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## ***But See Kohlheim: The Third Circuit Muddies the Water on the Compensability of Employee Meal Periods under the Fair Labor Standards Act in *Babcock v. Butler County****

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***BUT SEE KOHLHEIM: THE THIRD CIRCUIT  
MUDDIES THE WATER ON THE  
COMPENSABILITY OF EMPLOYEE MEAL  
PERIODS UNDER THE FAIR LABOR  
STANDARDS ACT IN *BABCOCK v.  
BUTLER COUNTY****

**Abstract:** On November 24, 2015, the U.S. Court of Appeals for the Third Circuit, in *Babcock v. Butler County*, formally adopted the application of the predominant benefit test when determining if the Fair Labor Standards Act requires an hourly employee’s meal period to be compensated. In so doing, the court implicitly concluded that each circuit that previously addressed the issue adopted the predominant benefit test. This Comment argues that the Third Circuit mischaracterized the status of the law on which test the circuit courts apply by overlooking the Eleventh Circuit’s application of the relieved from all duties test.

INTRODUCTION

Congress enacted the Fair Labor Standards Act (“FLSA”) in 1938 in an effort to ensure and maintain the “general well-being” of workers in the United States.<sup>1</sup> As part of this effort, the overtime-pay provision of the FLSA requires an employee working more than forty hours in a week to be paid at least one and one-half times his or her regular rate of pay for the time exceeding forty hours.<sup>2</sup>

Disputes surrounding the administration and interpretation of the overtime-pay provision followed closely on the heels of the FLSA’s enactment.<sup>3</sup>

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<sup>1</sup> See Fair Labor Standards Act of 1938 § 2(a), 29 U.S.C. § 202(a) (2012) (noting that Congress established the Fair Labor Standards Act (“FLSA”) in an effort to remedy the poor labor conditions to which American workers were subjected and that Congress believed adversely affected interstate commerce). See generally Michael A. Hacker, Comment, *Permitted to Suffer for Experience: Second Circuit Uses “Primary Beneficiary” Test to Determine Whether Unpaid Interns Are Employees Under the FLSA* in *Glatt v. Fox Searchlight Pictures, Inc.*, 57 B.C. L. REV. E. SUPP. 67 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss6/5> [<https://perma.cc/2KKG-6A7L>] (describing the underlying purpose of the FLSA).

<sup>2</sup> 29 U.S.C. § 207(a)(1).

<sup>3</sup> See, e.g., *Black Mountain Corp. v. Adkins*, 133 S.W.2d 900, 900–01 (Ky. 1939) (addressing whether increased wages resulting from an employee’s disability pay nullified § 207(a)(1), the overtime-pay provision); *Gurtov v. Volk*, 11 N.Y.S.2d 604, 605–06 (Mun. Ct. 1939) (addressing whether or not an increase in an employee’s base pay was sufficient to satisfy the overtime pay

One such dispute concerned whether or not the time included in an employee's meal period counts toward the forty-hour workweek.<sup>4</sup> The FLSA itself makes no mention of whether or not an employee's meal period is compensable under the act.<sup>5</sup>

In 1961, in an effort to clarify and more efficiently administer certain provisions of the FLSA, including the overtime-pay provision, the U.S. Department of Labor ("DOL") promulgated a number of interpretive regulations.<sup>6</sup> Included among these regulations is 29 C.F.R. § 785.19, which provides that the time accrued during an employee's meal period is not compensable under the FLSA if the meal period constitutes a "bona fide" meal period as the term is defined in the regulation.<sup>7</sup> Courts regularly construe § 785.19 as merely instructive, however, and consistently look beyond the plain meaning of its definition of a bona fide meal period in favor of their own interpretations.<sup>8</sup>

The method by which courts determine whether or not a meal period is bona fide under § 785.19 turns on a court's application of one of two tests: (1)

provision of the FLSA). Many disputes came in response to the U.S. Supreme Court's early interpretations of FLSA provisions. *See* Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513, 516 (2014) (noting that the Court's early cases interpreting the FLSA "provoked a flood of litigation").

<sup>4</sup> *See, e.g.,* Culkin v. Glenn L. Martin Neb. Co., 97 F. Supp. 661, 672 (D. Neb. 1951) (addressing whether guards and firemen were relieved from their work responsibilities during their meal periods), *aff'd*, 197 F.2d 981 (8th Cir. 1952); Thompson v. F.W. Stock & Sons, 93 F. Supp. 213, 214–15 (E.D. Mich. 1950) (addressing whether lunch periods were compensable under the FLSA), *aff'd*, 194 F.2d 493 (6th Cir. 1952); Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 40 F. Supp. 4, 11 (N.D. Ala. 1941) (finding that the meal periods of miners eating inside of the mine did not count as worktime under the overtime-pay provision of the FLSA), *aff'd*, 135 F.2d 320 (5th Cir. 1943), *aff'd*, 321 U.S. 590 (1944).

<sup>5</sup> *Babcock v. Butler Cty. (Babcock II)*, 806 F.3d 153, 155 (3d Cir. 2015).

<sup>6</sup> 29 C.F.R. §§ 785.1–.50 (2016). These regulations were promulgated in 1961 with the main purpose of attempting to establish "what constitutes working time" so that the overtime pay provision could be properly administered. *Id.* § 785.1; *see* Leslie E. Barron, Note, "A Fair Day's Pay for A Fair Day's Work": Why Congress Should Amend the Fair Labor Standards Act to Include an Actual Time Test for Retroactive Damages, 99 IOWA L. REV. 1297, 1328 n.171 (2014) (noting that these regulations "discuss the issues involved in determining what activities constitute work time"). The regulations provide guidance on when particular activities will be considered worktime under the FLSA. *See, e.g.,* 29 C.F.R. § 785.19 (meal periods); *id.* §§ 785.33–.41 (time spent travelling); *id.* §§ 785.20–.23 (time spent sleeping).

<sup>7</sup> 29 C.F.R. § 785.19(a). The regulation defines a "bona fide" meal period as a meal period typically lasting for at least thirty minutes and one where the employee is "completely relieved from duty for the purposes of eating regular meals." *Id.* The regulation further advises that breaks or rest periods, such as "coffee breaks," do not constitute bona fide meal periods. *Id.*

<sup>8</sup> *See* Reich v. S. New England Telecomms. Corp., 121 F.3d 58, 64 (2d Cir. 1997) (noting that because § 785.19 is an interpretative regulation, it should be construed flexibly and therefore courts are not required to adhere to its guidance on when a meal period should be compensable under the FLSA); 29 C.F.R. § 785.2 (acknowledging that interpretations of the Department of Labor's ("DOL's") regulations are ultimately left to the courts); *see also* *Babcock II*, 806 F.3d at 156–57 (noting that courts routinely rely on their own interpretations of § 785.19 rather than the literal meaning of the regulation's definition).

