No. 82030

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WALDEN JR., NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Appellants,

v.

THE STATE OF NEVADA *ex rel* ITS NEVADA DEPARTMENT OF CORRECTIONS,

Respondent.

Original Proceeding under NRAP 5 - Certified Question from United States District Court, District of Nevada, Case No. 3:14-cv-000320-MMD-WGC

RESPONDENT'S APPENDIX

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RESPONDENT'S APPENDIX

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
06/05/17	[Doc 105] Plaintiffs' Opposition to Defendant's Motion to Dismiss First Amended Complaint	I	0001-0023
05/20/20	[Doc 307] Plaintiffs' Opposition to Defendant State of Nevada ex rel. Department of Corrections' Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims	I	0024-0071

DATED this 23rd day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on April 23, 2021.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR., NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

STATE OF NEVADA, *EX. REL.* ITS DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendant(s).

Case No.: 3:14-cv-00320-MMD-WGC

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Plaintiffs DONALD WALDEN JR., NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY, (collectively, "Plaintiffs") hereby file this opposition to the Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion") filed by Defendant STATE OF NEVADA, *ex. rel.* its DEPARTMENT OF CORRECTIONS ("Defendant").

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I. INTRODUCTION

Plaintiffs have remedied the Court's perceived deficiencies in the originally filed complaint by adding specific workweeks in which Plaintiffs were not paid straight time and overtime wages in the operative First Amended Complaint ("FAC"). Defendant moves to dismiss this action yet again primarily on the grounds that the pre- and post-shift activities at issue here are not compensable activities under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and the Portal-to-Portal Act. Although fully briefed before, the Court did not address this issue in its prior order. Now is the time to resolve this legal question in favor of Plaintiffs so that the case can move forward.

It is well established precedent that despite the Portal-to-Portal Act's exclusion for preliminary and postliminary activities, "guards" must be paid for the time that they spend doing the same types of tasks that are involved in this lawsuit, *i.e.*, showing up at a designated time for roll call, uniform inspection, receiving instruction, receiving weapons, drawing badges, and then walking to their post as part of the continuous workday rule.[1] Cases such as *Baylor v. United States*, 198 Ct. Cl. 331, 331 (1972), *Albright v. United States*, 161 Ct.Cl. 356 (1963), *Baker v. United States*, 161 CT.CL. 356 (1963), *Riggs v. United States,* 21 Cl. Ct. 664, 674 (1990), *Whelan Security Co. v. United States*, 7 Cl.Ct. 496 (1985), *IBM v. United States*, 11 Cl.Ct. 588 (1987) all held the activities of guards alleged in the complaint in this case are not excluded from compensation by the Portal to Portal Act, 29 U.S.C. §253. The precedents of the above cited cases are unaffected by the recent Supreme Court decision in *Integrity Staffing Solutions, Inc. v.*

[1] In its Motion, Defendant raises numerous fictitious factual scenarios to paint the picture that Plaintiffs and all other class members did not perform the same duties or take the same amount of time to perform those duties. These misstatements of fact should be ignored. First, this Court must not pay attention to these alternative facts because all facts asserted in Plaintiffs' FAC must be accepted as true at the motion to dismiss stage. Second, these are indeed misstatements of fact. All correctional officers were required to appear for roll call pursuant to mandated procedures by the State and performed most of the same activities each and every day. And, while there may be differences in the amount time class members spent performing pre- and post-shift activities, these differences do not affect whether the activities are compensable and thus do not defeat class certification.

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Busk, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014), which concerns only a security clearance on the way out of a facility; it does not in any way effect the compensability of receiving of instructions, the drawing of badges, the issuing of weapons, gathering intelligence, and other tasks necessary for the safe and effective execution of the job of a correctional officer of controlling inmates and protecting others.[2] As the *Riggs v. United States,* Court stated:

> By convening a roll call and ordering plaintiffs to bring protective equipment, and by making roll call the occasion for passing on information which the Air Force apparently believes to be necessary for proper work performance, the Air Force is stating, in effect, that attendance at the roll call with protective equipment is a necessary, integral part of the day's principal activities.

Riggs v. United States, 21 Cl. Ct. 664, at 677.

Although Defendant's threshold argument relates to the compensability of the pre- and post-shift activities, Defendant also raises four other basis for dismissing certain causes of action. First, Defendant contends that the First Cause of Action must be dismissed because Plaintiffs earned more than the minimum wage. Defendant's understanding of Plaintiff's First Cause of Action is incorrect. It is a straight time claim under the FLSA—not a minimum wage claim—and "gap time" defenses to straight time claims have been recently rejected by numerous courts in the Ninth Circuit. *See, e.g. Douglas v. Xerox Bus. Servs.*, LLC, No. C12-1798-JCC, 2015 WL 10791972 (W.D. Wash. Dec. 1, 2015), motion to certify appeal granted, No. C12-1798-JCC, 2016 WL 4017407 (W.D. Wash. Feb. 29, 2016).

