38:00 | 12:24:17 | 1:46:17 | 0:00:00 | 4:01 | 0:08:02 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120702 | HBURENR01 | 8:15 AM | 3:00 PM | 6:45 | 8:15:00 | 10:30:02 | 2:15:02 | 0:07:58 | 6:23 | 0:22:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120702 | HBURENR01 | 8:15 AM | 3:00 PM | 6:45 | 10:38:00 | 12:14:46 | 1:36:46 | 0:14:14 | 6:23 | 0:22:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120702 | HBURENR01 | 8:15 AM | 3:00 PM | 6:45 | 12:29:00 | 15:00:11 | 2:31:11 | 0:00:00 | 6:23 | 0:22:12 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120703 | HBURENR01 | 8:15 AM | 12:00 PM | 3:45 | 8:15:00 | 10:30:01 | 2:15:01 | 0:08:59 | 3:37 | 0:08:59 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120703 | HBURENR01 | 8:15 AM | 12:00 PM | 3:45 | 10:39:00 | 12:00:43 | 1:21:43 | 0:00:00 | 3:37 | 0:08:59 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120705 | HBURENR01 | 8:15 AM | 2:21 PM | 6:06 | 8:15:00 | 10:30:00 | 2:15:00 | 0:08:00 | 5:44 | 0:22:21 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120705 | HBURENR01 | 8:15 AM | 2:21 PM | 6:06 | 10:38:00 | 12:14:39 | 1:36:39 | 0:14:21 | 5:44 | 0:22:21 |
| 422 | 6/25/2012 | 7/8/2012 | DUBOIS | UREN | RICKY | 120705 | HBURENR01 | 8:15 AM | 2:21 PM | 6:06 | 12:29:00 | 14:21:24 | 1:52:24 | 0:00:00 | 5:44 | 0:22:21 |

## APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

---

Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

---

DECLARATION OF JOAN BOOTEL

I, Joan, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP" as a sales representative in its Bensalem, Pennsylvania branch. I have worked for Progressive for 20-plus years. My current manager is Dorothy Scat. Ion. She has been my manager since about April 2014. Before that, my manager was Bob Pirock. I have personal knowledge about the matters stated in this Declaration and, if called as a Witness, I could and would testify to them.

2. As a PEP sales representative, my job is to sell the publications that PEP develops. To do that, I make

outgoing calls to business executives to offer them PBP's publications.

3. As a sales representative, I commit to how many hours I will work over a two week pay period. I am currently committed to working 40 hours over two weeks and that is the level to which I typically commit. I am not required to follow a set daily schedule and can vary the times that I start and stop working each day. My managers are flexible on when I arrive and do not give me specific instructions in that regard. I typically choose to arrive around 8:15 a.m. and finish working around 12:00 p.m. or 1:00 p.m., but I could choose to arrive and leave at different times if I wanted to.

4. I have never been reprimanded or disciplined for working less than my committed hours level. I have also never been put on probation or a set schedule for missing my committed hours.

5. PBP's flexible policies allow me to control my schedule and my breaks. I can log-off whenever I want, for whatever reason I want, and take a break for as long as I want. In short, PBP's break policy is very flexible. There is no real limit on the number of breaks or the length of breaks that I could choose to take. When taking a break. I am completely free from work and do not have to perform any work until I decide to return.

6. Being able to take breaks when I want and for as long as I want has been very helpful to me in connection with my cancer treatment. I use short breaks of five to ten minutes to call my hospital to set up appointments. I also use the flexibility to attend appointments and move my work schedule around. Within 24 hours of receiving chemotherapy, I get a Neulasta shot to build up my white blood count. On

those days, I come into the Bensalem branch in the morning around my regular time and will work for a few hours. I will then leave the branch to go to the hospital in order to get the Neulasta shot and then return to work. The hospital is about 20 minutes away and the shot is very quick, so I am usually gone for about 45 minutes to an hour on those days.

7. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I have never been disciplined or put on probation for taking too many breaks.

8. I have never worked another job with a similar level of flexibility that I have at PBP. Before PBP, I worked in a bagel store, Manhattan Bagels. I was responsible for baking the bagels in the morning and getting other products ready for the day. That job was a lot more stressful than PBP, which I do not find to be a stressful job. PBP helps companies and people. and I enjoy that and do not need to take breaks from my job to deal with stress of frustration.

9. I worked at PBP when it used to have a set break schedule of one fifteen-minute break in the morning and one fifteen-minute break in the afternoon. I greatly prefer the current flexible policy over the previous policy of set breaks. The current policy gives representatives more freedom and is more relaxing. It would be more difficult and more stressful to schedule the treatment I need for my cancer if PBP had to get rid of its flexible break policy.

10. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to m employment if I signed the Declaration, or chose not to sign it.

Executed on 5-19-14

I declare under penalty of perjury under the laws of the United States of America that the foregoing 1s true and correct.

/s/ Joan Bootel
Joan Bootel

## APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF PAMELA DAVIS

I, Pamela Davis, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Pottsville, Pennsylvania branch. I have worked for Progressive since April 2012 and have worked as a sales representative in the Pottsville branch since that time. Colin McIlwain has been my manager for the entire time that I have worked for PBP. I have personal knowledge about the matters stated in is Declaration and, if called as a witness, I could and would testify to them.

2. My job at PBP requires me to call current subscribers to have them renew their subscriptions. PBP is a business-to-business company, and I make calls to business executives across the country.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit to working sixty hours every two weeks and I can work various hours to reach that goal. I fill out a schedule every two weeks indicating the times that I expect to work but I am not tied to those hours. For instance, I normally put down either 8:30 a.m. to 3:30 p.m. or 9:00 p.m. to 4:00 p.m. depending on whether I have custody of my daughter that week. However, I have flexibility over the hours that I actually work and could work from 9:00 a.m. to 5:00 p.m. or from 10:00 a.m. to 4:00 p.m. Basically, I set the level of hours I will work over a two-week period and then decide when to work to reach that level.

4. I have come up short of my committed hours in the past. When that happened, I made my manager aware but I have not been disciplined.

5. PBP's break policy lets representatives self-manage their time. I can take a break at any time I want or need one. My breaks can be for as long or as short as I want, for any reason, and I control what I can do during these breaks. I have complete freedom during these breaks including whether to return to work, when to return to work. Because it is up to me to decide when to return to work, I can use the breaks to do whatever I would like.

6. I use the flexible break policy to take care of medical issues. I was diagnosed with carpel tunnel in both hands and have nerve damage in my neck. As a result, I have to make lots of medical appointments

and will take short breaks to call and set up appointments. I also use breaks to attend the appointments. Typically I will go on break for around 40 minutes to go to an appointment but it could be longer or shorter and I take a break for however long I need to. For example, when I've had to get an MRI, I would leave work for closer to 90 minutes. I also take breaks of five to ten minutes to call the doctor and get the results of tests or to return a doctor's phone call.

7. I also use breaks to take care of my twelve year old daughter. My husband and I work opposite shifts, so we have to be flexible to take care of her. I frequently had to leave work early to pick up my daughter because she does not take the bus home. Sometimes I will come back to work after picking her up; other times, I will be done for the day. Either way, I have control over my schedule to decide what I will do. Beyond making sure my daughter gets to and from school, I will take short breaks to talk on the phone with her, especially if she is home by herself.

8. I also take breaks to address issues at my daughter's school. In particular, I go to parent-teacher conferences during breaks. I've also used breaks to speak to the guidance counselor at her school or to talk to the school nurse if my daughter is not feeling well. There are also a variety of little things that come up at her school for which I take breaks. For example, when she won a merit award, I took a break to attend the award ceremony.

9. I also use breaks to complete errands including paying car insurance, cell phone, and mortgage bills by phone. When I do that, I typically am on break for ten minutes. I also take care of personal errands including running over to my husband's job to see him for a few minutes before coming back to work.

10. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a break. I've also ever been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

11. I would not like it if PBP changed its break policy. It would be harder for me to take care of my daughter if I could not control the timing and length of my breaks. I would not be able to pick my daughter up from school or to visit my husband during the day.

12. There is no set lunch time at PBP. Representatives can take lunch whenever they like and for however long they like. I usually take a 30 minute lunch around 11:00 a.m. or 11:30 a.m. but I have never been told that I have to take lunch at any specific time.

13. Although telemarketing can be stressful at times, I do not feel the need to take breaks because of stress. Before working at PBP I worked as a tax collector. I found that job to be more stressful than PBP.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not

be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 04-16-2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Pamela Davis
Pamela Davis

**APPENDIX R**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF CATHY GALLAGHER

I, Cathy Gallagher, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Williamsport, Pennsylvania branch. I have worked for Progressive since November 2005 and have worked as a sales representative in the Williamsport branch since that time except for a summer off to take care of my mother. My current manager is Chrissy Bennett. She has been my manager for approximately the last six or seven years. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. My job as a sales representative for PBP requires me to call different companies and try to help them with the information that we have. PBP publishes newsletters that help all different kinds of companies and I call to sell subscriptions to those newsletters.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit to working 40 hours over the two-week pay period. I do not have a set schedule of the hours that I will work each day but only let my manager know the number of hours that I plan to work over the two-week period.

4. I can take a break at any time I want or need one. My breaks can be for as long or as short as I want, for any reason, and I control what I do during these breaks. I have complete freedom during these breaks including whether to return to work, and when to return to work. Because it is up to me to decide when to return to work, I can use the breaks to do whatever I would like. Basically, PBP makes me responsible for managing my own time.

5. I predominantly use the flexibility at PBP to take care of my parents. My mother is 72, my father is 77, and they both require care from me in order to stay in their home. My father has a serious health condition that substantially limits his mobility. My parents live only three miles away from the Williamsport branch, so I frequently take breaks to leave work to go check on them. I visit them at least three times a week and some weeks every day. Because there is no one else around who can take care of them, I take breaks to do all sorts of things to help them. For instance, I help give my dad his medicine which he has to take at 3:00 p.m. Other times, my mom will call saying that she needs help with the laundry so I will go over and help and then return to work. I also take short breaks to

call and set up appointments for my mom and dad and then take breaks to drive them to all of their appointments. My mom often calls unexpectedly so I need to be able to take breaks at any moment and for varying lengths of time. PBP's policy allows me to control the use of my breaks and take them when I need to help my parents.

6. I also use breaks to take care of my youngest son who is nine years old. I am a single parent as his father passed away when he was five months old. I use breaks to attend PTO conferences at his school and will be gone for about 40 minutes. If he gets sick, I will sometimes pick him up from school and take him to my sister's and then come back to work. Other times, I need to leave work for the day to take him to the doctor.

7. I also use breaks to run personal errands such as cashing my pay check at the bank which ordinarily takes 10 to 15 minutes.

8. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

9. Before coming to PBP, I worked as a telephone representative for Liberty Business Information and would conduct surveys over the phone. Liberty Business Information had a set break policy. I also worked at PBP when it used to have a set break policy. I greatly prefer PBP's current flexible break policy to its previ-

ous set break policy and the policy at Liberty Business Information. I would not be able to give my parents the care that they need without a flexible break policy. Without that care, my parents would have to be in a nursing home and that is not something that I will let happen. If I could not take breaks when I need to, and for how long I need to, then I would quit in order to take care of my parents to keep them out of a nursing home. I don't know of any other employers who have a policy similar to PBP so I expect that I would likely be unemployed if it were not for PBP. Flexibility is the reason that I have continued to work at PBP; PBP cares about its workers and gives them the flexibility to handle life outside of work.

10. There is no set lunch time at PBP. Representatives can take lunch whenever they like. Most people take lunch around noon, but I've never been I had to take lunch at a specific time.

11. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 17, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Cathy Gallagher
Cathy Gallagher

## APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF LESLEY GRAHAM

I, Lesley Graham, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Woodbury, New Jersey branch. I have worked for Progressive since February 2004 and have worked as a sales representative in the Woodbury branch since that time. My current manager is Chris McCunney. He has been my manager for almost the entire time that I have worked at PBP except for a short period of time when he left to manage another branch. I have personal knowledge about the matters stated in this

Declaration and, if called as a witness, I could and would testify to them.

2. My job as a sales representative at PBP requires me to reach out to business executives across the country to offer them subscriptions to publications with important information tailored to their specific business that they can use to become more knowledgeable.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit to working 40 hours over a two-week period. I work various hours to total those 40 hours. I do not have to fill out a schedule listing what times I will work on specific days. Instead, I can vary my schedule depending on what is going on in my life. I usually try to come in around 9:00 a.m. and leave around 3:00 p.m. but this often varies due to my second job and there is no restriction on changing the hours I will work. I have never been disciplined for changing what time I come into the PBP office or leave. Basically, it is up to the representative to decide what days and hours they will work over the two-week period.

4. PBP's break policy lets representatives take breaks whenever they want. There is no limit on the length or number of breaks that I can take. There is no limit on the reasons for which I can take a break. The break policy allows me to stop working whenever I want or need to. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

5. The main reason that I take breaks is to work my second job in retail for Disney. This job requires me to be on-call at all times so I never know when I will need

to take break. I regularly take breaks to make a short call to Disney to check whether they need me to come in and work. I also take breaks whenever Disney calls me to let me know that they need me to work. These are always short calls that last less than five minutes. Because there is no way to predict when I might have to make or receive such calls, the ability to take a break at any time is very important to me.

6. In addition to taking breaks to call or receive calls from Disney, I also have to take longer breaks to leave PBP and go into Disney to begin a shift there. My schedule there is constantly varying and there is no way for me to know ahead of time when they will need me to come in but I always need to be available whenever they need me. For example, I have had days where I'll begin working at PBP in the morning but then will hear from Disney that they need me to work in the afternoon. On those days, I'll work at PBP until I have to leave, perhaps around 1:00 p.m., but then I can leave PBP for the rest of the day to go work at Disney. Depending on how long I have to work at Disney, I have also come back to work at PBP after I'm done working at Disney. When Disney calls and asks me to start working, I simply tell my manager that they've asked me to come in and let him know when I need to leave. This flexibility is crucial to my ability to work a second job.

7. I also take breaks to handle family issues and other general things that come up in my personal life. I take breaks to talk to my family just to check in and see how everyone is doing. For instance, I'll take breaks of a couple minutes to call to set up doctor's appointments for myself or my daughter. I will also take breaks to call and set up transportation for my daughter if she is sick at school or if one of her sports

practices is cancelled. If a practice is cancelled, I'll take a break to go pick her up and take her home. I also use breaks to run errands and take care of personal business whenever I need to such as running to the bank or stopping by a store that is only open during working hours. These are almost always short breaks that last less than twenty minutes. I also take breaks to leave to go to a doctor's appointment and then can come back to PBP after the appointment. When that happens, I can work different hours and come in and leave when I need to.

8. I do not take breaks to deal with the stress of the representative job at PBP. All jobs that I've ever worked can be stressful but there is nothing specifically about working at PBP that is particularly stressful for me.

9. PBP's break policy lets me decide all of the details about my breaks — when I want or need them, what I do during a break, and how long I need to be on a break to take care of personal business or to take care of things at my job with Disney. Under the current break policy, no one at PBP has ever told me that I have to take a break at any specific time. Also, no one has ever told me that I could not take a break at any particular time or prevented me from taking a break when I wanted or needed one. Similarly, I have never been told that my breaks are too long or that I am taking too many breaks. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

10. This flexibility is very important to me because without it I would not be able to continue to work both at PBP and at Disney. The times when I need to call Disney, or when they need to call me, vary from day-to-day and cannot be predicted in advance. If1 were

only allowed to take breaks at predetermined times, I could not complete the tasks required of me at Disney while continuing to work at PBP. I also would not be able to check in on my daughter and set up transportation for her if I could not take breaks when I needed to.

11. I have the same flexibility about when to eat lunch. Although I usually eat lunch around noon, I can decide what time and for how long I take lunch. Besides being in training, I have never been told that I have to take a lunch break at a specific time.

12. I have never worked at another job that provides the flexibility for breaks and scheduling that PBP does.

13. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 4/16/2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Lesley Graham
Lesley Graham

Schedule ______ ______ Commitment

Disciplinary Committed Hours & Schedule

Representative schedule for ______________________
Name

As of ______ my schedule will be as follows:
(date)

My committed hours will be ____ hours. (In my interview I asked to be able to work ______ hours.)

* I understand that I have been placed on this schedule as a result of my failure to meet my previous commitments. This schedule will remain in effect until I have met both my committed hours and committed schedule for 3 consecutive pay periods.
* I understand that I will only be allowed to change my schedule only at the discretion of the Branch Manager (family emergency, doctor's excuse . . .) and that I must meet with the Branch Manager before I change it.
* If I cannot make it in I must call by 10am to let one of the managers know. Immediately upon my return to work I will meet with the Branch Manager to adjust my schedule.
* Failure to work my committed hours 3 times during a 12 week period will result in my being placed on a "Disciplinary" committed schedule until I have demonstrated that I will regularly meet my committment.
* I understand that I can change my hours commitment every 2 weeks but largely I am expected to work at least the number of hours I was hired to work on my application.

Due to my repeated failure to honor one or more of the above rules I understand that any further violations may result in my position being terminated

| Monday | Tuesday | Wednesday | Thursday | Friday | Total Hours |
|---|---|---|---|---|---|
| M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ |

| Monday | Tuesday | Wednesday | Thursday | Friday | Total Hours |
|---|---|---|---|---|---|
| M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ | M.S. ___ |

* This grand total should equal your committed hours ______

Signed: Date:

___________________________ ____________

(representative signature)

___________________________ ____________

(manager signature)

## APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF HEATHER HARTNETT

I Heather Hartnett, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Wyomissing, Pennsylvania branch. I have worked for Progressive since February 2012 and have worked as a sales representative in the Wyomissing branch since that time. My current manager is Tara Shinn. She has been my manager the entire time that I have worked at PBP. I have personal knowledge about the matters stated in this Declaration and if called as a witness, I could and would testify to them.

2. As a sales representative for PBP, I call business executives listed in PBP's database and attempt to sell them subscriptions to newsletters or various topics. I follow a script in making these calls but also use different techniques to engage the customer.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. When I first started working at PBP, I committed to working 70 hours over the two-week period. Currently, however, I commit to working 50 hours over a two-week period. I have control over what hours I work to reach my 50 hour goal. although I fill out a schedule every two weeks of the times that I expect to work, I decide when to come in to work and when to leave. For example, I usually write that I will work from 9:00 a.m. to 5:00 p.m. for every day but then can and do change the actual hours that I work. Until March 2013, I was working at McDonald's in addition to PBP. There were times McDonald's unexpectedly called and asked if I could come in early, and I was able to stop working at PBP earlier than I had planned and go work at McDonald's for the rest of the day. Because I decide what days and hours I will work over the two-week period to make up the number of hours that I want to reach, I had the flexibility to accommodate working at both jobs.

4. I have come up short of my committed hours goal in the past and was not penalized or disciplined.

5. PBP has a flexible break policy that lets sales representatives take breaks when they need to. Sales representatives are free to take a break at any time, for as long or as short as they want, and for any reason that they want. The break policy allows me to control my breaks and use them as I want to. Basically, when

I go on a break, I am free from work and can decide when and whether to return to work.

6. I use my breaks at PBP to take care of personal business during the day. For instance, I take short breaks to make personal phone calls to my family, to set up doctor's appointments, or to make calls about errands I need to do after I am done working for the day. other times, I use short breaks to run a quick errand, such as stopping by a store. These breaks typically take about ten minutes. I also take longer breaks to go to doctor's appointments during the day and then will come back to work afterward. On those occasions, I am usually on break for about 45 minutes to one hour.

7. PBP's break policy also helps me complete my online classes at the University of Phoenix. As part of my classes, I am required to participate in online discussions. During breaks, I'll check an application on my phone that allows me to check course-related posts from my professor or fellow students. I'll also post responses myself to satisfy the participation requirement. I will also check on my assignments and look at the syllabus. These are short breaks that last only five to ten minutes.

8. I have never tried to take a break at PBP and been told that I could not. I have also never been told that there are any specific times where breaks are prohibited. Likewise, I have never been told that I must take a break at any specific time. Similarly, I have never been told that my breaks are too long or that I am taking too many breaks. because the length of breaks is up to me, I do not focus on whether any specific break is going to be longer or shorter than twenty minutes.

9. Before PBP, I worked at McDonald's and at Pioneer College Caterers. Neither of those jobs gave employees much flexibility or control over their breaks because employees had to be ready for customers coming in. The flexibility over breaks and schedules at PBP was one of the reasons I applied to work here because I knew such flexibility would be very beneficial to me in order to also be a full-time college student. The ability to control my schedule and breaks at PBP allows me to work and go to school. PBP's flexibility also allowed me to work two jobs, here and at McDonald's.

10. PBP's lunch policy is similar to the break policy in that sales representatives decide when to take a lunch break and how long their lunch break will be.

11. I do not find my job at PBP to be very stressful and do not have to take breaks because of job-induced stress. The level of stress that I experience working at PBP is comparable to that I felt when working at McDonald's and in previous jobs.

12. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 14, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Heather Hartnett
Heather Hartnett

## APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF DANIELA HOLLISTER

I, Daniela Hollister, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Wyomissing, Pennsylvania branch. I have worked for Progressive since August 2013 and have worked as a sales representative in the Wyomissing branch since that time. My manager is Tara Shinn; she has been my manager for the entire time that I have worked at PBP. I have personal knowledge about the matters stated in this Declaration and if called as a witness, I could and would testify to them.

2. My job as a sales representative for PBP requires me to call business executives at companies across the country to offer them our business publications. in making these calls, I follow a prepared script.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. My committed hours level is 50 hours over the two-week period. Before the start of every two-week period, we are given a "committed sheet" on which we fell out the hours that we expect to work over the upcoming two-week period. I normally put down 9:00 a.m. to 3:00 p.m. for every day of the week. However, that does not mean that I have to work those hours each day. Instead, I can come in earlier or stay later if I want to. basically, I control and decide what times to work in order to make my committed hours goal.

4. I have come up short of my committed hours in the past when requirements of my living in a halfway house interfered with my work schedule. In those instances, PBP worked with me to accommodate my schedule. My manager, Tara Shinn, encouraged me to keep track of my hours and to try and make my goal, but I was never disciplined for coming up short.

5. PBP has a very flexible and lenient break policy. Sales representatives can take breaks at any time, for any length of time, and for any reason. When taking a break, I am completely free from work and have total control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

6. PBP's break policy has enabled me to balance the requirements of living in a halfway house while maintaining a good job at the same time. As part of living in the halfway house, I have drug and alcohol

counseling sessions, up to four times a week. I take breaks in order to leave PBP and attend the counseling sessions. Although these were usually at set times, there were occasions when the counselor would reschedule a meeting without advance notice and I would have to take a break on short notice. My attendance at these sessions is mandatory, and I was able to take advantage of PBP's break policy to attend the sessions. In addition to attending counseling sessions, I take shorter breaks of 15 to 20 minutes to speak with my counselor on the phone. Sometimes these calls last a little longer as well.

7. I also use breaks to meet various requirements imposed by the halfway house. For example, the halfway house occasionally goes into "shut down" where everyone is required to be present for room searches. I have had to take a break to leave work at PBP to return to the halfway house for these "shut downs." These lock downs typically last from one to three hours. There is no way to predict when they might happen so I need to always be able to quickly leave work and return home. Similarly, I have to be available if the case manager at the halfway house ever wants to speak with me. PBP's break policy helps me make sure I can meet all of these requirements by letting me control when and how I use my breaks.

8. I also had to take a break on one occasion when there was a problem with the piping in my room. On that occasion, the house called me in the afternoon so I logged off and took the rest of the day off to pack and move rooms.

9. I also use breaks to take care of my children, who are currently living with my brother. I'll take breaks to speak with my brother or to take care of issues at

their school, including having to notarize paperwork for the school.

10. Basically, I have responsibility for and control over my breaks. I have never been told to take a break at any specific time and have never been told that I couldn't take a break when I wanted to. Similarly, I've never been told that I'm taking breaks that are too long or that I'm taking too many breaks. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

11. None of my previous jobs have had a break policy that is similar to PBP's. I know people at the halfway house who have lost their jobs because their employers would not work with them and give them the flexibility they needed to attend counseling and meet other halfway house requirements. There are also plenty of other people in the halfway house program that are unable to find jobs because of their personal schedules. I am skeptical that I would have been able to work another job besides at PBP given the counseling requirements that I had when I first moved into the halfway house. I looked into getting a fast food job but they couldn't work around my schedule, and there was no possible shift that I could work which would have allowed me to attend my counseling sessions.

12. PBP does not have a set policy on when employees must take lunch or how long they can be on a lunch break. The sales representatives have responsibility for deciding the details of their lunch breaks.

13. My job at PBP is not stressful and I very rarely have to take breaks in order to relieve stress. Before working at PBP, I worked as a manager at Dunkin

Donuts for close to a year. Working at PBP is certainly less stressful than working at Dunkin Donuts.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 15, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Daniela Hollister
Daniela Hollister

**APPENDIX V**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF MICHAEL MeCANN

I, Michael McCann, declare:

1. I am employed by Progressive Business Publications ("Progressive") as a sales representative in its Altoona, Pennsylvania branch. I have worked for Progressive since 2002 and have worked as a sales representative in the Altoona branch since that time. My current manager is Brian Stotler. He has been my manager since about 2004. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit

to working sixty hours over a two week period. For every two week period, I set up a schedule estimating how many hours I will work each day. I generally arrive around 9:00 a.m. but do not have a set schedule of when I leave and will leave at different times depending on how many hours I am trying to work that day.

3. Progressive's break policy allows representatives to take breaks whenever they want for whatever reason they want. As long as the representative logs out of the system, they can decide how to use that time including when and if they will return, When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

4. I am a single father so I. use breaks to take care of my children. For example, if they get out of school early, I leave and pick them up. Or, if there is a snow day, I use Progressive's break policy to take care of them. If I have a babysitter lined up, I will take a break to pick up my children from school, drop them off with the babysitter, and then return to work. If I cannot line up anyone to watch them, then I will take the rest of the day off and make up my hours later, Also, if my daughter is sick, I can stay home with her and make up my hours at another time. More generally, I use breaks to make phone calls to get ahold of people when I need to and to deal with various situations are they come up. For example, I take breaks of about ten minutes to leave and go to the post office or the bank. The flexibility in Progressive's break policy is very useful and allows me to be more independent.

5. Progressive's break policy is also beneficial to my ability to increase my income. The old break policy

with one break in the morning and one break in the afternoon gave me more hours worked but with less sales. This resulted in me making less money because it lowered the sales per hour rate that my bonus is based on.

6. Progressive's break and scheduling policies give me more independence and flexibility than my previous job managing a convenience store, and the ability to work different days and hours factored into my decision to take a job at Progressive.

7. A representative's use of breaks is their personal choice. I can take one when I want and decide how long it will be Unlike under the old policy of two breaks per day, I have not been instructed to take breaks under the current policy. I've never been told that I take too many breaks and never been told that breaks at any specific time are off-limits or been denied a break when I wanted one. Because there is no set length of breaks, I do not focus on whether my breaks will last longer or shorter than twenty minutes.

8. It is also my personal choice when I eat lunch. I generally take lunch around 12:15 p.m. to 1:00 p.m. but that is flexible and I can take lunch when I want to. I have never been told to take a lunch break at any specific time under the current policy.

9. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign

the Declaration. .1 have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 4/15/14

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/Michael McCann
Michael McCann

## APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF WENDY MILLER

I, Wendy Miller, declare:

1. I am employed by Progressive Business Publications ("Progressive" or PBP") as a sales representative in its Wyomissing, Pennsylvania branch. I have worked for Progressive since January 2010 and have worked as a sales representative in the Wyomissing branch since that time. My current manager is Tara Shinn. She has been my manager for slightly over a year. Before that, my manager was Bob Pirock. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sale representative, I reach out to business executives throughout the country to inform the about our high-end newsletters and reference guides in the hope that they will subscribe to receive our products.

3. When I first began working at PBP, I committed to working the maximum possible hours and worked 38.75 hours per week. I did this from approximately January 2010 to July 2010. In July 2010, I began working a second, full-time job as an assistant manager at Bojangle's, a fast food restaurant. My schedule at Bojangle's changes week to week and also varies by the day. For example, I will work shifts at 5:30 a.m. to 3:00 p.m., 11:00 a.m. to 8:00 p.m., or 1:00 p.m. until closing at 10:00 p.m.

4. When I received the job at Bojangle's, I thought that I would not be able to continue to work at PBP and informed my manager at the time, Bob Pirock, that I would be resigning. I told him that I was leaving because I would not be able to maintain a consistent schedule at PBP, could not set a committed hours target, and would not know the hours that I could work.

5. Since that time, I have not had to set committed hours target at PBP. Instead, I am allowed to come in when I am able and to work as many hours as my schedule at Bojangle's will allow. In general, I work between ten to twenty hours a week at PBP. I asked if they wanted to know ahead of time the hours that I intended to work each week but both Bob Pirock and Tara Shinn have not required e to provide that.

6. Instead, they allow me to have complete flexibility and work varying hours day-to-day and week-to-

week. For example, if I am scheduled to start a shift at Bojangle's at 11:00a.m., then I will come into PBP for about two hours that morning. If my shift at Bojangle's starts later, around 2:00 p.m. for example, then I will work from 8:00 a.m. to 1:00 p.m. at PBP before leaving to go to Bojangle's. If I have a week day off at Bojangle's then I will come into PBP to work a full day. Without the flexibility to set my own hours, I would not be able to work both of my jobs at Bojangle's and at PBP. Because I have a different schedule at Bojangle's every week, there is no way that I could continue working both jobs if I had to commit to a set schedule with specific days and specific hours at PBP.

7. From the time I started working at PBP, its break policy was made clear" breaks are entirely up to the representative. You can take a break for any reason that you want. You may take a break whenever you want and for as long or as short as you want and you are not required to come back from a break at any specific time – or even come back at all – if that is what the representatives decides. Basically, representatives set a committed hours goal but then have independence to work whatever hours they choose and take whatever breaks they want in order to meet those hours. When taking a break, I am completely free to work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

8. From time to time I will take breaks to run errands such as going to the bank. Recently, my husband and I were completing renovations on our home, and I took breaks to call and check on the progress of those renovations. Specifically, I called to

check to make sure the carpeting, painting, or siding contractor came to complete the work. I also talked to my husband about how the work was progressing and to make sure that the projects are going well. These were always short calls lasting only a couple of minutes.

9. The amount of breaks, lengths of breaks, and how to use breaks are up to me to decide. I have never been told to take a break at a specific time or been told that I could not take a break at any particular time. Similarly, I have never been told that I am taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

10. There is also no set time that representatives are required to take lunch. My lunch schedule varies depending on my shift at Bojangle's and I am free to take it whenever is convenient to me.

11. I do not find the duties of sales representative job at PBP (calling business executives and trying to sell subscriptions) to be stressful and I do not take breaks to handle that stress or relieve frustration. My job at Bojangle's is more stressful than my job at PBP.

12. I understand that there is a lawsuit being broght by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interest. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there

would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 15, 2014

I declare under penalty of perjury under the laws if the United States of America that the foregoing is true and correct.