the relieved from all duties test or (2) the predominant benefit test.<sup>9</sup> Both tests evaluate the nature of the work responsibilities that an employee owes to the employer during his or her meal period.<sup>10</sup> The overwhelming majority of U.S. Courts of Appeals have adopted the predominant benefit test.<sup>11</sup> The U.S. Court of Appeals for the Eleventh Circuit remains the only jurisdiction to definitively apply the relieved from all duties test in any context.<sup>12</sup> In November 2015, in *Babcock v. Butler County* (“*Babcock II*”), the U.S. Court of Appeals for the Third Circuit became the most recent jurisdiction to formally adopt the predominant benefit test.<sup>13</sup> In doing so, the court joined the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits.<sup>14</sup>

This Comment argues that the Third Circuit, in *Babcock II*, mischaracterized the status of the law on the compensability of meal periods under the FLSA when it concluded that the Eleventh Circuit does not apply the relieved from all duties test.<sup>15</sup> Part I of this Comment examines the standards and underlying reasoning of the two tests and discusses the factual and procedural history of *Babcock II*.<sup>16</sup> Part II discusses the Third Circuit’s treatment of relevant Eleventh Circuit precedent and examines the reasoning behind the court’s interpretations of two pertinent Eleventh Circuit holdings.<sup>17</sup> Finally, Part III argues that the court misinterpreted this precedent

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<sup>9</sup> *Babcock II*, 806 F.3d at 155; see Michael Carlin, *Bringing Home the Bacon: Mealtime Donning and Doffing Under the FLSA in the Meat Processing Industry*, 39 OKLA. CITY U. L. REV. 191, 203–04 (2014) (describing the two tests).

<sup>10</sup> See *Babcock II*, 806 F.3d at 155 (describing what the tests “look[]” at when they are applied).

<sup>11</sup> See *id.* at 156 (listing circuits that have adopted the test); see also *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264 n.16 (5th Cir. 1998) (adopting the predominant benefit test); *Roy v. Cty. of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998) (same); *Reich*, 121 F.3d at 64 (same); *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531, 534 (8th Cir. 1993) (same); *Alexander v. City of Chicago*, 994 F.2d 333, 339 (7th Cir. 1993) (same); *Lamon v. City of Shawnee*, 972 F.2d 1145, 1157 (10th Cir. 1992) (same); *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984) (same).

<sup>12</sup> *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (holding that an employee’s meal period is compensable under § 785.19 when an employee is relieved of their work duties during the meal period); see also *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1307 n.4 (N.D. Ala. 2008) (noting that the Eleventh Circuit applies the relieved from all duties standard when interpreting § 785.19). The First, Ninth, and D.C. circuits have yet to formally adopt either test. See *O’Hara v. Menino*, 253 F. Supp. 2d 147, 155 (D. Mass. 2003) (applying the predominant benefit test and acknowledging that the First Circuit had yet to officially adopt either test); Daniel Wiessner, *3rd Circuit Adopts “Predominant Benefit” Test for Meal Break Lawsuits*, 30 No. 11 WESTLAW J. EMP. 4, Dec. 22, 2015, at \*1 (noting that the First Circuit, Ninth Circuit, and D.C. Circuit have not adopted either test).

<sup>13</sup> *Babcock II*, 806 F.3d at 156.

<sup>14</sup> *Id.*; see *supra* note 11 and accompanying text (listing circuits that have adopted the predominant benefit test).

<sup>15</sup> See *infra* notes 73–92 and accompanying text.

<sup>16</sup> See *infra* notes 25–50 and accompanying text.

<sup>17</sup> See *infra* notes 56–69 and accompanying text.

and that there remains a circuit split on which test to apply when determining whether or not a meal period is bona fide under § 785.19.<sup>18</sup>

## I. WEIGHING THE OPTIONS: THE THIRD CIRCUIT HAS ITS SAY ON THE COMPENSABILITY OF MEAL PERIODS UNDER THE FLSA

Prior to the *Babcock II* ruling, the U.S. Court of Appeals for the Third Circuit had yet to address the compensability of employee meal periods under the FLSA.<sup>19</sup> The decision in *Babcock II* turned on whether or not the meal periods of the appellants were bona fide under § 785.19.<sup>20</sup> If they were bona fide, the meal periods would not count as worktime and thus would not implicate the FLSA's overtime-pay provision.<sup>21</sup> To make this determination, the Third Circuit formally adopted and applied the predominant benefit test.<sup>22</sup> Section A of this Part examines the standards and underlying reasoning of the two tests.<sup>23</sup> Section B discusses the factual and procedural history of *Babcock II*, wherein the Third Circuit formally adopted the predominant benefit test.<sup>24</sup>

### A. The Tests

Under the relieved from all duties test, a meal period is bona fide if the employee is completely relieved of all of his or her duties during the meal period.<sup>25</sup> The application of the relieved from all duties test derives from

<sup>18</sup> See *infra* notes 73–92 and accompanying text.

<sup>19</sup> *Babcock II*, 806 F.3d at 155.

<sup>20</sup> See *id.* at 156–57 (discussing § 785.19(a) and applying the predominant benefit test); 29 C.F.R. § 785.19(a) (“Bona fide meal periods are not worktime.”).

<sup>21</sup> See *Babcock II*, 806 F.3d at 156–57 (analyzing whether the nature of the corrections officers’ duties during their meal periods required them to be compensated). Under the corrections officers’ collectively bargained compensation scheme, no employee would exceed forty hours of compensated worktime per week. See *id.* at 155 (describing the parties’ collectively bargained compensation scheme). Were the entirety of their meal periods deemed compensable, however, they would have been entitled to overtime pay. See *id.* (explaining that only forty-five minutes of each one-hour meal period was compensated).

<sup>22</sup> See *id.* at 156 (adopting and applying the predominant benefit test).

<sup>23</sup> See *infra* notes 25–35 and accompanying text.

<sup>24</sup> See *infra* notes 36–50 and accompanying text.

<sup>25</sup> See 29 C.F.R. § 785.19(a) (requiring that an employee be “completely relieved from duty” during a bona fide meal period); see also *Summers v. Howard Univ.*, 127 F. Supp. 2d 27, 33 (D.D.C. 2000) (concluding that the relieved from all duties test follows the literal language of § 785.19); *Abendschein v. Montgomery Cty.*, 984 F. Supp. 356, 361 (D. Md. 1997) (concluding that the relieved from all duties test relies on the literal language of § 785.19). Section 785.19 provides several illustrations of when an employee is, in fact, relieved from all duties and thus when his or her meal period is bona fide. § 785.19(a). For example, the regulation advises that an office employee who is required to eat at his or her desk while performing work related tasks would not be considered to be completely relieved of all of his or her duties and thus his or her meal period would not be bona fide under the regulation. *Id.* The DOL still instructs that an em-

both Tenth Circuit and U.S. Supreme Court precedent, which encourages lower courts to grant a measure of deference to the guidance set forth by the DOL regulations.<sup>26</sup> According to this precedent, such regulations constitute strong persuasive authority that should be followed absent a legitimate reason to cast them aside.<sup>27</sup> The application of the relieved from all duties test therefore stays true to that sentiment by directly tracking the plain meaning of § 785.19's language.<sup>28</sup>

Conversely, the predominant benefit test looks outside the plain meaning of the regulation's language and evaluates which party receives the predominant benefit of the meal period: the employer or the employee.<sup>29</sup> If the employee receives the predominant benefit, the meal period is bona fide and the time will not count as worktime.<sup>30</sup> The predominant benefit test is derived from the U.S. Supreme Court's construction of the term "work," as used in the FLSA, in its 1944 opinion in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*.<sup>31</sup> In *Tennessee Coal*, the Court construed the

employee's meal period must be compensated unless the employee is completely relieved of all of his or her duties during the meal period. See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (2008), <https://www.dol.gov/whd/regs/compliance/whdfs22.htm> [<https://perma.cc/RF5W-TMC9>] (noting the standard for a compensable meal period).