Second, Defendant argues that the state of Nevada does not have to follow Nevada's Constitutional minimum wage law. The plain language of the constitution does not support Defendant's view. The State of Nevada is not excluded from the term "employer" under Article 15 Section 16 of the Nevada State Constitution. The plain reading of the term "other entity that may employ individuals or enter into contracts of employment" under Nev. Const. Art. 15 § 16(C) includes the Department of Corrections of the State of Nevada. Clearly, the Department of

[2] Specifically, *Busk* does not apply to guards, whose primary duty is security as opposed to warehouse employees whose primary duty is handling merchandize.

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Corrections of the State of Nevada is the employer of these correctional officers. The fact that the Nevada Revised Statutes already has a section governing payment for public employees is as irrelevant to this case as the same argument was to the private sector in the case of *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014). The term "any other entity" is deliberately intended to be broad enough to cover any employer, which includes the Department of Corrections for the State of Nevada ("NDOC").

Third, Defendant argues that Plaintiffs must first exhaust an administrative remedy prior to filing a compensation "grievance" in court. Defendant misreads the statutes. NRS 284.195 provides for an express direct private right of action to enforce the compensation provisions contained in NRS 284.175-.265.

Fourth, Defendant's argument that Plaintiff's contract claim must be dismissed similarly fails. Just because the terms of employment are mandated by statute, does not mean the employees do not have a contract of employment with the State. The statute does not say "you are hired" but merely says "if you are hired, then the terms of the employment will be as specified." Plaintiffs each have a signed agreement with their employer, NDOC, saying they will be paid overtime for hours worked in excess of 40 in a workweek, or 80 in a two-week period. The State of Nevada entered into this agreement with the employees pursuant to NRS 284.180(5)-(6). Defendant breached the signed agreements with correctional officers who work variable work schedules by not paying employees for all time worked, and failing to pay the time worked in excess of 80 hours in a two-week period, at a contractual rate specified in the agreement.

II. ARGUMENT

A. The Pre- And Post-Shift Activities Described In Plaintiffs' Complaint Are Compensable Under The FLSA

1. Plaintiffs' First Amended Complaint Alleges A Plethora of Pre- And Post- Shift Activities For Which Compensation Is Required

Defendant attacks Plaintiffs' FAC for failing to allege that the pre- and post-shift activities described therein are compensable under federal law. Plaintiffs have alleged that they (and all other similarly situated employees) were required to perform the following pre-shift activities:

- Report to the supervisor or sergeant on duty for roll-call/check-in;
- Receive assignments for the day;
- Pass a uniform inspection;
- Collect any and all tools needed for their daily assignments (*e.g.*, radios, keys, weapons, tear gas, hand cuffs);
- Proceed to their designated work station; and
- Receive debriefing from the outgoing correctional officer.

See ECF No. 95 ("FAC") at ¶¶13-50. At the end of their respective shift, Plaintiffs have alleged that they (and all other similarly situated employees) were required to perform the following post-shift activities:

- Debrief incoming correctional officer;
- Return to the main office; and
- Return the various tools attained for the day.

Id.

Only the activities alleged in the Complaint are the activities that must be examined under the current legal landscape of compensable work. Plaintiffs allege that they worked fulltime regular shifts (40 hours per workweek and/or 80 hours per work period) and that they performed the pre- and post-shift activities without compensation. *Id.* at ¶¶44-50. Plaintiffs also identified at least one workweek as an example where they worked over 40 hours in a workweek or over 80 hours in a work period and they were not paid wages for the pre- and post-shift activities. *Id.* (Walden alleges that he is owed $132.19 for the pay period between January 7, 2013 through January 20, 2013; Echeverria alleges that he is owed 132.19 for the pay period between September 30, 2013 through October 13, 2013; Dicus alleges that he is owed $119.10 for the pay period between January 16, 2017 through January 29, 2017; Everist alleges that he is owed 128.25 for the pay period between January 20 through February 2, 2014; Zufelt alleges that he is owed 123.75 for the pay period between March 26, 2017 through April 9, 2017; Redenour alleges that he is owed $189.00 for the pay period between November 26, 2012 through December 9, 2012;

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and Tracy alleges that he is owed $146.25 for the pay period between March 17, 2014 through March 30, 2014).[3]

2. The legal framework for determining compensable work under the FLSA.

The FLSA provides that a covered employee who "is employed for a workweek longer than forty hours" must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a); 29 U.S.C. § 203(g) ("Employ" is defined as "to suffer or permit to work."). The FLSA itself does not contain a definition of "workweek" or "work."