/s/ Wendy Miller
Wendy Miller

## APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF AMBER NADONLY

I, Amber Nadonly, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Meadville, Pennsylvania branch. I have worked for Progressive since January 2010 and have worked as a sales representative in Meadville branch since that time. However, I was away from work for three months from December 2012 to March 2013 to take care of personal issues. My current manager is Jen Maziarz. She has been my manager the entire time that I have worked for PRP. I have personal

knowledge about the matters sated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative at PBP, I make business-to-business sales of newsletters to business executives. To do this, I log onto a phone system and call numbers in a database that is provided to me.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period, I commit to working 50 hours over a two-week period, and I work various hours to total those 50 hours. Although I normally indicate that I will work from 8:30 a.m. to 2:30 p.m., I am not locked into those hours and can adjust my schedule as necessary. As a courtesy, I let my manager know that I will be working at different times, hut there is no restriction on changing the hours I will work. I have never been disciplined for changing what time I come into or leave the PBP office. Basically, it is up to me to decide what days and hours I will work over the two-week period to try and reach my committed hours goal.

4. I have come up short of my committed hours before and have not been disciplined. My manager, Jen, encouraged me to try to reach my hours but I have never received a warning or gotten into any other trouble due to not reaching my committed hours

5. PBP's break policy lets representatives take breaks whenever they want. There is no limit on the length or number of breaks that I can take. There is no limit on the reasons for which I can take a break. The break policy allows me to stop working whenever I want or need to. When taking a break, I am completely free from work and have control over deciding

whether and when to return to work. Because of that control. I can use breaks however I want.

6. I take breaks to take care of my children. I am a single mother so it is very valuable to me to be able to control the timing and length of my breaks so that I can take care of the various issues that arise concerning my children. For example, I've altered my schedule to come in two hours late when the start of my children's school day has been delayed due to weather. I also will take short breaks to leave the office temporarily to go and help my kids. Because there is no set length of breaks, I am able to leave to take care of personal business of that kind.

7. Likewise. I use breaks to take my children to appointments. For instance, I will leave work to pick them up and take them to the dentist or sometimes they II walk from school to my office and I will then take them to the dentist. Because of the flexibility of the break policy, I have the option to leave work to take them to such appointments and then can return to work after about an hour. I also take breaks lasting only a few minutes to call and set up appointments for them or to call and check on them if they are sick.

8. I recently moved and I used breaks to handle that including taking breaks of ten to fifteen minutes to call the landlord. Also, I took breaks to complete paperwork including paying bills and filing out an application to receive relief for gas and heat bills. Additionally, I'll take short breaks to go to the bank in order to pay a bill.

9. My job at PBP is not a high-stress job, and I do not take breaks to deal with the stress of my job. It would be more stressful if PBP had set break times because I would have to figure out how to help my

children whenever they needed help. Or, even worse, ill could not help them because I was unable to take a break when I needed to.

10. PBP's break policy lets me decide all of the details about my breaks – when I want or need them, what I do during a break, and how long I need to be on a break to take care of my children or other personal business. No one at PBP has ever told me that I have to take a break at any specific time. Also, no one has ever told me that I could not take a break at any particular time or prevented me from taking a break when I wanted or needed one. Similarly, I have never been told that my breaks are too long or that I am taking too many breaks. I do not on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

11. I have worked as a telemarketer for three other companies end PBP has by far the most flexible break policy that I have lied. I would not be able to do all of the things to take care of my children that I have to do as a single mother without the ability to take breaks when I need them as I ;an at PBP.

12. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims, that sales representatives must he paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. 1 am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on ______04/15/2014________

I declare under penalty of per perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Amber Nadonly
Amber Nadonly

## APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF DEBRA O'NEILL

I, Debra O'Neill, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Altoona, Pennsylvania branch. I have worked for Progressive since October 2011 and have worked as a sales representative in the Altoona branch since that time. Brian Stotler has been the manager of the Altoona branch for the entire time that I have worked there. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. PBP is a business-to-business telemarketing company and my job as a sales representative requires me to sell PBP's publications to other businesses. I call business executives across the country to sell them our publications that can help their business.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I am currently committed to working 40 hours over the two-week pay period. I had previously committed to working 60 hours, but I recently reduced it to 40 hours because I have had to do a lot to incorporate the business that my husband and I operate. I fill out a schedule every two weeks of the times that I expect to work but I am able to change those times and work different hours as my schedule requires. For example, although I would normally write down 8:30 a.m, to 2:30 p.m. on the schedule, I can change that to take my grandchildren to school or for any other reason, There is no requirement that I call in to say that I will not be arriving at 8:30 a.m. on those days, but I normally call as a professional courtesy. Basically, I decide what days and hours I will work over the two-week period to make up the number of hours that I want to reach.

4. PBP's break policy lets representatives control when they take breaks and how they use their breaks. I can take a break at any time that I want and it can be for as short or as long as I want. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

5. My husband and I run a business that provides the service of cleaning beer taps for restaurants and bars. One of the main ways that I use my breaks is to help out with this business. I will take short breaks to

answer calls from customers or to let my husband know that a customer called. These are almost always short calls that last only a few minutes.

6. Recently, I have been using breaks in order to incorporate our business. I've been taking breaks from PBP once every week or two to go to our attorney who is helping us through the incorporation process. I will come to work at PBP for a few hours, then go on break in order to visit with our attorney, and then return to work. These breaks usually last about an hour.

7. In addition to using breaks to help run my business, I take care of personal errands and needs during breaks. For example, I use breaks to leave work to go to a doctor's appointment. I also use breaks to pick up my grandkids from school.

8. I have never been told that I had to take a break at a specific time or that I could not take a break at times when I wanted to. Likewise, I have never been told that I am taking too many breaks or breaks that are too long. The flexible break policy allows me to decide when and for how long I want to take a break. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want

9. That flexibility is important to me and is one of the reasons that I came to work at PPP. Specifically, I was drawn to PBP's flexible break and scheduling policies because it would allow me to help out with the business that my husband and I run. For example, I would not be able to visit my attorney to incorporate my business if I worked for a company that did not have a flexible break policy. Additionally, the flexibility is important to me for personal reasons. My father was recently diagnosed with serious health problems,

and I anticipate using the flexibility in order to take care of him.

10. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 04/15/2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Debra O'Neill
Debra O'Neill

**APPENDIX Z**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF KATHLEEN PEDRICK

I, Kathleen Pedrick, declare:

1. I am employed by Progressive Business publications ("Progressive" or "PBP") as a sales representative in is Bensalem, Pennsylvania branch. I have worked on-and-off for Progressive for many years and recently returned to Progressive in March 2013. Since that time, I have worked as a sales representative in the Bensalem branch. My current managers is Dorothy Scollon. She has been my manager since April 1, 2014. Before that my manager was Bob Pirock. I have personal knowledge about the matters stated in this

Declaration and, if called as a witness, I could and would testify to them.

2. My job for PBP is not a telemarketing job. I am an account sales representative and I sell informational newsletters to Fortune 1000 companies. To do this, I make business-to-business calls and speak with business professionals at various companies.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I currently commit to working twelve hours per week for a total of twenty four hours over a two-week period. because of all the other things going on in my life right now, I cannot commit to more than twenty four hours over the two-week period. My managers are fine with this.

4. I can work whatever days and hours I want in order to reach that twenty four hour level. I do not set a schedule in advance of the times or days when I will be coming into the Bensalem branch. For example, I could decide to work Monday, Wednesday, and Friday, or I could decide to work only Thursday and Friday and work six hours each day. It is entirely my choice when to start work and when to stop work.

5. If I were to come up short of my committed hours level, it would only affect my bonus compensation. I've never been warned or disciplined for not reaching my committed hours.

6. I can take a break at any time I want or need one. My breaks can be for as long or as short as I want, for any reason, and I control what I can do during these breaks. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want. Because representatives

can take breaks whenever they want, representatives at the Bensalem branch end up taking breaks at all different times of the day.

7. I am currently going through a divorce and Progressive's flexible break policy has been enormously helpful by allowing me to take care of matters relating to that. As an example, I am able to take calls from my lawyer at any time of the day. If she calls me when I'm at work, I simply step away from my computer and address any concerns that she may have. These are usually short calls of five to ten minutes where she'll ask me some specific questions and then I'll go back to work. Sometimes they last a little longer but they are almost always under twenty minutes.

8. I also use breaks to attend medical appointments. For instance, I recently had an infected finger that required me to go to the doctor on short notice. Because of the short notice, the doctor only had an appointment at 12:45 p.m. Since I have total control and freedom over my breaks, the doctor's limited availability was not a problem, and I was able to leave for the appointment and come back to work about an hour later.

9. In addition to working at Progressive, I also teach piano lessons and I am currently trying to get more students. Progressive's flexible break policy will allow me to arrange my work at Progressive around the times when students could take lessons. For instance, if a student wanted a lesson at 3:00 p.m., I could either come into work before the lesson and stop for the day; or, I could return to work after the lesson. The ability to decide when to start and stop working allows me to coordinate my schedule at Progressive with the availability of my piano students.

10. I also sing in retirement homes in over 50 communities as entertainment for the residents. I arrange my schedule at Progressive around the times and days when I have an event in a nursing home. Again, because I can change my schedule around and work only when I want to, I can either come in after a singing job or just work on another day.

11. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether breaks are longer or shorter than 20 minutes because I can go on break for as long as I want.

12. Besides working at Progressive, I used to be a legal secretary. I could return to being a legal secretary, and make more money than I do at Progressive, but I would never find the same type of flexibility that Progressive gives me. That flexibility keeps me working at Progressive because it allows me to handle personal business (such as my divorce or medical issues) and also work other jobs that I love (singing in nursing homes and teaching piano). There is no other place like Progressive, and I would not be able to do these same things if I were working as a legal secretary. If that flexibility were taken away, then I would return to being a legal secretary.

13. My job at Progressive is less stressful than working as a legal secretary. Working at Progressive would be a lot more stressful if I could only take breaks at set times.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on May 12, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Kathleen Pedrick
Kathleen Pedrick

## APPENDIX AA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF BONNIE PETERS

I, Bonnie Peters, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Clearfield, Pennsylvania branch. I have worked for Progressive for two years and have worked as a sales representative in the Clearfield branch that entire time. Denise Plubell has been my manager the whole time that I have worked for PBP. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative at PBP, I call business executives across the country and offer them subscriptions to PBP's various newsletters that can help them run their business.

3. I commit to work 60 hours over a two-week pay period. I do not fill out any weekly or biweekly schedule and do not have to indicate daily times when I will start and finish working. I normally try to arrive around the same time in the morning but I can arrive later if I have to. In those cases, I will let my manager know as a matter of respect but it is not mandatory to do so.

4. I can take a break at any time I want or need one. My breaks can be for as long or as short as I want, for any reason, and I control what I can do during these breaks. I have complete freedom during these breaks including whether to return to work, and when to return to work. Because it is up to me to decide when to return to work, I can use the breaks to do whatever I would like.