<sup>26</sup> See *Babcock II*, 806 F.3d at 157 n.7 (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)) (noting that DOL regulations are a source of "guidance" for parties); *Kohlheim*, 915 F.2d at 1477 n.20 (citing *Mitchell v. Greinetz*, 235 F. 2d 621, 625 (10th Cr. 1956)) (noting that courts should not be too quick to dismiss the guidance of the DOL's regulations).

<sup>27</sup> See *Kohlheim*, 915 F.2d at 1477 n.20 (citing *Skidmore*, 323 U.S. at 140 and *Mitchell*, 235 F. 2d at 625).

<sup>28</sup> See *Summers*, 127 F. Supp. 2d at 33 (concluding that the relieved from all duties test follows the literal language of § 785.19); 29 C.F.R. § 785.19 ("The employee must be completely relieved from duty . . .").

<sup>29</sup> See *Babcock II*, 806 F.3d at 156–57; *Avery v. City of Talladega*, 24 F.3d 1337, 1346 (11th Cir. 1994) (noting that the employer may receive the predominant benefit of the meal period if the employee's meal period is limited by the imposition of work duties); *Alexander*, 994 F.2d at 339 (noting that an employer typically receives the predominant benefit of a meal period when the imposition of work responsibilities or duties disrupts the employee's meal period such that the employee is "unable to pass the mealtime comfortably").

<sup>30</sup> See *Babcock II*, 806 F.3d at 158 (holding that employee meal periods were not compensable under the FLSA because the employees did not receive the predominant benefit of their meal periods); see also Lawrence E. Henke, Comment, *Is the Fair Labor Standards Act Really Fair? Government Abuse or Financial Necessity: An Analysis of the Fair Labor Standards Act 1974 Amendment—the § 207(k) Exemption*, 52 SMU L. REV. 1847, 1865 (1999) (describing the predominant benefit test). The rationale that courts have typically proffered in support of interpreting § 785.19 to require an application of the predominant benefit test is most soundly set forth in the Second Circuit's opinion in *Reich v. Southern New England Telecommunications Corp.* See 121 F.3d at 64–65 (describing Supreme Court precedent as the basis for the creation of the predominant benefit test); see also *Henson*, 6 F.3d at 534 (describing the reasoning behind the application of the predominant benefit test).

<sup>31</sup> See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining work as "physical or mental exertion (whether burdensome or not) controlled or required

FLSA's use of the term "work" to encompass activities required by an employer that are carried out predominantly for the benefit of the employer.<sup>32</sup> Thus, lower courts have reasoned that if the time spent during a meal period does not predominantly benefit the employer, it cannot properly be considered "work" as that term is understood under the FLSA and is not be compensable.<sup>33</sup>

The predominant benefit test can accurately be said to be more employer-friendly because it allows the employer to impose uncompensated work responsibilities on an employee during his or her meal period as long as the employee ultimately enjoys the predominant benefit of the meal period.<sup>34</sup> Conversely, the relieved from all duties test grants more rights to em-

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by the employer and pursued necessarily and primarily for the benefit of the employer and his business"); see also *Reich*, 121 F.3d at 64, 65 (citing U.S. Supreme Court cases as the basis for the development of the predominant benefit test).

<sup>32</sup> See *Integrity Staffing*, 135 S. Ct. at 516 (acknowledging that the decision in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* was issued in response to the fact that Congress did not define the term "work" in the FLSA); *Reich*, 121 F.3d at 64 (describing the *Tennessee Coal* decision); see also Victor M. Velarde, Comment, *On the Construction of Section 203(o) of the FLSA: Exclusion Without Exemption*, 21 U. MIAMI BUS. L. REV. 253, 256 (2013) (describing the *Tennessee Coal* holding). Subsequent to the *Tennessee Coal* decision, the U.S. Supreme Court held that determinations of work are necessarily fact-bound inquiries. See *Reich*, 121 F.3d at 64 (citing *Armour & Co. v. Wantock*, 32 U.S. 126, 133 (1944)). Recognizing the disputes surrounding what exactly constitutes work, Congress passed the Portal-to-Portal Act in 1947 to categorically preclude employees from claiming that time spent "walking, riding, or travelling" to their place of work or activities "preliminary to or postliminary to" their "principal . . . activities" constitutes work. 29 U.S.C. § 254(a) (2012); see *Integrity Staffing*, 135 S. Ct. at 516 (describing the history of the Portal-to-Portal Act).

<sup>33</sup> See *Reich*, 121 F.3d at 64 ("The central issue in mealtime cases is whether the employees are required to 'work' as that term is understood under the FLSA."). The argument in favor of the predominant benefit test over the relieved from all duties test when interpreting § 785.19 is further supported by the existence of opinion letters issued by DOL representatives in the 1980s that suggest the Secretary of Labor's desire for the courts to apply a "broad" and "flexible" interpretation of § 785.19. See *id.* (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Aug. 25, 1980)) (discussing opinion letters that advised a literal reading of § 785.19 would require certain types of employees to be compensated "24 hours [a] day").

<sup>34</sup> See *Henson*, 6 F.3d at 534 (describing the relieved from all duties test as "unrealistic" because it would require compensation even if the employee merely "remain[ed] on-call"). The practical implications of one test over the other on employers and employees alike was evident following the issuance of the 2015 *Babcock II* opinion, as law firms and employment blogs across the country raced to provide analysis on what the ruling meant for employers and employees. See, e.g., Nicole L. Leitner, *Third Circuit Adopts New Test for Determining Whether Meal Breaks Are Compensable*, LABOR & EMP. L. BLOG (Dec. 1, 2015), <http://www.labor-law-blog.com/wage-and-hour-flsa/third-circuit-adopts-new-test-for-determining-whether-meal-breaks-are-compensable> [https://perma.cc/344A-322G] (suggesting the employers should remain vigilant on whether the meal periods offered to their employees are in line with the *Babcock II* ruling); Adam R. Long, *When Must Meal Breaks Be Paid? Third Circuit Clarifies FLSA Test*, PA. LABOR & EMP. BLOG (Dec. 1, 2015), <http://www.palaborandemploymentblog.com/2015/12/articles/wage-hour/mealbreaks/> [https://perma.cc/AUQ3-D3JR] (advising that employers should take note of the *Babcock II* ruling because a failure to follow the meal break requirements under the FLSA could expose them to liability); David Treibman, *Third Circuit: Meal Breaks for Employees' "Predominant Benefit" Are Not Worktime*, WAGE & HOUR LS.

ployees, as the imposition of work responsibilities during an employee's meal period would require the entirety of the meal period to be compensated.<sup>35</sup>