Congress amended the FLSA with passage of the Portal-to-Portal Act. 61 Stat. 84 (1947). The Portal-to- Portal Act "narrowed the coverage of the FLSA slightly by excepting two activities that had been treated as compensable under [prior Supreme Court] cases: [1] walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and [2] activities that are 'preliminary or postliminary' to that principal activity." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005) (quoting 29 U.S.C. § 254(a)). As with the FLSA, the Portal-to-Portal Act itself does not define "work." The Portal-to-Portal Act left unchanged the prior precedent relating to what constitutes "work" under the FLSA, *see IBP*, 546 U.S. at 28 ("[T]he Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek', or define the term 'workday.'"), which is defined as any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business[,]" *see Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

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[3] By alleging the total amount of money that Plaintiffs believe that they worked without compensation and identifying at least one workweek in which they did not receive overtime pay for which they were entitled, they have overcome the Court's perceived deficiencies and complied with the requirement set forth in *Landers v. Quality Commc'ns, Inc*., 771 F.3d 638 (9th Cir. 2014), as amended (Jan. 26, 2015), cert. denied, 135 S. Ct. 1845, 191 L. Ed. 2d 754 (2015). Defendant's continued argument to the contrary ignores the pleading requirement from *Landers* and the overwhelming facts that have been plead.

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3. There are many cases holding the "off the clock" time alleged in this complaint is compensable work under the FLSA despite the limitation of the Portal-to-Portal Act.

There are many reported "guard cases" under the FLSA or related statutes, all holding that the Portal to Portal Act does not preclude compensation for the activities alleged in this case. The case of *Baylor v. United States* specifically held that conduct identical to the conduct in this case was so integral to the performance of the principal activity that the situs of these activities is the place of performance, and the principal activity for which the employee was employed to perform has begun. *Baylor v. United States*, 198 Ct. Cl. 331, 337 (1972). Although *Baylor* was brought under the Federal Employees Pay Act (the FEPA), the Court performed its analysis under the Portal-to-Portal Act, and the United States Court of Claims held that the FEPA and the FLSA were in *pari materia*. *Agner v. United States*, 8 Cl.Ct. 635, 637 (1985). The activities involved were changing into uniforms, which were Government owned and could not be worn to or from the guard's home, uniform inspection before work, and picking up Government-owned firearms. This is consistent with a Comptroller General decision "To the Sec'y of the Treasury," which stated, because:

> … the guards were notified to report early for roll call for the purpose of receiving specific assignments and instructions and for the purpose of drawing badges, weapons, etc., our opinion is that they are entitled to overtime compensation under the principal enunciated in *Albright v. United States,* 161 Ct.Cl. 356 [1963], and *Baker v. United States*, 161 CT.CL. 356 [1963].

"To the Sec'y of the Treasury," 44 Comp. Gen. 195, 197 (Oct. 8, 1964).

Another example is the case of *Riggs v. United States*, which stated that by "convening a roll call and ordering plaintiffs to bring protective equipment, and by making roll call the occasion for passing on information which the Air Force apparently believes to be necessary for proper work performance, the Air Force is stating, in effect, that attendance at the roll call with protective equipment is a necessary, integral part of the day's principal activities." *Riggs v. United States*, 21 Cl. Ct. 664, 677 (1990). In *Whelan Security Co. v. United States*, the court was called upon to apply FLSA precedent in a case brought by a government contractor to recover liquidated damages assessed under the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40

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U.S.C. §§ 327–333 (1982). *Whelan Security Co. v. United States*, 7 Cl.Ct. 496 (1985). The company had been assessed for failing to pay for 15 minutes spent by guards picking up and then returning weapons and other equipment before and after their shifts. Citing *Baylor,* the court sustained the damages. *Id.* at 499–500. In *IBM v. United States* the court found that 30 minutes spent traveling between the place at which security guards picked up weapons and where they reported for duty was compensable time. *IBM v. United States*, 11 Cl.Ct. 588 (1987). And, in a recent case brought pursuant to the FLSA, the court found that certain activities of cook foremen were not preliminary or postliminary. *Amos v. U.S.,* 13 Cl.Ct. 442 (1987). These activities included picking up keys, a radio, and a body alarm as the foremen passed through a control room on their way to their work sites and later reversing this process. *Id*. at 44.

Unlike the postliminary security screenings considered by the Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk*, a correctional officer cannot do his or her job of controlling inmates and protecting others without performing these activities. Guards cannot safely and effectively control the inmate population nor protect themselves and others without the retrieval of keys, guns, tear gas, and handcuffs, which the employer mandates remain on site, and must be retrieved from a central location under strict inventory controls. Nor can these employees perform their assignments until they are told where and what positions for which they are assigned. These activities are "therefore integral and indispensable to the principal activities that an employee is employed to perform" because "it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. at 517.