5. I use short breaks on a daily basis to treat my diabetic condition. I was diagnosed with diabetes in the beginning of 2013 and frequently took breaks to make appointments. I also use breaks to work with a counselor at a diabetes clinic that helps me control my condition. At first, I would take breaks to call my counselor multiple times a week to talk through issues. It's not always possible to establish a set time for these calls so having the ability to take a break whenever I needed and for however long I needed was very helpful to me in learning how to handle my diabetes.

6. I also take multiple breaks a day to check my blood sugar level. This normally takes only a few

minutes and then I continue working. If my blood sugar is getting low, then I will take a break to eat or drink something to get my blood sugar level back up.

7. Because of the flexible break policy, I was able to work a second job when I started working at PBP. At that time, I worked part-time in a J.C. Penney's store in the same mall where PBP's Clearfield branch is located. My hours at J.C. Penney would vary from week to week so the flexibility to control my schedule and breaks at PBP allowed me to work both jobs. For example, I normally work until 5:00 p.m. at PBP but I could leave earlier to start a shift at J.C. Penney if I had to. This was particularly true during the holiday season when J.C. Penney wanted me to work extra hours.

8. Another way that I used breaks was to keep in touch with my family. My father recently had to have a few surgeries so I would often take breaks for about five minutes to talk to my brother to see how he was doing.

9. I also took advantage of PBP's policies to take classes at Pennsylvania State University, which is close to an hour's drive away from the Clearfield branch. I scheduled all my classes for one day a week, Tuesday in the fall and Wednesday in the spring, and would leave earlier from PBP on those days.

10. I also take breaks to run personal errands occasionally such as going to the bank or post office during the day. Those breaks normally last twenty to thirty minutes.

11. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a

break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

12. Before starting at PBP, I worked as an office manager for an auto repair shop. I had less flexibility in that position because I had to always be able to answer the phone since the other employees were usually busy doing repairs. I was not able to take classes at that job because I couldn't leave early on the days that I would have to. It would be much harder to schedule appointments and talk with my counselor because of my diabetes at a job without a flexible break policy.

13. There is no set lunch time at PBP. Representatives can take lunch whenever they like and for however long they like. Most representatives take lunch around noon but I typically eat lunch at 1:30 p.m. or 2:00 p.m. After training ended, I've had freedom to decide when to take a lunch break.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 4/15/2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Bonnie Peters
Bonnie Peters

## APPENDIX BB

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF CYNTHIA RIDDICK

I, Cynthia Riddick, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative and a morning manager in its Pottsville, Pennsylvania branch. I began working for Progressive in February 2003 as a sales representative in the Pottsville branch. In July 2011, I left Progressive to work in sales and 'telemarketing at Telecommunications On Demand ("TOD"). I left TOD and returned to Progressive in November 2011 and have worked in the Pottsville branch since that time. My currant manager is Colin McIlwain. He has been my manager since about April

2012. Before that, m manager was Joshua Back. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. I work as both a morning manage and a sales representative for PBP with four hours in the morning dedicated to being a morning manager and four hours a day acting as a sales representative. As a morning manager, I am responsible for assisting the branch manager and helping and encouraging sales representatives. I also work as a sales representative and call business executives to offer them subscriptions to PBP's business publications.

3. Before I took on morning manage responsibilities, I would commit to work 60 hours in a two-week period as a sales representative. I would generally try to work from 8:30 a.m. to 5:00 p.m. but I could alter my work schedule as I needed to based on my personal schedule. If something came up, I would let my manager know that I would be working different times, but it was up to me to decide what hours I wanted to work and PBP gave me the flexibility to arrive and leave at different times.

4. When I missed my committed hours goal in the past, the only thing that happened was that my manager would explain the committed hours policy and encourage me to take more responsibility for my time at work. I have never been reprimanded or disciplined for working fewer hours in a two-week period than what I committed to. As a morning manager, I have not disciplined any sales representatives who worked fewer hours than the number they committed to.

5. The break policy at PBP makes representatives their own bosses when it comes to breaks. There is no

set break time or length and representatives can choose to take a break whenever they want to. It is up to each individual representative to decide how often they will take a break and how long a break will be. The representative could even decide to leave for the rest of the day. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want. PBP's policy lets representatives manage themselves and decide what hours they will work.

6. When I'm making calls as a sales representative now, and in the past when I was only a sales representative, I use breaks to take care of family matters. On many occasions I have taken breaks to pick up my children from school in order to take them to a doctor's appointment or daycare and then have returned to PBP afterward. My son lives out of town to attend the same high school that I went to. He is an exceptional athlete and I take breaks to attend his games and track meets. For example, when he had his state finals for track in Harrisburg, Pennsylvania, I was able to leave early for the day to go and watch him. To be able to attend and watch was very important to me and I would not have wanted to miss that. Sometimes I will also take him to appointments in Allentown, Pennsylvania which is about an hour away from the Pottsville branch where I work. I've been able to take a three or four hour break to drive to Allentown, go to the appointment, and then still been able to return to work afterward.

7. I also use breaks to take care of health and receive treatment for some recent medical issues. Specifically, I've had to undergo testing because of a low white blood cell count. At one point, I had to go to

the emergency room because of how ill I felt and was kept under observation. Additionally, I've used breaks to receive treatment for health issues with my lungs. Because of my health issues, I've been going to the doctor at least once a month and am able to leave work for two or three hours and then come back and continue working. Recently, I used a break to get in to see the dentist; they had an unexpected cancellation so I was able to take a break to get an appointment sooner than I thought. I let my manager know that I was leaving on a break as a courtesy and they were fine with me doing so.

8. The Pottsville branch is located in a shopping mall and I will take breaks to run personal errands including to go shopping for any items I might need, to pick up prescriptions, or to buy occasional gifts for my children and grandchildren. I also use breaks to go to the bank, pay phone bills, utility bills, and insurance bills. Some of these breaks are very short in duration. Others, such as going to the bank, may take close to an hour because my bank is further away. Because I can decide how long of a break I will be taking, I am able to get all of these errands done when I need to.

9. PBP puts representatives in charge of managing their time and lets them decide how and when to use breaks. Under the current policy, I have not been required to take a break at a specific time. I've not been told that I could not take a break at any particular time and I've never been told that my breaks were too long or too frequent. I can take as long as I want on a break, including taking the rest of the day off. I a o not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

10. I have never worked for another company that gave its employees this same level of flexibility. I worked at PBP when it used to have a set break policy and I like the current policy much better. I went to work at TOD because I thought it gave me an opportunity to earn more money. There was no flexibility at TOD, however, for how employees used breaks or set their own schedules. I came back to PBP because I valued the flexibility that PBP offered more than the money offered by TOD. I would not be able to do the things I do for my son, for my own health, or run my own personal errands if not for PBP's break policy. Because of that, I could not see myself working for another company.

11. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 4-16-14

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Cynthia Riddick
Cynthia Riddick

## APPENDIX CC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF JODI ROBERTSON

I, Jodi Robertson, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Pottsville, Pennsylvania branch. I have worked for Progressive since 2011 and have worked as a sales representative in the Pottsville branch since that time. My current manager is Colin McIlwain. He has been my manager since about April 2012. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. At PBP, I call business executive to secure renewals of subscriptions for newsletters that they currently receive from us.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I set my committed hours level at 60 hours per two-week period but will often work more than 60 hours. I put 8:00 a.m. to 5:00 p.m. on a schedule that we fill out bi-weekly of the hours that we expect to work. I have the flexibility to change those hours, however. For example, I'll often work more at the beginning of the week so that I can leave earlier at the end of the week. Essentially, I am responsible for making my hours and can decide the times that I will work.

4. I worked at PBP when they used to have set breaks but then left and worked in sales for a web design company and a telemarketing company. When I came back to PBP, the policy had changed to a flexible break policy. There are no set breaks; instead, sales representatives can take breaks any time that they want and for as long or as short as they want. There is no limit on the reasons that sales representatives can take breaks or the things that they can do while on a break. I have complete freedom during these breaks including whether to return to work, and when to return to work. Because it is up to me to decide when to return to work, I can use the breaks to do whatever I would like.

5. I use breaks to help treat my son's serious health condition. He was recently diagnosed so I've had to take breaks to make doctor's appointments and call his school to work out the details of his lunches. For example, one of the ways that I used a break was to go to my son's school to discuss his lunch schedule and what he needed to eat with the woman running his

school's lunch program. Since the doctor's office and school are open only during business hours, I can make and return their calls by being able to take a break whenever I need to. These are almost always short calls of fifteen minutes or less. I've also used breaks to pick my son up from school when he was sick and drop him off at home before returning to the office. Typically, I'd be gone from work only ten to fifteen minutes when I take a break for that reason.

6. I have an older son who is in the Army and is stationed in Afghanistan. Because of the time difference, there are only limited hours in the day where we can talk to each other. Additionally, because he was deployed in September 2013, he only started getting privileges to make phone calls in December 2013. There is no way for me to know when he might call since he can call only when he has some free time so it is very important to me to be able to take a break whenever he calls so that we can talk.

7. I also use short breaks to take care of personal business including setting up appointments for myself or going to the bank, which I do regularly.

8. Under PBP's current policy, I've ever been told that I have to take a break at any specific time. I've also never been told that I could not take a break any time that I wanted to use a break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

9. I have never worked at a job that gave me as much control over my breaks and my schedule as PBP does. This flexibility is one of the reasons that I came back to PBP because I would not be able to take care

of my family and personal business at a job that did not have a flexible break policy. For one thing, it is impossible for me to schedule the times that my son in Afghanistan may call so I would likely not be able to talk to him if PBP had set break times. Additionally, since I normally work until 5:00 p.m., I would not be able to take care of errands during the day like I do now. It would be much harder for me to take care of my son in high school since I can only call the school during business hours.

10. PBP also lets me decide when to take lunch and for how long.

11. My job as a sales representative a PBP is not a high stress job. PBP does a good job training its sales representatives on how to handle the things that come up in making sales calls. Because of this training process, I feel less stress here than I did at my other telemarketing jobs.

12. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose I of to sign it.

Executed on 4-16-14

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Jodi Robertson

Jodi Robertson

**APPENDIX DD**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF PAMELA RODRIGUEZ

I, Pamela Rodriguez, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Wyomissing, Pennsylvania branch. I have worked for Progressive since May 2011 and have worked as a sales representative in the Wyomissing since that time. My current manager is Tara Shinn. Before that my manager was Bob Pirock. I have personal knowledge about the matters states in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit to working 40 hours over that two-week period. Because I am going to school full-time, my schedule is flexible. In the fall of 2013, on Monday, Wednesday, and Friday, I had class from 8:00 a.m. to 3:00 p.m. so I normally arrived between 3:30 to 4:00 p.m. and worked the rest of the day. Although that is what I normally did, I had flexibility to come in and make up the difference for any hours that I may have not worked on a different day.