*B. Babcock v. Butler County: The Third Circuit Adopts the Predominant Benefit Test*

On March 29, 2012, Sandra Babcock, a corrections officer at Butler County Prison in Butler, Pennsylvania, initiated a putative class action suit against her employer in the U.S. District Court for the Western District of Pennsylvania.<sup>36</sup> The complaint alleged that Butler County Prison ("Butler County") violated the FLSA by improperly failing to compensate the plaintiffs for the entirety of their meal periods.<sup>37</sup>

Under the parties' collective bargaining agreement ("CBA"), the corrections officers were required to work eight and one-quarter hours during each shift.<sup>38</sup> These shifts included a one hour meal period.<sup>39</sup> Butler County, however, only compensated forty-five minutes of the one hour meal peri-

BLOG (Nov. 30, 2015), <https://www.fisherphillips.com/Wage-and-Hour-Laws/Meal-Breaks-Predominant-Benefit-Not-Worktime> [<https://perma.cc/GWL5-4DZ4>] (suggesting that the *Babcock II* ruling is welcome news for employers given the strict standard that the predominant benefit test applies to whether a meal period is compensable under the FLSA); Casey Yamasaki, *Meal Breaks Undergo FLSA Test*, SHEPHERD, FINKELMAN, MILLER & SHAH, LLP (Dec. 10, 2015), <http://www.sfmislaw.com/blog/2015/12/meal-breaks-undergo-flsa-test.shtml> [<https://perma.cc/BL3Q-3JLQ>] (emphasizing the significance of the *Babcock II* decision because the law was now clear in the Third Circuit's jurisdiction).

<sup>35</sup> See Kevin McGowan, *Unpaid Meal Time Not Covered by FLSA, 3rd Cir. Affirms*, BLOOMBERG BNA: DAILY LABOR REP. (Nov. 25, 2015), <http://www.bna.com/unpaid-meal-time-n57982063954/> [<https://perma.cc/DCU3-AV6C>] (suggesting the relieved from all duties test is more "employee-friendly"). In adopting the predominant benefit test, the Eighth Circuit in *Henson v. Pulaski County Sheriff Department* specifically rejected the relieved from all duties test over concerns that its application would hamstring employers. See *Henson*, 6 F.3d at 534 (holding that it is "unrealistic" for employers to be responsible). The court expressed reservations over the broad scope of plaintiffs that an adoption of the relieved from all duties test would seem to allow for. See *id.* In the court's view, the test was "unrealistic," as it would force employers to compensate the meal period of any employee who had even a minimal level of responsibility during his or her meal period. See *id.*

<sup>36</sup> *Babcock II*, 806 F.3d at 155; see *Babcock v. Butler Cty. (Babcock I)*, No. 12CV394, 2014 WL 688122, \*2 (W.D. Pa. Feb. 21, 2014). The lawsuit took a number of years to reach court, as the corrections officers' complaint was originally dismissed in 2012 because of a jurisdictional issue emanating from the parties' collective bargaining agreement. *Babcock I*, 2014 WL 688122, at \*2. The court stayed the case while the parties worked through arbitration but eventually reopened it in January 2014 after the corrections officers filed an unopposed motion to reopen the case. *Id.*

<sup>37</sup> *Babcock I*, 2014 WL 688122, at \*1, 3; Complaint at 6–7, ¶¶ 41–48, *Babcock I*, 2014 WL 688122 (No. 12CV394) (alleging that Butler County Prison ("Butler County") violated the FLSA by failing to pay plaintiffs overtime compensation).

<sup>38</sup> *Babcock II*, 806 F.3d at 155.

<sup>39</sup> *Id.*



od.<sup>40</sup> The corrections officers challenged the legality of the uncompensated fifteen minutes under the overtime-pay provision of the FLSA and contended that the full hour should have been compensated.<sup>41</sup> In support of their claim, the corrections officers alleged that, during their meal periods, they were not allowed to leave the prison without permission and were required to remain on-call, in-uniform, and in close proximity to emergency response equipment.<sup>42</sup> The corrections officers argued that these facts proved that their meal periods were not bona fide under § 785.19 and that Butler County was in violation of the FLSA for not compensating the entirety of the meal periods.<sup>43</sup>

Butler County moved to dismiss the suit in February 2014, arguing that, under the predominant benefit test, the corrections officers received the predominant benefit of the meal periods and therefore Butler County was not required to compensate them for the full hour.<sup>44</sup> The district court agreed and dismissed the suit.<sup>45</sup> The corrections officers appealed the dismissal to the Third Circuit.<sup>46</sup>

Prior to its decision in *Babcock II*, the Third Circuit had yet to adopt either the relieved from all duties test or the predominant benefit test when making a determination on whether a meal period was bona fide under § 785.19.<sup>47</sup> Confident that the allegations within their complaint were sufficient to satisfy either test and thus survive Butler County's motion to dismiss, the corrections officers did not implore the court to apply one test over the other.<sup>48</sup> Following the trend among its sister circuits, the Third Circuit adopt-

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<sup>40</sup> *Id.* By compensating only forty-five minutes of the one-hour meal period, it was not possible for the corrections officers to work in excess of eight hours per shift. *See id.* (describing the compensation scheme). Thus, Butler County was not required to pay any overtime to the corrections officers because the corrections officers could typically only accrue a maximum forty hours of worktime per week. *See id.* (describing the compensation scheme).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; see Complaint at 5, ¶¶ 27–34, *Babcock I*, 2014 WL 688122 (No. 12CV394) (reciting the factual allegations that the corrections officers contended established that Butler County was required to pay overtime compensation under the FLSA).

<sup>43</sup> *See Babcock II*, 806 F.3d at 155 (describing the corrections officers' argument); Appellants' Brief at 15–16, *Babcock II*, 806 F.3d 153 (No. 14-1467), 2014 WL 3696690, at \*15–16 [hereinafter *Babcock II* Appellants' Brief] (reciting the facts and alleging that the facts were sufficient to prove that the meal period should have been fully compensated).

<sup>44</sup> *See Babcock II*, 806 F.3d at 156.

<sup>45</sup> *Babcock I*, 2014 WL 688122, at \*10.

<sup>46</sup> *See Babcock II*, 806 F.3d at 155.

<sup>47</sup> *Babcock I*, 2014 WL 688122, at \*4 (noting that the Third Circuit had not previously addressed whether to apply the predominant benefit test or the relieved from all duties test when interpreting § 785.19); see also *Babcock II*, 806 F.3d at 155 (acknowledging that the issue before the court was one of first impression).