In addition, the United States Department of Labor has already decided that each of the tasks alleged in the Complaint in this case are "an intrinsic element of" the principal activity of a correctional officer. For example, 29 C.F.R. § 553.221(b) specifically states that attending roll call by law enforcement personal (including correctional officers) is compensable time.[4] And as

[4] "Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes

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stated in *Guzman v. Laredo Sys., Inc*., time spent receiving instructions and picking up tools needed to perform the work assigned is compensable pursuant to 29 C.F.R. § 785.38.[5] *Guzman v. Laredo Sys., Inc*., No. 10 CV 1499, 2012 WL 5197792, at *4 (N.D. Ill. Oct. 19, 2012). There is no need to speculate whether these tasks are compensable because, except for the inspection of uniforms, all the tasks listed in the Complaint are covered by specific Department of Labor regulations.

The United States Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk* did not change the precedent in any of these cases.[6] In *Integrity*, the Supreme Court reaffirmed its prior holding in *Steiner v. Mitchell*, 350 U.S. 247, 252-253 (1956), that a preliminary and/or postliminary activity must be compensable if it is integral and indispensable to an employee's job. For the first time since *Steiner*, the Supreme Court defined those two terms:

> The word "integral" means "[b]elonging to or making up an integral whole; constituent, component; *spec*[*ifically*] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage." 5 Oxford English Dictionary 366 (1933) (OED); accord, Brief for United States as *Amicus Curiae* 20 (Brief for United States); see also Webster's New International Dictionary 1290 (2d ed. 1954) (Webster's Second) ("[e]ssential to completeness; constituent, as a part"). And, when used to describe a duty, "indispensable" means a duty "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected." 5 OED 219; accord, Brief for United States 19; see also Webster's Second 1267 ("[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory").

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all pre-shift and post-shift activities which are ***an integral part of the employee's principal activity or which are closely related to the performance of the principal activity***, ***such as attending roll call***, writing up and completing tickets or reports, and washing and re-racking fire hoses." (Emphasis supplied.)

[5] "Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to ***pick up and to carry tools***, the travel from the designated place to the work place is part of the day's work, and ***must be counted as hours worked***."

[6] Plaintiffs' counsel is very familiar with the Supreme Court's decision in *Busk*—Plaintiffs' counsel argued that case before the Ninth Circuit and the United States Supreme Court.

Busk, 135 S. Ct. at 517. The Supreme Court then held that "[a]n activity is therefore integral and indispensable to the principal activities that an employee is employed to perform ***if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities***." *Id.* (emphasis added). A prison guard cannot do his job safely or effectively without being issued weapons, without having received instructions, without being briefed by the prior shift, and then briefing the next shift on any activity that occurred during his or her shift, as well as all the other required pre- and post-shift activities alleged in the complaint.

Justice Sotomayor's concurrence provides further guidance as to the standard applied by the court. *Id.* at 519 ("I concur in the opinion, and write separately only to explain my understanding of the standard the Court applies."). In her concurrence, Justice Sotomayor states that a preliminary and/or postliminary activity is compensable if an employee cannot dispense with it without impairing her ability to perform the principal activity "safely or effectively":

> [T]he Court confirms that compensable "'principal'" activities "'includ[e] ... those closely related activities which are indispensable to [a principal activity's] performance,'" *ante,* at 518 (quoting 29 CFR § 790.8(c)(2013)), and holds that the required security screenings here were not "integral and indispensable" to another principal activity the employees were employed to perform, *ante,* at 518. I agree. As both Department of Labor regulations and our precedent make clear, an activity is "indispensable" to another, principal activity only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively. Thus, although a battery plant worker might, for example, perform his principal activities without donning proper protective gear, he could not do so safely, see *Steiner v. Mitchell,* 350 U.S. 247, 250–253, 76 S.Ct. 330, 100 L.Ed. 267 (1956); likewise, a butcher might be able to cut meat without having sharpened his knives, but he could not do so effectively, see *Mitchell v. King Packing Co.,* 350 U.S. 260, 262–263, 76 S.Ct. 337, 100 L.Ed. 282 (1956); accord, 29 CFR § 790.8(c). Here, by contrast, the security screenings were not "integral and indispensable" to the employees' other principal activities in this sense. The screenings may, as the Ninth Circuit observed below, have been in some way related to the work that the employees performed in the warehouse, see 713 F.3d 525, 531 (2013), but the employees could skip the screenings altogether without the ***safety or effectiveness*** of their principal activities being substantially impaired, see *ante,* at 518.

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Id. at 519-20 (emphasis added).

4. The pre- and post-shift activities described in Plaintiffs' Complaint are integral and indispensable to correctional officers' primary job responsibility.