3. If I do not reach my 40 hours worked goal over the two-week period, my manager, Tara Shinn, will work with me to help me reach the goal next time. She understands that I am a full-time student and need flexibility to handle that. I've misses committed hours in the past and the only thing that has happened is that Tara has told me to work hard next period to try and reach my goal. I have not been disciplined for failing to reach my committed hours.

4. Progressive's break policy lets representatives decide how and when they want to take breaks and how to use breaks. There is no limit on the amount or lengths of breaks. When taking a break, representatives are responsible for deciding how they'll use that time and when and whether they'll return to work. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

5. As stated before, I use Progressive's flexible break policy to balance school and work. I use that flexibility to adjust my work schedule to go to my school's math lab for tutoring or to take extra time to study. I'm currently taking algebra, which is a

required course for my degree. If I did not have the flexibility to get tutoring in the math lab, I would not be able to pass algebra and then would not be able to move on to getting a masters degree.

6. I also regularly take care of different school related things during the days. I'll take short breaks of a couple of minutes to check my syllabus online and to submit assignments online. I do this at least a couple times a week throughout the semester and always more toward the end of the semester as I get closer to final examinations. I also take breaks to look at any notes that my teachers post online. Similarly, I use breaks to read a chapter of algebra and complete assigned homework problems and then submit those assignments online.

7. In addition to using breaks for my school work, I also use breaks to take care of personal business. My husband and I recently bought a house in September 2013. I was able to go to the closing with my husband and then come into work. Because of Progressive's flexible policy, I was able to attend the closing and then work additional hours the next day to make up my time. The house we bought is only five minutes away from Progressive's Wyomissing branch, so I'll take quick breaks to run home and check in on the renovations that we're doing to the house to make sure that everything is going correctly.

8. If there is any kind of problem with the renovations, I am able to take a breaks of whatever length necessary to deal with the problem. For instance, there was an emergency when an old pipe in the basement burst. I was able to leave Progressive and run home to shut the water off, call a plumber, and stay home to let the plumber in. When that happened, the ability to take a break for as long as I

needed was very important to me personally to make sure that my new home did not suffer any extreme damage.

9. I also use breaks to take care of family issues. I have eight children so all different kinds of things come up that require me to take short breaks to address. Sometimes it's just taking a break to talk on the phone with one of my children for a few minutes. Other times, I'm able to leave to help out in more urgent situations. For example, I took a break to help out when one of my children got a flat tire and their car broke down on the road. I took a fifteen minute break to leave work and help fix the tire and then came back to work. At another job without Progressive's break policy, I would not have been able to leave work and help.

10. Progressive's policy also allowed me to take care of my daughter when she was hospitalized with an urgent medical condition that required surgery. I was able to leave work and run to the hospital to check on her. The hospital is only two blocks away from Progressive's Wyomissing office so I went back and forth from work to the hospital multiple times – returning to work while she was in surgery and then going back to the hospital to check on her.

11. I've also used breaks to take care of my own medical issues. I was in a car accident that injured my back requiring me to see a chiropractor, and I took short breaks to call and set up appointments.

12. Under Progressive's policy, representatives are responsible for their own hours and making their own schedule. I have never been told that I had to take a break at a specific time. Similarly, I have never been told that I could not take a break when I wanted to.

I've also never been told that my breaks are too long or that I am taking too many breaks. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

13. I would not have been able to do all these things – go to school, check on mu house, and take care of family issues – if it was not for Progressive's break policy. I definitely would not have gotten as far in school as I have if I couldn't stay to get extra tutoring when I need it. I had an opportunity to take a different job at another call center that paid higher wages than Progressive but had set breaks. I turned that job down because the ability to determine when and how I will use breaks was more important to me than higher pay. I would not be able to do all of the things in my life at a job that had assigned times for breaks or allowed only a set number of breaks with a pre-determined length.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 15, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Pamela Rodriguez
Pamela Rodriguez

## APPENDIX EE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

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DECLARATION OF KENDRA RUTTER

I, Kendra Rutter, declare:

1. I was employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Meadville, Pennsylvania branch from August 2011 through October 2013. Jen Maziarz was my manager for the entire time that I worked for PBP. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative for PBP, I made business to business phone sales of PBP newsletters that help business executives do their job better. I left

PBP at the end of October 2013 to become a certified nursing assistant. I loved my job at PBP and hated to leave PBP behind, but family circumstances required me to look for a higher-paying job.

3. As a sales representative, I committed to how many hours I would work over a two-week pay period. For the majority of the time that I worked at PBP, I committed to working 60 hours over a two-week period but sometimes I would commit to working only 50 hours. I would fill out a biweekly schedule listing the hours that I expected to work each day but I had flexibility to change those hours around. I normally would write down 8:00 a.m. to 2:00 p.m. or 3:00 p.m. and try to get my time in as quickly as possible. Nonetheless, PBP gave me lots of independence and I could take responsibility for my own time change my schedule around.

4. PBP's break policy allows sales representatives to be in complete control of their breaks and schedules. I was able to take a break at any time that I wanted one or needed one. Those breaks could be for as long or as short as I wanted and I could take as many breaks as I wanted or when going on break, I was completely free from work and had control over deciding whether and when to return to work. Because of that control, I was able to use br[e]aks however I wanted.

5. The flexibility in PBP's break policy allowed me to take care of my stepdaughter. Her mother has a substance abuse problem, so I have to always be available to take care of her. For instance, there were times where I would get a call from her school that no one else could come pick her up. When that happened, sometimes I would take short breaks to make phone calls to arrange a ride for her. Other times, I would take a longer break and pick her up from school and

then come back to work. On those occasions, I would be gone about 30 minutes. -Because I was in control of the timing and length of my breaks, I was able to be gone from 30 minutes to an hour, not get in trouble, and make up my time at another point.

6. Another way that I frequently used breaks was to talk with my fiancé. He has a serious medical condition that he tries to manage without medication. Because of that, there would be times when he would call and. I'd have to answer his call in order to calm him down so that he could continue working.

7. I also used PBP's flexible break policy to help my mother-in-law. She works two jobs, one of which is in the jail commissary, I've used breaks to bring things to her at the jail, including when she would forget to bring her clothes for her second job. When that happened, I'd be able to run home and grab what she needed, bring those things to her, and then come back to PBP. Those breaks would typically last 30 to 45 minutes.

8. I have personal control over all aspects of my breaks. I've never been told that I have to take a break at any specific time. I've also never been told that I: could not take a breaks any time that I wanted to use a break. I've also never been told that I'm taking too many breaks or that my breaks are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on break for as long as I want.

9. I've never worked at another job that had a similar level of flexibility as PBP gives me. That is the thing that I miss most about PBP. It allowed me to do things that I cannot now such as answer important telephone calls whenever they come in, including to

help my fiancé cope with his condition. As another example, there was one day at PBP where my grandmother stopped in unexpectedly and we ended up talking outside for an hour. I definitely would not be able to just go on break for an hour to do that at my current job. PBP made it easier to handle all of the things that life throws at you. Beyond allowing me to take care of my family, PBP's flexible policies also helped me grow individually and get on the right letting me take charge of my schedule and develop a level of independence, responsibility, and self-esteem. Because of all that, I absolutely preferred PBP's flexible break policy to any other break policy at places that ye worked.

10. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 5/16/14

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Kendra Rutter
Kendra Rutter

**APPENDIX FF**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

---

DECLARATION OF AMBER SMITH

I, Amber Smith, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Williamsport, Pennsylvania branch. I initially began working for Progressive around May 2012. In, the spring of 2013, I left Progressive to work at McDonald's but: returned to Progressive approximately three months after leaving. For the entire time that I have worked at Progressive, I have worked as a sales representative in the Williamsport branch. My current manager is Chrissy Bennett and she has been my manager the whole time that I have worked there.

I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative for PBP, I make business-to-business sales of newsletters that are helpful to the businesses we contact: To do this, I call companies and speak with their executives in order to explain the value of PBP's publications.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. My committed hours level is set at 60 hours over a two week period. I may work any hours that are convenient to me in order to reach those 60 hours over the pay period. I do not fill out a daily or weekly schedule of my hours and I do not commit to specific times that I will be at work. Nor do I have to let my managers know in advance the hours that I will be working on any given day. However, as a courtesy, I will still call if I am not coming in. My schedule is flexible and I am free to come and go as I pleas and to work whenever I can or want to reach my committed hours goal.

4. PBP's break policy allows representatives the freedom to take breaks at any time and for as long or as short as the representative wants. There is no limit on the number of breaks that I can take and I can take a break for any reason. The break policy allows me to stop working whenever I want to or need to. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

5. When I first began working at PBP, I used PBP's flexible break policy to attend counseling and

meetings with my probation officer. As a result of a prior conviction, I was required to attend three counseling meetings a week and an Alcoholics Anonymous ("AA") meeting every day. The ability to take a break whenever I wanted allowed me to work for a few hours in the morning, leave to attend my two hour counseling meeting, and then come back to work to finish the day. Similarly, I went on break to meet with my probation officer and would be gone anywhere from ninety minutes to three hours depending on how long 1 had to wait to see him.

6. I also take breaks to take care of my family. I have a daughter in school and have taken breaks when she is sick. For example, I use short freaks to answer calls from her school when she is sick. I have also taken longer breaks of about an hour to pick her up from school and drop her off at her dad's house or her grandparents' house, after which I return to work. I also use breaks to go to appointments for myself or to take my daughter to appointments. As an example, I recently took my daughter to a dentist appointment, then dropped her off at school, and then went to work.

7. I use shorter breaks to take care of personal business such as making short phone calls of a couple minutes to set up appointments or to cancel appointments. I also take short breaks to go to the bank, especially on pay day to deposit my pay check.

8. When I first began working at PBP, I lived at the YWCA. One day, I received a call from the YWCA informing me that there was an infestation of bed bugs. I had to take a break to go to the YWCA to pack up my things so that they could clean and exterminate the beg bugs. 1 was gone for about an hour to do that. After I got back to work, they called again so I had to leave to take a second break to handle the situation.

9. My job as a sales representative at Progressive is not a high-stress job and I do not take breaks because of stress very often. Before I came to work at PBP, I held jobs working in factories and at Red Lobster. I also left PBP for a few months to work at McDonald's. All of those jobs were more stressful than working at PBP,

10. 1 took a job at McDonald's and left PBP in the spring of 2013, in part because the pay was higher at McDonald's. I intended to work the third shift at night at McDonald's so that I would have my days free to run errands and be home to take care of my daughter over the summer when she was not in school. However, McDonald's scheduled me for other shifts during the morning and the day. During those shifts, I had to leave to go to my probation and counseling sessions because failure to do so would result in my going to jail. McDonald's was not flexible and did not accommodate my need for a flexible schedule. Because I had to be at McDonald's for the full shift, I was unable to balance working there with my probation requirements. Because of that, I decided to return to PBP.