<sup>48</sup> *See Babcock II*, 806 F.3d at 156 (noting that neither party disputed the application of the predominant benefit test over the relieved from all duties test); *Babcock II* Appellants' Brief, *supra* note 43, at \*16–18 (arguing that the corrections officers' complaint should survive Butler County's

ed the predominant benefit test.<sup>49</sup> After applying the test, the Third Circuit affirmed the district court's decision and held that the corrections officers retained the predominant benefit of their meal periods and thus the full hour of their meal periods were not required to be compensated under the FLSA.<sup>50</sup>

## II. UNANIMITY AMONG THE CIRCUITS?: THE THIRD CIRCUIT CONCLUDES THAT THE ELEVENTH CIRCUIT APPLIES THE PREDOMINANT BENEFIT TEST

In dismissing the corrections officers' claims in 2015 in *Babcock v. Butler County* ("Babcock II"), the U.S. Court of Appeals for the Third Circuit formally adopted the predominant benefit test.<sup>51</sup> Prior to doing so, the court summarized the status of the law across the circuits and concluded that there was not a circuit split on the appropriate test for determining whether a meal period is bona fide under § 785.19.<sup>52</sup> Included in this summary was reference to and discussion of Eleventh Circuit precedent on the issue.<sup>53</sup> Section A of this Part examines the Third Circuit's discussion and interpretation of the U.S. Court of Appeals for the Eleventh Circuit's 1990 holding in *Kohlheim v. Glynn County*.<sup>54</sup> Section B of this Part examines the Third Circuit's citation to the Eleventh Circuit's 1994 opinion in *Avery v. City of Talladega*.<sup>55</sup>

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motion to dismiss because the corrections officers were entitled to have their meal periods compensated under the FLSA irrespective of whether the court applied the predominant benefit test or the relieved from all duties test).

<sup>49</sup> *Babcock II*, 806 F.3d at 156. The majority ruled over one dissenting judge who concluded that the corrections officers had met the requisite pleading standard required to survive a motion to dismiss. *See id.* at 162 (Greenaway, J., dissenting) (arguing that the corrections officers had "set forth sufficient allegations to state a claim"). The dissent did not, however, dispute the majority's decision to adopt and apply the predominant benefit test. *Id.* at 158–62.

<sup>50</sup> *Id.* at 157–58 (majority opinion). Although it acknowledged that some limitations were placed on the corrections officers during their meal periods, the court concluded that the limitations were not so restrictive that Butler County received the predominant benefit of the meal periods. *Id.* at 157. The court also observed that the collective bargaining agreement ("CBA"), although silent on the compensability of the fifteen-minute period, included a provision that compensated the corrections officers for any meal period that was in fact interrupted by their work duties. *Id.* In the court's view, this provision buoyed the view that the corrections officers retained the predominant benefit of the meal period. *Id.* at 157–58. Although the petitioners disputed the court's decision, their motion for rehearing and rehearing *en banc* was denied. *Babcock v. Butler Cty.*, No. 14-1467, slip op. at 2 (3d Cir. Feb. 26, 2016) (denying motion for rehearing and rehearing *en banc*).

<sup>51</sup> *Babcock v. Butler Cty. (Babcock II)*, 806 F.3d 153, 156 (3d Cir. 2015) (holding that the Third Circuit joins the majority of other circuits in adopting the predominant benefit test).

<sup>52</sup> *See id.* at 155, 156 (acknowledging the two tests and noting the positions of other U.S. Courts of Appeals with respect to their application of the predominant benefit test or the relieved from all duties test).

<sup>53</sup> *Id.* at 156.

<sup>54</sup> *See infra* notes 56–63 and accompanying text.

<sup>55</sup> *See infra* notes 64–69 and accompanying text.

*A. Did They or Didn't They?: Kohlheim and the Application  
of the Predominant Benefit Test*

On appeal, the Third Circuit in *Babcock II* rejected the corrections officers' contention that the circuits were split on the appropriate test to apply when determining whether a meal period is bona fide under § 785.19.<sup>56</sup> In the Third Circuit's view, the Eleventh Circuit—the only circuit to arguably apply a separate test—did not apply the relieved from all duties test.<sup>57</sup> The Third Circuit rested this conclusion in part on its own interpretation of the Eleventh Circuit's 1990 decision in *Kohlheim*.<sup>58</sup> *Kohlheim* involved a claim brought by local firefighters against their town employer for the employer's failure to compensate the firefighters' meal periods under the overtime-pay provision of the FLSA.<sup>59</sup> The Eleventh Circuit held in favor of the firefighters and ruled that their meal periods should have been compensated.<sup>60</sup> The Third Circuit in *Babcock II* examined the *Kohlheim* decision and concluded that the Eleventh Circuit did not apply the relieved from all duties test in that case, as the corrections officers had asserted.<sup>61</sup> Rather, the Third Circuit

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<sup>56</sup> *Babcock II*, 806 F.3d at 156; see *Babcock II* Appellants' Brief, *supra* note 43, at \*17 ("There is current [sic] a circuit split regarding the appropriate test relating to the compensation of meal periods."). The Third Circuit in *Babcock II* addressed two cases from the Eleventh Circuit and Ninth Circuit that the corrections officers cited to for the proposition that the circuits were split on whether to apply the predominant benefit test or relieved from all duties test. *Babcock II*, 806 F.3d at 156 (citing *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 531 n.4 (9th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 513 (2014), and *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1477 (11th Cir. 1990)). After analyzing the two cases, however, the Third Circuit concluded that the cited Ninth Circuit case did not definitively adopt either test and that the cited Eleventh Circuit case did not apply the relieved from all duties test, but rather "applied its version of the predominant benefit test." *Id.*

<sup>57</sup> *Babcock II*, 806 F.3d at 156 (examining case law that the corrections officers argued to have applied or adopted the relieved from all duties test and rejecting the corrections officers' contention).

<sup>58</sup> See *id.* (concluding that the court in *Kohlheim v. Glynn County* did not apply the relieved from all duties test).

<sup>59</sup> See *Kohlheim*, 915 F.2d at 1474. The firefighters in *Kohlheim* would regularly work several shifts per week of approximately twenty-four hours per shift. *Id.* at 1474–75. Because each shift spanned the entire day, the town did not compensate the plaintiffs for three hours of each shift, thereby effectively building in three one-hour meal periods per shift. *Id.* at 1475. The plaintiffs brought a claim under the FLSA, arguing that the three one-hour meal periods per shift should have been compensated because they were effectively still working during these meal periods. *Id.*

<sup>60</sup> See *id.* at 1477 (concluding that the plaintiffs' meal periods were "compensable under FLSA regulations for overtime purposes").

<sup>61</sup> See *Babcock II*, 806 F.3d at 156 (citing *Kohlheim*, 915 F.2d at 1477) (concluding that the Eleventh Circuit did not apply the relieved from all duties test in *Kohlheim*). At the time of the *Babcock II* decision, the only circuit that could have been said to apply the relieved from all duties test was the Eleventh Circuit. See *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1307 n.4 (N.D. Ala. 2008) (noting that the Eleventh Circuit applies the "completely relieved from duty" standard when interpreting § 785.19 and acknowledging that the Eleventh Circuit was an outlier among the circuits by doing so). By concluding that the Eleventh Circuit did not apply the re-

concluded that the actual test applied in *Kohlheim* was a derivation of the predominant benefit test.<sup>62</sup> To support its conclusion, the Third Circuit cited a portion of the Eleventh Circuit’s analysis in *Kohlheim* that noted that the restrictions placed upon the firefighters during their meal periods “inure[d] to the benefit of the county.”<sup>63</sup>

### B. *Avery and the Predominant Benefit Test*

In further support of its conclusion that the Eleventh Circuit had adopted the predominant benefit test, the Third Circuit in *Babcock II* cited the Eleventh Circuit’s 1994 decision in *Avery*.<sup>64</sup> In *Avery*, members of the city’s police department alleged that the department had violated the FLSA by failing to properly compensate its employees during their meal periods.<sup>65</sup> Notably, however, *Avery* did not involve an interpretation of § 785.19, but instead dealt exclusively with whether or not the employer could claim an exemption under section 7(k) of the FLSA (“section K”) to avoid compensating the employees’ meal periods.<sup>66</sup> Under section K, public agencies may

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relieved from all duties test, the Third Circuit in *Babcock II* implicitly swept away any suggestion of a circuit split on the issue. See *Babcock II*, 806 F.3d at 156 (concluding that in *Kohlheim* the Eleventh Circuit did not apply the relieved from all duties test). *But see* *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531, 535 (8th Cir. 1993) (noting that *Kohlheim* turned on the fact that the plaintiffs had not been “completely relieved from duty”).