Plaintiffs have sufficiently alleged in their FAC that the pre- and post-shift activities they were required to perform could not be ignored without affecting the safety or effectiveness of their principal activities of maintaining security at state correctional facilities. *See* FAC at ¶¶31-33, 36. Correctional officers are hired to protect the safety of the inmate population, their colleagues, fellow NDOC employees, and the general public. Each and every day, correctional officers go to work to guard the inmate population against themselves (*e.g.*, prevent disturbances) and guard against security breaches from the facility (*e.g.*, the quintessential "jail break"). While some correctional officers may be assigned to the watchtower over the exercise yard and others are assigned to the cafeteria, their primary job responsibilities remain the same—inmate and public safety. *See* FAC at ¶14. Correctional officers cannot dispense with these primary job responsibilities safely or effectively without performing the pre- and post-shift activities that are required by Defendant. *See* FAC at ¶¶19-22, 26-36.

As outlined above, Plaintiffs perform the following pre-shift activities prior to the start of their regularly scheduled shift (and prior to the point of receiving compensation for their work): Plaintiffs report to the supervisor or sergeant on duty for roll-call/check-in; receive their work assignments for the day; they must pass a uniform inspection; they then collect any and all tools/materials/gear that would be needed for their daily assignments (*e.g.*, radios, keys, weapons, tear gas, hand cuffs); they then walk to their designated work station; and lastly receive a debrief from the outgoing correctional officer about the current happenings at their assigned post. Whether taken as a whole or analyzed separately, each activity must be performed in order for Plaintiffs and other correctional officers to perform their primary job responsibilities safely and effectively as more further described in the following paragraphs.

Roll-Call/Check-In. Plaintiffs must report to the supervisor or sergeant on duty for roll-call/check-in to ascertain who is present and ready for work so that the supervisor or sergeant knows the facility will be adequately staffed. *See* FAC at ¶19. Importantly, the Department of

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Labor has consistently held that such time is compensable. Part 553 of the Department of Labor's regulations applies the FLSA to employees of state and local governments; subsection C of those regulations applies to law enforcement employees of public employees; and section 553.221 defines "compensable hours of work." Subsection (b) of Section 553.221 states:

> Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as ***attending roll call***, writing up and completing tickets or reports, and washing and re-racking fire hoses.

29 C.F.R. § 553.221(b) (emphasis added).

Attending roll call is one example of what the Department of Labor considers to be compensable work for law enforcement employees. Although not explained by the Department of Labor, the reason such time is compensable is fairly apparent; a law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need. This is precisely why Defendant requires its correctional officers to attend roll call/check-in upon passing through security prior to the start of their regularly scheduled shift. Defendant must know who is present for work and then assign each officer to address the greatest need for the day, whether it be the transport of an inmate or maintaining a lock down in a particular building.

Defendant minimizes the roll call procedure, asserts that Plaintiffs are not required to perform any duties pre-shift except to check their position on the [seniority] list and initial, signifying that they are aware of their position on the list that day, and argues that Plaintiffs reliance on Administrative Regulation 326 does not support a claim for compensation. For the most part, Defendant's argument in this respect are fact questions that cannot be decided on a motion to dismiss. As for now, the Parties are confined to the common understanding of "roll-call" in a law enforcement environment.

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In "Prison and Jail Administration: Practice and Theory," roll-call is described as a process of checking-in, receiving assignments, and getting debriefed on recent activity at the facility:

> Regardless of the facility or shift, most correctional officers' days begin at roll call. This often occurs approximately 15 minutes before officers can clock in and entails a general debriefing by the shift supervisor of anything that might have happened on the previous shift that warrants discussion: this can be the number of fights/injuries that have occurred, discovery of dangerous contraband, or incoming/outgoing inmate transfers. It is during roll call that officers will find out where they are working that day. Most facilities keep officers on fairly consistent weekly post assignments, but this is rarely definite and is influenced by the number of officers working overtime from other shifts and institutional need. Some officers serve in a relief capacity, filling in on regular posts on others' off-days, and are rarely assured of where they will be working during that shift until they look at the roster. Once roll call is concluded, officers can begin checking out the gear they require, usually from the institutional control center. Items that most officers carry include flashlights for cell searches and counts, handcuffs, oleoresin capsicum (OC) or "pepper spray" and personal radios for communication.

Christopher Newport University Peter M Carlson, Ph.D., Peter M. Carlson, Judith Simon Garrett, Ph.D, *Prison and Jail Administration: Practice and Theory*, p. 232 (3d ed. 2015). (Relevant portions are attached hereto as Exhibit A). This is consistent with Defendant's own job descriptions for correctional lieutenants and sergeants which describes "roll-call" as a process of assigning work. *See* http://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/ClassSpecs/13/13-310spc.pdf (last visited Apr. 12, 2015) (stating that correctional lieutenants and sergeants must "Assign work by conducting roll call (verifying attendance) at the beginning of each shift to ensure sufficient employees are available and authorize or recommend overtime when necessary by assessing institution/facility's need and availability of personnel to provide adequate security staffing."). The roll-call described in Plaintiffs complaint and supported by scholarly research (and Defendant's own job description) suggests that the process was much more involved than simply checking-in for work. Accordingly, based on the common understanding of a roll-call

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procedure, and the fact that the Department of Labor considers the time spent participating in such procedures to be compensable, Plaintiffs have adequately asserted a claim for relief.