11. The other jobs that I worked at before PBP—factories and Red Lobster—did not have flexible break policies. It would not be possible for me to take care of all of the things that are going on in my life, related to probation and taking care of my daughter, without PBP's flexible break policy. Even now, with my reduced probation requirements, it would still be impossible to work at a job where I could not control my schedule and use breaks to take care of my personal business.

12. While working at PBP, I have never been told that I have to take a break at a specific time except when we have a meeting. I have also never been told

that I could not take a break or leave work when 1 wanted to. Similarly, I have never been told that I was taking too many breaks or that I had to limit the length of any breaks that I have taken. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

13. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my -employment if I signed the Declaration, or chose not to sign it.

Executed on May 12, 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Amber Smith
Amber Smith

## APPENDIX GG

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

---

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

---

DECLARATION OF MARISSA WALKER

I, Marissa Walker, declare:

1. I am employed by Progressive Business Publications ("Progressive") as a sales representative in its Warren, Ohio branch. I began working for Progressive in February 2012 and have worked as a representative in the Warren branch since that time. My current manager is Michael Landgraff. Kelly Caswell was my manager before that. I have personal knowledge about the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. As a sales representative. I commit to how many hours I will work over a two-week pay period. I

am an assistant high school soccer coach. During the soccer season 1 typically commit to 40 or 50 hours hut aim for 60 hours as representatives may work more hours than they commit to. In the soccer offseason, I try to commit to 60 hours

3. For every two-week period, I fill out a schedule of the number of hours I expect to work. On that schedule, I note how many hours I anticipate working each day but do not note when I will be working each day. I can also note any upcoming appointments on my schedule and can change my schedule around. I would not be disciplined for working hours different than those I note on my schedule.

4. I generally arrive at the Warren branch around 8:30 a.m. when the call center opens. My arrival time in the morning varies, however, depending on my personal schedule. I am free to decide when to come and go from the office as long as I reach my committed hours. I do not have to tell my manager the specific hours when I will be in the office each day. I usually do verbally tell my manager when I am planning on coming and going the next day, however. I do this as a courtesy and do not believe that it is a requirement. I have never been disciplined for coming in later or leaving earlier than I had mentioned.

5. My understanding of Progressive's break policy is that representatives can take breaks whenever they want for as long as they want and that they are free to decide when and whether they will return to work when they decide to take a break. When taking a break, I am completely free from work and have control over deciding whether and when to return to work. Because of that control, I can use breaks however I want.

6. I work a second job as a high school soccer assistant coach and I take advantage of Progressive's flexible break policy to work soccer into my life. I started coaching soccer around the same time that I started working at Progressive. One of the reasons that I took the job as a representative at Progressive was because Progressive's flexible break policy would let me be able to also work as a coach. Getting the coaching position required me to regularly leave work. For example, I had to take a physical, get finger-printed, and fill out various paperwork with the school to be cleared to coach. I also had to take some online classes to become a coach. This process took approximately one year and, during that time, I used breaks to leave work to fill out the paperwork at the school and get fingerprinted.

7. In addition, the head coach of the soccer team comes to the Warren branch to speak with me. The head coach comes to visit me at the branch to get the information he needs or to talk about strategy and plan practices for the team. During these times, I normally am off the phone only fora few minutes.

8. I also take care of coaching business during breaks in the day. The head coach of the team regularly calls me to talk about the team and I will take a break to speak with him. The calls with my head coach vary in length but most are in the fifteen to twenty minute range. I also do other coaching work during breaks. For example, I will take a couple of minutes and go to the back room and try to figure things out about an upcoming game. Similarly, I will use breaks to think about what formations to use and what players to start.

9. During the high school soccer season my team has practice every day which starts around 3:15 p.m.

The school is located in Youngstown, Ohio, which is approximately 30 minutes away from Progressive's Warren office. Because of Progressive's break policy, I can come into the office early then leave to coach my team's practice. Depending on the length of the practice, I can also come back to the office after practice if I have time to get in more hours. My manager has always been fine with my doing this.

10. I have recently also been using the breaks to care for my aunt who had developed a serious medical condition in late November 2013. She is in a rehabilitation center that is just down the street and I take breaks to visit her and help out. Her rehabilitation center is about a five minute drive away from the Warren branch and most of my visits to her take fifteen to twenty minutes. I help with various things such as bringing her items from her house and also just going to visit. I have been this a few times a week. I am very thankful that I can leave work when I need to in order to help care for her.

11. Before I came to Progressive. I worked in a dietary program in a nursing home. They did not have a flexible break policy and had set work hours from noon to 8:30 p.m. with a thirty minute break for lunch. I would not be able to do these things – both coach soccer and leave work to help my aunt without Progressive's flexible break policy. I would not be able to coach soccer without this job, and I certainly would not have been able to take breaks to speak with the head coach like I can at Progressive.

12. The time, length, and reason for breaks are up to me. I have never been told that must take a break at any specific time and I have never been told that I could not take a break at certain times. When I leave for a break. I am free to take as much time as I want.

There is no requirement that I go back to work at a certain time or at all. Because of that, I do not focus on whether the breaks are longer or shorter than 20 minutes.

13. It is also up to me when I eat lunch. Must people take lunch from around noon to 12:45 p.m. but that is because that is when most people want to take lunch and is not a required time for lunch. I have never been told to take lunch at noon or at any other time. It is up to the representative to decide since they are responsible for their own hours.

14. I do not think my job as a sales representative is more stressful than other jobs. Although it sometimes has stressful moments, most of the time it is not stressful.

15. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represent Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no-one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on 5-12-14

I declare tinder penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Marissa Walker
Marissa Walker

**APPENDIX HH**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action No. 12-6171

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THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

*Plaintiff*,

v.

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS, a corporation; and EDWARD SATELL, individually and as President of the above referenced corporation,

*Defendants*.

---

DECLARATION OF ROBIN WILLARD

I, Robin Willard, declare:

1. I am employed by Progressive Business Publications ("Progressive" or "PBP") as a sales representative in its Wyomissing, Pennsylvania branch. I have worked for PBP on and off since April 2003 and consecutively since December 2008. My current manager is Tara Shinn. She has been my manager since about November 2012. Before that, my manager was Bob Pirock. I have personal knowledge about the matter stated in this Declaration and, if called as a witness, I could and would testify to them.

2. I am currently a senior sales representative. As a senior sales representative, I make sales calls lie all of PBP's sales representatives but also complete approximately two hours of administrative tasks a day. My duties are no different from other sales representatives when I am making sales calls. Those duties consist of making phone calls to business executives and reading from a script that is tailored to the publication we are trying to sell. Basically, we provide information to business executives about our publications and then they decide whether they want to purchase a subscription.

3. As a sales representative, I commit to how many hours I will work over a two-week pay period. I commit to working 50 hours every two-week period. I fill out a by-weekly scheduling listing estimated start and finish time for each day but I am free to vary from what I put on the schedule. Generally, I work from 8:30 a.m. until 3:00 p.m. but I am not tied to that. Sometimes I'll come in late or leave early for any reason, I simply let my manager now and then I am able to do so. Overall, I am responsible for determining what hours I will work.

4. Under PBP's current break policy I can take breaks any time I want and for however long I want. There is no restriction on the reasons that I take a break or the things that I can do during a break. I could even go on break and then decide to take the whole day off if I needed or wanted to. The break policy allows me to control my breaks and use them as I want to. I have complete freedom during these breaks including whether and when to return to work. Because it is up to me to decide when to return to work, I can use the breaks to do whatever I would like.

5. One of the main ways that I take advantage of the flexibility at PBP is to help take care of my grandson. He was diagnosed with a serious health condition in March 2013 when he was six years old and goes to the hospital every six months. As part of his treatment, I am required to go to classes that teach me to car for him. My son, his father, and I alternate going to these classes so I'll go once every three or four months. When I have to attend a class, I will take a few days off to be able to attend. My manager, Tara Shinn, has always been accommodating and allowed me to take off whatever time I need.

6. Although those classes are scheduled in advance, I also take unexpected breaks to help care for my grandson when emergencies at home come up. As an example, I had to take a few days off when my son, the grandson's father, could not attend the required classes. On other occasions, I've had to leave PBP on short notice if my grandson has to go to the hospital so that I can take care of my granddaughter at home.

7. Additionally, I take breaks to care for my adult son who also has a serious health condition. There are times when he has a medical episode or simply otherwise calls me needing something and I will take a break and leave work to go help him. As another example, I've gone on break to talk to my mother when my father was having a health issue and would not go to the hospital. When that call started, there was no way for me to know how long it would last, so I need the flexibility to be able to take a break for as long as I needed to make sure that my father received that care that he needed.

8. I also use breaks to handle personal business including going to court for divorce hearing or child support hearings. For both of those, I left work to

attend the hearing and then come back to work afterward. For the child support hearings, I was gone about 90 minutes to two hours; for the divorce settlement, I was gone about 45 minutes to an hour.

9. I use shorter breaks to take care of other errands as well including taking care of business that can only be done during working hours such as calling my bank or setting up doctor's appointments. I also take breaks to call local government offices about welfare and food stamp issues. It's impossible to know how long those call will last because I'll often be put on hold for a long time so sometimes it could be a short call while other times it could be at least an hour.

10. Under the current policy at PBP, I've never been told that I have to take a break at a specific time or that I couldn't take a break any time that I wanted to. I've also never been told that I'm taking too many breaks or that the breaks that I take are too long. I do not focus on whether the breaks are longer or shorter than 20 minutes because I can go on a break for as long as I want.

11. The flexible schedule at PBP was a major factor in my returning to work here. I first left PBP in 2005 to work as an assistant manager for Hess Express, a convenience store and gas station but came back to PBP in 2006. Flexibility is important to me because it lets me be able to take care of any issues that may come up with my son or grandson. None of my previous jobs offered flexibility similar to what I have at PBP. Without that flexibility, I would not be able to help my son whenever he calls or to go to the classes relating to my grandson's heath condition, which are required for me to be able to live in the same house as my grandson.

12. PBP's lunch policy similarly lets sales representatives decide when to take a lunch break and how long their lunch break will be.

13. My job at PBP is less stressful than my job working at Hess Express. Although working at PBP has stressful moments from time to time, that is not different than any other job that I've had, and PBP is not stressful on a daily basis.

14. I understand that there is a lawsuit being brought by the Department of Labor, in which they are making claims that sales representatives must be paid for breaks lasting twenty minutes or less. I also understand that the attorney who interviewed me and gave me this Declaration to review for accuracy represents Progressive and does not represent my personal interests. I am making the statements in this Declaration voluntarily and no one told me that I had to sign the Declaration. I have been advised that there would not be any consequences to my employment if I signed the Declaration, or chose not to sign it.