<sup>62</sup> *Babcock II*, 806 F.3d at 156. The Third Circuit is not alone in its interpretation, as several courts and commentators have wrestled over whether the Eleventh Circuit does in fact apply the relieved from all duties test. Compare *Havrilla v. United States*, 125 Fed. Cl. 454, 464 (2016) (citing *Kohlheim* as precedent for the application of the predominant benefit test), and *Wiessner*, *supra* note 12, at \*1 (concluding that the Eleventh Circuit has not adopted the relieved from all duties test), with *Henson*, 6 F.3d at 534–35 (recognizing the circuit split and noting that *Kohlheim* turned on the fact that the plaintiffs had not been “completely relieved from duty”), and *Chao*, 568 F. Supp. 2d at 1307 n.4 (interpreting the *Kohlheim* decision as having applied the relieved from all duties test), and *McGowan*, *supra* note 35 (concluding that the Eleventh Circuit applied the “relieved from duty” standard).

<sup>63</sup> See *Babcock II*, 806 F.3d at 156 (quoting *Kohlheim*, 915 F.2d at 1477) (“The firefighters are subject to real limitations on their freedom during mealtime which inure to the benefit of the county; accordingly, the [meal periods] are compensable under FLSA regulations for overtime purposes.”). *But see* *Kohlheim*, 915 F.2d at 1477 (“[T]he essential consideration in determining whether a meal period is a bona fide meal period . . . is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal.”); *infra* notes 73–80 and accompanying text (arguing that the Third Circuit misinterpreted the *Kohlheim* decision).

<sup>64</sup> See *Babcock II*, 806 F.3d at 156 (citing *Avery v. City of Talladega*, 24 F.3d 1337, 1347 (11th Cir. 1994)) (“The majority of the courts of appeals have adopted [the predominant benefit] test.”).

<sup>65</sup> See *Avery*, 24 F.3d at 1345–46.

<sup>66</sup> See Fair Labor Standards Act of 1938 § 7(k), 29 U.S.C. § 207(k) (2012); *Avery*, 24 F.3d at 1344–46 (concluding that § 785.19 is a “regulation of general application” but that § 7(k) of the FLSA (“section K”) law enforcement employees are subjected to a different standard). Although the corrections officers in *Babcock II* would seemingly have been subject to the section K exemption, the court noted that neither party asserted that the exemption applied. See *Babcock II*, 806 F.3d at 155 n.1 (“There is a special provision in the FLSA that covers employees engaged in fire

claim an exemption and avoid paying overtime to law-enforcement and fire protection employees who typically work long shifts where they remain on-call.<sup>67</sup> In resolving the claim, the Eleventh Circuit applied the predominant benefit test in *Avery* and held that the meal periods of the employees who fit within the section K exemption were not required to be compensated under the FLSA.<sup>68</sup> Relying on this holding, the Third Circuit in *Babcock II* included *Avery* in a string citation purporting to provide an exhaustive list of U.S. Courts of Appeals that had definitively adopted the predominant benefit test for their jurisdictions.<sup>69</sup>

### III. MUDDYING THE WATER: THE THIRD CIRCUIT MISINTERPRETS THE STATUS OF THE LAW REGARDING THE APPLICATION OF THE PREDOMINANT BENEFIT TEST

By concluding that the U.S. Court of Appeals for the Eleventh Circuit had adopted the predominant benefit test, the U.S. Court of Appeals for the Third Circuit in 2015, in *Babcock v. Butler County* (“*Babcock II*”), mischaracterized the status of the law regarding which test the U.S. Courts of Appeals apply when determining whether a meal period is bona fide under § 785.19.<sup>70</sup> Section A of this Part argues that the Third Circuit was incorrect

protection or law enforcement activities, 29 U.S.C. § 207(k), but none of the parties to this case has suggested it has any applicability here.”); see also 29 U.S.C. § 207(k) (noting that security at correctional institutions falls within the class of employees that may be exempted from the overtime pay provision). Accordingly, the court did not address the section K exemption in the opinion. See *Babcock II*, 806 F.3d at 155–58 (failing to address the section K exemption).

<sup>67</sup> 29 U.S.C. § 207(k); see *Kohlheim*, 915 F.2d at 1477 (summarizing the section K exemption). Thus, section K looks at the hours worked over a monthly period before calculating overtime, rather than requiring overtime pay when an employee works more than forty hours in any one week as required by the overtime-pay provision. See 20 U.S.C. § 207(k) (authorizing overtime calculation across a twenty-eight day period if the total number of hours exceeds 216); see also Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 1897, 2024 (Jan. 16, 1987) (“Congress was aware of the extended duty hours and unusual working conditions of public safety employees. To accommodate these conditions, [Congress] adopted the limited overtime pay exemption in section 7(k).”).

<sup>68</sup> See *Avery*, 24 F.3d at 1346 (concluding that under the predominant benefit test, the plaintiffs’ meal periods were not required to be compensated). Section K has its own administering regulation, 29 C.F.R. § 553.233, which contains language similar to § 785.19 but instead addresses when a public agency must compensate the meal periods of section K employees. See 29 C.F.R. § 553.233 (2016). Although similar to § 785.19, the DOL itself and courts have noted that the differences between the regulations indicate that the regulations are intended to be analyzed differently. See *infra* notes 82–88 and accompanying text (arguing that the Eleventh Circuit applies a different standard for determining the compensability of meal periods for an employee under § 785.19 than for a section K exempt employees). But see Henke, *supra* note 30, at 864–68 (compiling cases where courts have applied § 785.19 to section K exempt employees).

<sup>69</sup> *Babcock II*, 806 F.3d at 156.