Receiving Assignments. Upon reporting for duty, correctional officers are given instructions for the day, such as the current happenings at the facility and their assigned post for the day. *See* FAC at ¶¶19-20, 26-35. Receiving assignments, such as the current happenings of the facility and where the officer is to be stationed for the day, is compensable under the FLSA. *See, e.g.*, *Dole v. Enduro Plumbing, Inc.*, 1990 WL 252270, at *5 (C.D. Cal. Oct. 16, 1990) ("[A]n employee is required to report to a designated meeting place (such as the shop in this case) to receive instructions before he proceeds to another work place (such as the jobsites in this case), the start of the workday is triggered at the designated meeting place, and subsequent travel is part of the day's work and must be counted as hours worked for purposes of the FLSA, regardless of contract, custom, or practice."). Indeed, a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job safely or effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike). The Department of Labor once again supports the position that receiving instructions prior to arriving at an officer's assigned post is compensable: "Where an employee is required to report at a meeting place ***to receive instructions*** or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice." 29 C.F.R. § 785.38 (emphasis added).

Retrieving Tools/Donning Gear. After receiving their assignments and instructions for the day, Plaintiffs must collect any and all tools/gear for their particular assignment. *See* FAC at ¶¶19-20, 26-30. Indeed, on some days plaintiffs need to transport an inmate so they need to check out handcuffs while on other days they are going to a post that requires that they carry tear gas. Without these tools or this gear, correctional officers will not be able to perform their jobs safely or effectively. They are necessary to protect their safety, the safety of their co-workers, the safety of the inmate, and, ultimately, the safety of the general public. The time it takes to retrieve

tools/gear to be used in carrying out an employee's primary job duties has always been considered compensable. *See Dole v. Enduro Plumbing, Inc.*, No. 88-7041-RMT (KX), 1990 WL 252270, at *5 (C.D. Cal. Oct. 16, 1990) ("The performance of other work at such a designated meeting place (even merely picking up needed tools or materials), as in this case, similarly triggers at the designated meeting place the start of the employee's workday, with the same effect on the subsequent travel[.]"); 29 C.F.R. § 785.38 ("Where an employee is required . . . to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.").

Despite the Portal-to-Portal Act, the Court in *Baylor v. United States* held the time spent by prison *guards* doing the same things alleged in this complaint was compensable time. *Baylor v. United States*, 198 Ct. Cl. 331, 357-58 (1972). *Baylor* reasoned "[i]n light of the foregoing, it is held that the pre-shift and post-shift activities performed by plaintiffs in this case constituted overtime 'hours of work' within the meaning of the Pay Act." *Id.* citing *Anderson v. Mt. Clements Pottery Co*., 328 U.S. 680 (1946). Just as alleged in this case, the court noted the following in the *Baylor* case:

> In substance and brief summary, the evidence shows that in order for the members of the guard force, including the plaintiffs who testified in this case, to comply with directives, rules, and regulations relating to preshift and postshift procedures, each guard normally and generally on each workday had to go, prior to the beginning of his scheduled shift, first to his assigned locker where he changed into his uniform, made himself presentable for inspection, and sometimes stood inspection; then, unless he obtained his gun on post, he had to proceed to a designated gun control point, variously located in the locker room, in an area adjacent or near thereto, or at a point on another floor of the same building or another building ranging from a short to a long distance away from the locker room, where he drew and signed for his weapon, and in some cases other equipment, and, if he had not already done so, to stand inspection; then he had to either walk or ride to his assigned post of duty, where he felt compelled by GSA directives and long standing custom or practice to report "a few minutes early," and familiarize himself with any special orders applicable to the post and any special instructions the guard being relieved had to pass on, and, if he had not already drawn his gun, to accept and check the one transferred to him by the guard going off duty. Then, after the end of his

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> scheduled shift, each guard had to follow, with some relatively minor deviations, substantially the same procedure in reverse.

Baylor, 198 Ct. Cl. At 352.