Executed on April 15 2014

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Robin Willard
Robin Willard

# APPENDIX II

[insert fold-in]

JA-1335

Personal Interview Statement

**U.S. Department of Labor**
Wage and Hour Division

WHD U.S. Wage and Hour Division

**This report is authorized by Section 11 of Fair Labor Standards Act and other Wage-Hour laws. While you are not required to respond, your cooperation is needed for the Wage Hour Division to make a determination of compliance under the applicable Act(s). Your identity will be kept confidential to the maximum extent possible under existing law.**

Redacted

Redacted
(Place of interview)

I, Mr. Miss Mrs. Ms. Redacted (Name of employee) Redacted (Number, street, apt. no.)

Redacted (City or town) Redacted State Redacted Zip Code

Redacted (Telephone number) (Driver's licence number - Do not request if number is same as Social Security Number)

Redacted years of age, (was/have been employed by) PBP (Establishment)

Redacted (Location of establishment) for the approximate period from 2009 to present (if still employed state "present") Redacted

as Sales Rep (Occupation or description of duties)

Statement: I usually work 830-4 (Mon-Fri). I am only paid for when I am on the computer. I work 60 / pay period. I am required to work 30 / week. Management Redacted told me the minimum hours is 30 / wk. I make $7.25/hour and have not yet got a bonus. I take a 15 min break at 10 AM. At 12^15 I get a 45 min break At 2^30 I get another 15 min. Redacted told me this break schedule. I can take a few more small breaks to get up, go to the bathroom.

**(If additional space is needed continue on reverse)**

Form WH-31 (Rev. May 2010)

B-DOL0000349

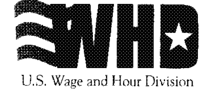
[insert fold-in]
JA-1336

If I wanted to get up and leave right now, I would have to make those hours up later. I'm aggravated that I'm only making $7.25 and the bonuses are unattainable for me. When I go to the bathroom I log off. I frequently talk about work on break. We try to give advice and help each other out. During the weekend when I am at home they want us to study the pub. If I take too many breaks I will not reach my 6 hours. I can't really do whatever I want during break because I won't meet my hours. If I'm not going to make my hours because of sickness you would need to make a special request / doctors note. If I leave early, they will ask where I went. Redacted has started saying recently that as long as you make your hours its ok. Most people here must choose 60 or 70 hours. If you dont want to make 60 eventually you would be fired, but they give you the opportunity to make up hours, but it is hard because we are only open 8:30-5pm. Also it is hard to stay on the computer all day. The breaks help me do the job better and help me to

[insert fold-in]
JA-1337

Personal Interview Statement

**U.S. Department of Labor**
Wage and Hour Division




**This report is authorized by Section 11 of Fair Labor Standards Act and other Wage-Hour laws. While you are not required to respond, your cooperation is needed for the Wage Hour Division to make a determination of compliance under the applicable Act(s). Your identity will be kept confidential to the maximum extent possible under existing law.**

(Date)

(Place of interview)

I, Mr. / Miss / Mrs. / Ms. ______ (Name of employee), of ______ (Number, street, apt. no.)

______ (City or town) ______ State ______ Zip Code

______ (Telephone number) ______ (Driver's licence number - Do not request if number is same as Social Security Number)

______ years of age, (was/have been employed by) ______ (Establishment)

______ (Location of establishment) for the approximate period from ______ to ______ (if still employed state "present")

as ______ (Occupation or description of duties)

Statement: stay focused. I declare under penalty of perjury that the foregoing is true and correct. X: Redacted

X: Redacted

Redacted

**(If additional space is needed continue on reverse)**

Form WH-31 (Rev. May 2010)

B - DOL0000351

**APPENDIX JJ**

UNITED STATES DEPARTMENT OF LABOR
SECRETARY OF LABOR THOMAS E. PEREZ
NEWS RELEASE

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WB News Release: [02/18/2011]

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Contact Name: Tiffany March or Deanne Amaden
Phone Number: (202) 693-4664 or (415) 625-2630

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Release Number: 11-0223-NAT

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US DEPARTMENT OF LABOR HOSTS NATIONAL DIALOGUE ON WORKPLACE FLEXIBILITY CONFERENCE IN PASADENA, CALIF., FOCUSED ON HOURLY-WAGE EMPLOYEES

PASADENA, Calif.- The U.S. Department of Labor's Women's Bureau yesterday hosted a conference on best flexibility practices for hourly-wage employees at the Pasadena Convention Center, drawing about 400 attendees. "Challenges and Solutions for Hourly Workers" is part of the Women's Bureau's National Dialogue on Workplace Flexibility, a series of events building on the goals of the March 2010 White House Flexibility Forum.

"Flexible workplace polices are good for employees, and they are also good for a company's bottom line," said Secretary of Labor Hilda L. Solis. "The Labor Department is committed to helping all Americans balance their work and home responsibilities, and to exploring solutions to challenges faced by both

employers and employees. Today's dialogue is a step forward in matching workplace policies with realities of the 21st century workforce."

Secretary Solis delivered the keynote and introduced First Lady Michelle Obama's video message on "changing workplaces." Women's Bureau Director Sara Manzano-Diaz gave welcoming remarks. KTLA-TV reporter and anchor Elizabeth Espinosa moderated the panel discussion, which included Joan Williams, founder and director, University of California-Hastings' Center for Worklife Law; Jennifer Piallat, owner, Zazie Restaurant; Rosalind Hudnell, chief diversity officer and global director of education and external relations, Intel; Barbara Grimm, senior vice president, labor management partnership, Kaiser Permanente; and Marianne Giordano, president, Office and Professional Employees International Union Local 30. Closing remarks were provided by Maria Elena Durazo, executive secretary-treasurer, Los Angeles County Federation of Labor, AFL-CJO.

As reported by the president's Council of Economic Advisers, changes in American society have increased the need for flexibility in the workplace, including a larger number of women entering the labor force, the prevalence of families in which all adults work, increasing elder care responsibilities and the rising importance of continuing education. Hourly workers face the same work-life issues as those faced by professional employees, but not having access to flexible policies can have more devastating effects on their employment status.

"Flexibility is not just a women's issue, it is a family issue," said Manzano-Diaz. "Women now serve as the primary or co-breadwinners in two-thirds of American

households. When employees are able to balance the needs of both work and home, it not only impacts productivity but strengthens families and communities."

The Women's Bureau, established by Congress in 1920, is the only federal agency designated to represent the needs of working women. Today, the bureau's goal is to empower all working women to achieve economic security by preparing them for well-paying jobs, ensuring fair compensation, promoting workplace flexibility and helping homeless women veterans reintegrate into the workforce.

# APPENDIX KK

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF DISABILITY EMPLOYMENT POLICY

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Workplace Flexibility Toolkit

A Unique Collection of Resources to Help Maintain a Strong Balance of Work and Life

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Workplace flexibility is a Universal Strategy that can meet the needs of employers and their employees, which includes when, where, and how work is done. Essentially, flexibility enables both individual and business needs to be met through making changes to the time (when), location (where), and manner (how) in which an employee works. Flexibility should be mutually beneficial to both the employer and employee and result in superior outcomes.

ODEP and the Women's Bureau have developed this unique Workplace Flexibility Toolkit to provide useful valuable information to employees, employers, policymakers, and researchers related to time and place, but also around task, a unique workplace flexibility strategy related to ODEP's Customized Employment research-based data. The Toolkit provides case studies, fact and tip sheets, issue briefs, reports, articles, websites, other toolkits, and frequently-asked questions.

Use the links to narrow the number of resources that are relevant to what you need. Each link includes the number of resources available.

In this Toolkit, the terms Workplace Flexibility, Flexible Work Arrangements, Work-Life Balance, and

Flexible Workplace Options are used interchangeably to describe all types of workplace flexibility.

There are currently 182 resources in the toolkit.

| Audiences | Flexibility Types | Questions |
|---|---|---|
| Employee (64) | Time (104) | from Employees (46) |
| Employer (124) | Place (73) | from Employers (108) |
| Policymaker (45) | Task (28) | from Policymakers (81) |
| Researcher (113) | | from Researchers (119) |

**Resource Categories**

| | | | |
|---|---|---|---|
| Case Studies (11) | Factsheets (12) | Issue Briefs (21) | Journal Articles (5) |
| News Articles (3) | Pending Bills (10) | Reports (47) | Slides (2) |
| Toolkits (6) | Websites (38) | Other Resource Types (27) | |

## APPENDIX LL

UNITED STATES DEPARTMENT OF LABOR
SECRETARY OF LABOR THOMAS E. PEREZ
OTHER BENEFITS

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Subtopics

- Child Care Assistance
- Disability Insurance
- Flexible Schedules
- Workers' Compensation
- Other Compensation Benefits
- Other Insurance Benefits
- Severance Pay
- Unemployment Insurance
- Wellness Benefits

FLEXIBLE SCHEDULES

A flexible work schedule is an alternative to the traditional 9 to 5, 40-hour work week. It allows Disability Insurance employees to vary their arrival and/or departure times. Under some policies, employees must work a prescribed number of hours a pay period and be present during a daily "core time." The Fair Labor Standards Act (FLSA) does not address flexible work schedules. Alternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee (or the employee's representative). The Department of Labor has conducted numerous surveys and published articles and reports on the subject.

DOL WEB PAGES ON THIS TOPIC

"*When Can an Employee's Scheduled Hours of Work Be Changed?*" Information about work hours from the elaws FLSA Advisor.

*Index of Bureau of Labor Statistics (BLS) Reports on Workers on Flexible and Shift Schedules* A report from BLS on the trend towards flexible work schedules.

*BLS' Monthly Labor Review Online (MLR)* article stating that from 1991 to 1997, the percentage of full-time wage and salary workers with flexible work schedules on their principal job increased from 15.1 percent to 27.6 percent.

*MLR Article: "Over One Quarter of Full-time Workers Have Flexible Schedules"* More information on flexible schedules.

*MLR Article: "Flexible Work Schedules: What Are We Trading Off to Get Them?"* More information on flexible schedules.

*MLR Article: "Executives most likely to have flexible work hours"* More information on flexible schedules.

*MLR Article: "Flexible Schedules and Shift Work: Replacing the '9-To-5' Workday?"* More information on flexible schedules.

*MLR Article: "Incidence of Flexible Work Schedules Increases"* More information on flexible schedules.

*MLR Article: "Workers with Longer Workweeks Often Earn More Per Hour"* More information on flexible schedules.

*Coverage Under the Fair Labor Standards Act (FLSA) Fact Sheet* General information about who is covered by the FLSA.