<sup>70</sup> See *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64–65 (2d Cir. 1997) (recognizing the circuit split); *Henson v. Pulaski Cty. Sheriff Dep’t*, 6 F.3d 531, 534–35 (8th Cir. 1993) (same); *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (applying the re-

when it concluded that the Eleventh Circuit, in 1990, in *Kohlheim v. Glynn County*, did not apply the relieved from all duties test.<sup>71</sup> Section B argues that the Eleventh Circuit's adoption of the predominant benefit test in 1994, in *Avery v. City of Talladega*, was narrowly tailored and was not intended as a blanket adoption of the test for the Eleventh Circuit.<sup>72</sup>

#### A. But See *Kohlheim*: *The Eleventh Circuit Did Not Adopt the Predominant Benefit Test in Kohlheim*

The Third Circuit misinterpreted *Kohlheim* when it concluded that the Eleventh Circuit had applied a variation of the predominant benefit test.<sup>73</sup> In reaching this conclusion, the Third Circuit in *Babcock II* cited language from the *Kohlheim* opinion that seemingly identified the “benefit” that “inure[d]” to the employer during the meal period as a consideration in determining whether a meal period is compensable.<sup>74</sup> It appears that the court overlooked, however, the *Kohlheim* opinion's preceding paragraph that identified the “the essential consideration” in determining whether or not a meal period is bona fide under § 785.19 to be “whether the employees are in fact relieved from work for the purpose of eating.”<sup>75</sup> Accordingly, the Eleventh Circuit's apparent consideration of the “benefit” that “inure[d]” to the employer during the meal period should not have been construed by the Third Circuit in *Babcock II* as an application of the predominant benefit test.<sup>76</sup> Moreover, the Eleventh Circuit's repeated deference to the explicit language of § 785.19's definition

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relieved from all duties test); see also *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 531 n.4 (9th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 513 (2014) (citing *Kohlheim*, 915 F.2d at 1477) (noting that *Kohlheim* applied the “‘completely relieved from duty’ standard”).

<sup>71</sup> See *infra* notes 73–80 and accompanying text.

<sup>72</sup> See *infra* notes 81–92 and accompanying text.

<sup>73</sup> See *Kohlheim*, 915 F.2d at 1477 (applying the relieved from all duties test). Numerous courts have recognized that the Eleventh Circuit in *Kohlheim* applied the relieved from all duties test. See, e.g., *Reich*, 121 F.3d at 64–65 (recognizing that the court in *Kohlheim* applies a different test than the predominant benefit test); *Henson*, 6 F.3d at 534–35 (noting that the court in *Kohlheim* required compensation for firefighters who were not “completely relieved from duty” during their meal periods); *O'Hara v. Menino*, 253 F. Supp. 2d 147, 155–56 (D. Mass. 2003) (concluding that the court in *Kohlheim* applied the relieved from all duties test); *Summers v. Howard Univ.*, 127 F. Supp. 2d 27, 33 (D.D.C. 2000) (same).

<sup>74</sup> See *Babcock v. Butler Cty. (Babcock II)*, 806 F.3d 153, 156 (3d Cir. 2015) (quoting *Kohlheim*, 915 F.2d at 1477) (“The firefighters are subject to real limitations on their freedom during mealtime which inure to the benefit of the county; accordingly, the [meal periods] are compensable under FLSA regulations for overtime purposes.”).

<sup>75</sup> *Kohlheim*, 915 F.2d at 1477; see also A.B.A., *Federal Labor Standards: Report of the Committee on Federal Labor Standards Legislation*, 7 LAB. LAW. 701, 726 (1991) (concluding that the Eleventh Circuit in *Kohlheim* held that the firefighters were not completely relieved of their duties and thus their meal periods were compensable under the FLSA).

<sup>76</sup> See *Kohlheim*, 915 F.2d at 1477 (describing the “essential consideration” of § 785.19 determinations as whether or not the employee is “relieved from work”).

of a bona fide meal period reflects the court's view that the regulation should be interpreted literally.<sup>77</sup> The test that most naturally follows from a plain reading of the regulation is the relieved from all duties test.<sup>78</sup> Furthermore, several of the U.S. Courts of Appeals and U.S. District Courts have recognized that the Eleventh Circuit applied the relieved from all duties test in *Kohlheim*.<sup>79</sup> Thus, as long as *Kohlheim* remains good law, the circuits remain split on which test to apply when determining whether a meal period is bona fide under § 785.19.<sup>80</sup>

*B. An Overbroad Reading of a Narrow Holding: The Third Circuit Expands the Scope of Avery's Adoption of the Predominant Benefit Test*

The Third Circuit improperly expanded the scope of *Avery*'s holding when it cited *Avery* as further support for the conclusion that the Eleventh Circuit had adopted the predominant benefit test.<sup>81</sup> Although the Eleventh Circuit did indeed apply the predominant benefit test in *Avery*—rather than involving an interpretation of § 785.19, as *Kohlheim* had—the case in the *Avery* dealt solely with section K of the overtime-pay provision and its administering regulations.<sup>82</sup> In fact, the Eleventh Circuit explicitly distinguished *Avery* from *Kohlheim*.<sup>83</sup>

<sup>77</sup> See *id.* at 1477 & n.20 (hailing § 785.19 as “an appropriate statement of the law” and noting that the regulation “offer[s] a useful and fair standard by which to determine whether a meal period should be considered worktime under the FLSA”).

<sup>78</sup> See *id.* at 1477; see also *supra* note 28 and accompanying text (explaining that the relieved from all duties test follows the plain meaning of the language in § 785.19).

<sup>79</sup> See *supra* note 70 and accompanying text (compiling cases recognizing the circuit split on the application of the predominant benefit test); see also, e.g., *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264 n.16 (5th Cir. 1998) (failing to cite *Kohlheim* in a footnote purporting to provide an exhaustive list of U.S. Courts of Appeals that had adopted the predominant benefit test); *Abendschein v. Montgomery Cty.*, 984 F. Supp. 356, 366 (D. Md. 1997) (concluding that the Eleventh Circuit in *Kohlheim* applied the relieved from all duties test).

<sup>80</sup> See *Reich*, 121 F.3d at 64–65 (acknowledging the circuit split implicitly); *Henson*, 6 F.3d at 534–35 (same); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1307 n.4 (N.D. Ala. 2008) (concluding that the Eleventh Circuit remains the only circuit to apply the “completely relieved from duty standard”); see also *McGowan*, *supra* note 35 (concluding that the *Babcock II* decision “deepens” the circuit split on the application of the predominant benefit test or the relieved from all duties test when determining the compensability of meal period under the FLSA).

<sup>81</sup> See *Avery v. City of Talladega*, 24 F.3d 1337, 1345–46 (11th Cir. 1994) (noting that the case before it was one of first impression regarding the compensability of meal periods for section K law-enforcement employees and that the court's decision stands alone and apart from its previous decision in *Kohlheim*).

<sup>82</sup> See *id.* at 1346 (concluding that the predominant benefit test is “the appropriate standard for determining whether a section 7(k) law enforcement employee's meal break is compensable time under the FLSA”).

<sup>83</sup> See *id.* (“[A] higher level of duty is required before meal breaks are compensable for [section K] law enforcement employees . . . . The fact that [§ 785.19] contains some broad language . . . not found in the regulation applicable to law enforcement employees also supports our conclu-

Section K exempts public agencies from the requirements of the overtime-pay provision with respect to compensating law enforcement and fire protection employees.<sup>84</sup> Rather than requiring public agencies to provide overtime compensation when an employee works more than forty hours in a week, as the overtime-pay provision requires, section K only requires overtime compensation for exempted employees once they exceed a threshold number of work hours over a twenty-eight day period.<sup>85</sup> Thus, under section K, a law enforcement employee could conceivably work eighty hours in a five day workweek without receiving overtime pay if the total number of his or her work hours over the twenty-eight day period fell below two hundred and sixteen, the threshold number outlined in the statute.<sup>86</sup>

Because the facts of *Avery* and *Kohlheim* were readily distinguishable, the Eleventh Circuit's adoption of the predominant benefit test in *Avery* was limited and the court strongly implied that the test would only apply in cases in which an employer asserts the section K exemption.<sup>87</sup> *Avery* did not implement a blanket adoption of the predominant benefit test for the Eleventh Circuit or otherwise overrule *Kohlheim* in any respect.<sup>88</sup> Indeed, the

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sion. Because *Kohlheim* did not involve law enforcement officers, that case turned solely on the Court's interpretation of section 785.19(a).")

<sup>84</sup> Fair Labor Standards Act of 1938 § 7(k), 29 U.S.C. § 207(k) (2012); see Henke, *supra* note 30 (describing the section K exemption).

<sup>85</sup> See § 207(k) (stating that overtime hours for section K law enforcement employees arise only if the employee exceeds a threshold number of hours over a twenty-eight day period); see also *Kohlheim*, 915 F.2d at 1476–77 (describing the section K exemption but concluding that it was inapplicable to the question before the court). Currently, employees exempted under section K will receive overtime pay if they exceed 216 work hours in a consecutive twenty-eight day period, or if they meet one of the other enumerated requirements under section K. § 207(k).

<sup>86</sup> See § 207(k) (describing when overtime hours arise for law enforcement employees exempted by section K); see also Henke, *supra* note 30 (describing the section K exemption).

<sup>87</sup> See *Avery*, 24 F.3d at 1346 (noting that it would not extend *Kohlheim* to section K law enforcement employees because that would “defeat the apparent regulatory intent to subject 7(k) [employees] to a different standard for compensated meals”). Indeed, in their respective appellate briefs, both parties in *Avery* recognized *Kohlheim*'s application of the relieved from all duties test and discussed whether the same test should be applied to section K exempt employees. See Appellee's Brief at 26–27, *Avery*, 24 F.3d 1337 (No. 93-6353), 1993 WL 13015859, at \*26–27 (acknowledging *Kohlheim*'s application of the “completely relieved from duty” standard); Appellants' Brief at 8 n.1, *Avery*, 24 F.3d 1337 (No. 93-6353), 1993 WL 13015858, at \*8 n.1 (acknowledging *Kohlheim*'s adoption of § 785.19's language).

<sup>88</sup> See *Avery*, 24 F.3d at 1346 (holding that the case at issue pertained specifically to employees exempt under section K and was distinguishable from the facts in *Kohlheim*). The court's decision in *Avery* makes clear that the Eleventh Circuit applies a different standard to employees exempted by section K. See *id.* Moreover, this application comports with Congress's intent. See Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 1897, 2023 (Jan. 16, 1987) (“However, the legislative history of the 1974 Amendments to the FLSA indicates that the unique ‘tour of duty’ concept utilized with respect to police and firefighters under section 7(k) should be treated differently from the normal ‘hours worked’ concept under section 7(a), as set forth in Part 785.”). But see Henke, *supra* note 30, at 864–68 (compiling cases where courts have applied § 785.19 to section K exempt employees).



narrow scope of *Avery*'s holding was expressly noted in the opinion.<sup>89</sup> Furthermore, the Fourth Circuit and numerous district courts within the Eleventh Circuit have acknowledged that *Avery*'s adoption of the predominant benefit test was limited to employees exempted under section K.<sup>90</sup> Because an interpretation of § 785.19 was not at issue in *Avery*, the Third Circuit's citation to its holding in *Babcock II* is misplaced.<sup>91</sup> *Kohlheim*'s application of the relieved from all duties test therefore remains controlling law in the Eleventh Circuit for employees not otherwise exempt under section K.<sup>92</sup>

### CONCLUSION

In reaching its holding in *Babcock v. Butler County*, the Third Circuit mischaracterized the status of the law on whether the U.S. Courts of Appeals uniformly apply the predominant benefit test when determining the compensability of an employee's meal period under the FLSA. Although indeed an outlier among the U.S. Courts of Appeals, the Eleventh Circuit's application of the relieved from all duties test in *Kohlheim v. Glynn County* nevertheless remains controlling authority in the circuit's jurisdiction. Given the far reaching implications that a circuit's adoption and application of

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<sup>89</sup> See *Avery*, 24 F.3d at 1345–46 (“[W]e have never before addressed whether we should apply the predominant benefit test to . . . [section K] law enforcement employees . . . . If we were to extend [*Kohlheim*] to law enforcement officers, we would defeat the apparent regulatory intent to subject [section K] law enforcement officers to a different standard.”).

<sup>90</sup> See, e.g., *Roy v. Cty. of Lexington*, 141 F.3d 533, 545 n.6 (4th Cir. 1998) (noting that several cases, including *Avery*, involved employees exempted under section K, and thus the court did “not rely on th[ose] cases” in deciding to adopt the predominant benefit test); *Perez v. La Bella Vida ALF, Inc.*, No. 8:14-CV-2487-T-33TGW, 2015 WL 6157102, at \*6 (M.D. Fla. Oct. 19, 2015) (noting that *Kohlheim* held that, under § 785.19, an employee must be relieved of all of their duties or the meal period will be compensated); *Chao*, 568 F. Supp. 2d at 1307 n.4 (concluding that the *Avery* holding requires the application of the predominant benefit test for claims brought by plaintiffs subject to the section K exemption whereas the “completely relieved from duty standard applies to § 785.19 claims *in this circuit*”); *Arrington v. City of Macon*, 986 F. Supp. 1474, 1482 (M.D. Ga. 1997) (acknowledging that *Avery*'s application of the predominant benefit test was limited to section K law enforcement employees). In *Roy v. County of Lexington*, the U.S. Court of Appeals for the Fourth Circuit in 1998 adopted the predominant benefit test but expressly stated that in coming to that decision, it did not look to the Eleventh Circuit's *Avery* opinion for support because *Avery*'s application of the predominant benefit test was restricted to employees subject to the section K exemption. *Roy*, 141 F.3d at 545 n.6.

<sup>91</sup> See *Avery*, 24 F.3d at 1346 (noting that *Kohlheim* turned solely on the interpretation of § 785.19 whereas the case before the court dealt with section K exempt law enforcement employees); see also McGowan, *supra* note 35 (concluding that the Eleventh Circuit applied the “relieved from duty” standard).

<sup>92</sup> See *Chao*, 568 F. Supp. 2d at 1307 n.4 (“[T]he completely relieved from duty standard applies to § 785.19 claims *in this circuit*, regardless of how other circuits have interpreted the regulation. Therefore, any argument posited by either party to this action that the Eleventh Circuit applies the predominant benefit test to meal period claims under 785.19 is inapposite.”).

either test has on the rights and responsibilities of employers and employees alike, it is vital that the status of the law remain clear.

JOHN A. LEBLANC

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