Travel To The Assigned Post After Roll-Call, Receiving Instructions, Passing Uniform Inspection, and Donning Gear. Defendant argues that the time spent walking from the muster area where Plaintiffs performed most of their uncompensated pre-shift activities to their assigned post is per se non-compensable under the Portal-to-Portal Act's travel time exemption. Defendant would be correct only if Plaintiffs had not performed any compensable activity prior the travel. As set out above, Plaintiffs have sufficiently alleged that they have performed numerous compensable activities prior to walking to their assigned post—attending roll call/check-in, receiving work assignments and instructions, passing a uniform inspection, and retrieving equipment/donning gear. *See* FAC at ¶¶19-20, 26-35. Travel time that occurs after an employee performs his or her first compensable activity and before his last compensable activity is compensable under the continuous workday doctrine. *IBP, Inc.*, 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded [from the travel exemption], and as a result is covered by the FLSA."). Accordingly, the time spent travelling to correctional officers' assigned post is compensable.

Pre-Shift Meeting With Outgoing Correctional Officer. Upon arriving at their assigned post, Plaintiffs then conduct a pre-shift meeting with the outgoing correctional officer to exchange information about the current happenings at the post. *See* FAC at ¶¶19-20, 26, 31-35. These meetings are essential to relay information so that correctional officers can adequately perform their jobs safely and effectively. Pre-shift meeting requirements, regardless of their length have consistently been deemed compensable. *See e.g., Brubach v. City of Albuquerque*, 893 F. Supp. 2d 1216, 1229 (D.N.M. 2012) ("[A] required in-person debriefing of a security officer beginning duty by the officer whose shift is ending constitutes time during which an employee is "on duty," 29 C.F.R. § 553.221(b), and that this briefing is an integral part of, and indispensable to the officers' principal activities, *see Steiner,* 350 U.S. at 254, 76 S.Ct. 330, of

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maintaining custody and control of, patrolling designated areas of, and ensuring the security of City property.").

Post Shift Activities. Plaintiffs have stated a valid claim of compensation for performing post-shift activities for many of the same reasons Plaintiffs pre-shift activities are compensable. Plaintiffs have alleged that following their regularly scheduled shift, they must debrief the incoming officer, walk back to the gatehouse area, and return all their gear prior to leaving work for the day. *See* FAC at ¶¶21-22, 36-37. Plaintiffs are not free to leave work until they have completed the last work activity—returning their gear—and thus the time spent performing all of the activities, including the walking time from the post to the gatehouse, is compensable under the continuous workday doctrine. *See IBP, Inc.*, 546 U.S. at 37. Failure to inform the incoming officer of current developments or not returning their gear (keys, radios, weapons, tear gas) would severely undermine the safety and effectiveness of other correctional officers and the entire correctional system. Plaintiffs have thus sufficiently alleged that these activities they perform after their regularly scheduled shift are integral and indispensable to their primary job duties of maintaining a safe and secure environment for inmates and the general public.

B. Plaintiffs' Straight Time Claim Under The FLSA Is Actionable In The Ninth Circuit

Defendant argues that Plaintiffs' First Cause of Action for minimum wages must be dismissed because Plaintiffs and putative class members made over the weekly minimum wages mandated by the FLSA. First off, Defendants misunderstand the theory of Plaintiffs' First Cause of Action. It is not a minimum wage claim. It is a straight time claim. But nevertheless, Defendant seems to be arguing that Plaintiffs cannot assert straight time claim under the FLSA based on a "gap time" theory. This argument is incorrect for the following reasons.

"Gap time," for FLSA purposes, "refers to time that is not covered by the overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the minimum wage provisions because, even though it is uncompensated, the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked." *Adair v. City of Kirkland*, 185 F.3d 1055, 1062, n. 6 (9th Cir. 1999). In this case there is no salary.

A salary is defined as a fixed amount paid for all hours worked. 29 C.F.R. 602(a). The employees in this case were paid hourly. Unlike a piece rate or a salary, there is no implication that the payment is for all time spent working. Plus, in this case, pre-shift work was done off the clock before the shift was officially commenced. There is no "gap" but a mere failure to include all hours worked.

And, even if this was a gap time case, which it is not, the gap time must be paid. "It is axiomatic, under the FLSA, that employers must pay employees for all 'hours worked.'" *Alvarez v. IBP, Inc.,* 339 F.3d 894, 902 (9th Cir. 2003). While the Ninth Circuit has not specifically addressed whether the FLSA permits gap time claims, the Ninth Circuit allowed such a claim in *Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th Cir. 1982), and numerous district courts rejected the use of gap time and the so-called "Klinghoffer" rule. *See Douglas v. Xerox Bus. Servs., LLC*, No. C12-1798-JCC, 2015 WL 10791972, at *7 (W.D. Wash. Dec. 1, 2015) (attached hereto as Exhibit B); *Gilmer v. Alameda-Contra Costa Transit Dist.*, C 08-05186 CW, 2011 WL 5242977 (N.D. Cal. Nov. 2, 2011). In *Douglas*, the district court rejected the notion that the Ninth Circuit had adopted the Klinghoffer rule. The court in *Douglas* recognized that the Ninth Circuit may have instead rejected such a rule: "And, in stating that 'it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA,' the Ninth Circuit may have functionally rejected the workweek average rule from *Klinghoffer.*" *Douglas,* at 2015 WL 10791972 at *5. The court in *Douglas* then rejected the gap time approach under *Klinghoffer*:

> First, *Klinghoffer* was a criminal case in which the Second Circuit reviewed jury convictions for violating the FLSA's minimum wage and overtime provisions. 285 F.2d 487, 489–90. In creating the weekly average rule, the Second Circuit did not examine the language of § 206 of the FLSA. (*Id.*) Nor did the Court acknowledge the broad construction afforded the FLSA as a remedial statute. *Biggs v. Wilson,* 1 F.3d 1537, 1539 (9th Cir.1993). Moreover, the very argument that *Klinghoffer* rejected, "that payments for certain hours in excess of the statutory minimum cannot be reallocated to make up for deficiencies in payments made for other hours during the week," is the essence of the Ninth Circuit's holding in *Ballaris. Klinghoffer,* 285 F.2d at

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> 493; *Ballaris,* 370 F.3d at 909–913. Finally, this Court agrees with the *Norceide* decision's rationale that "[w]hen Congress meant to use the word 'workweek' it did so. When it meant to use 'hour' that was the word it used." *Norceide,* 814 F.Supp.2d at 24.

Id. at *7. Ultimately, the court determined "that the appropriate measure for FLSA compliance is whether an employee is paid the minimum wage for every hour he or she worked."

Likewise, in *Gilmer*, plaintiffs argued that their damages calculation should "include compensation at their straight time rate of pay for unpaid travel time incurred before they had accrued forty hours in a given week, in those weeks when they are owed overtime damages for travel time incurred in excess of forty hours." 2011 WL 5242977, *14. Although such time neither exceeded the overtime limit nor violated the minimum wage provisions, and thus constituted gap time, the court permitted plaintiffs to recover for such time at their regular rate of pay. *Id.* The *Gilmer* court relied on the Ninth Circuit's holding in *Donovan*, explaining that:

> [In *Donovan*,] the defendant-appellants argued that the FLSA only permitted recovery for unpaid minimum wages or unpaid overtime wages, not underpaid wages resulting from a kickback scheme which failed to result in wages falling below the minimum wage. *Id*. However, the court reasoned that if the employer were permitted to reduce straight time pay during overtime weeks, "the employer could effectively eliminate the premium paid for overtime," undermining the policy goals of the FLSA's overtime provision.

Id. The *Gilmer* court found *Donovan*'s reasoning to be persuasive, and thus allowed plaintiffs' gap time claims to proceed. *Id*.

Importantly, the defendant in *Gilmer* also argued that the plaintiffs failed to plead for recovery of such amounts specifically in their complaint. The court rejected this argument, holding that, "*Donovan* does not require more specific pleading to recover for unpaid wages that do not amount to unpaid minimum or overtime wages, where recovery is contingent on a FLSA claim that has been alleged." *Id*.

Here, as in *Donovan* and *Gilmore*, Plaintiffs allege several FLSA violations in support of their claims, including failure to pay any wages for hours worked off-the-clock and failure to pay overtime wages. Even though Plaintiffs assert that most, if not all, of the uncompensated hours that were worked were overtime hours, Plaintiffs can still assert a claim for straight time wages

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in the event that a Plaintiff or putative class member did not work over 40 hours in a particular workweek and/or over 80 hours in a particular work period. Accordingly, Plaintiffs' straight time FLSA claim is proper and Defendant's Motion to Dismiss Plaintiffs' First Cause of Action should be denied.

C. The Nevada Constitution's Minimum Wage Amendment Does Not Exempt State Entities From Complying From Its Mandate

Defendant argues that state entities such as itself are exempt from complying with Nevada's constitutional minimum wage amendment. Despite defining an "employer" as any "entity" that may employ individuals, *see* Nev. Const. Art. 15 § 16, Defendant argues that by not including the term "governmental entity," it is not an "employer" under the constitutional amendment. *Id.* Such an interpretation violates commonly understood principals of constitutional construction.

The voters of the state of Nevada did not create a bifurcated standard by which governmental entities could pay less than their private enterprise peers. To the contrary, the clear and unambiguous text of the constitutional minimum wage amendment indicates that all entities are to be deemed "employers" and subject to the mandates contained therein. "The goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'" *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014), *reh'g denied* (Sept. 24, 2014) (quoting *Waymire,* 126 Nev. at ——, 235 P.3d at 608–09 (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed.2008 & Supp.2010))). "'To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.'" *Thomas*, 130 Nev. Adv. Op. 52, 327 P.3d at 522 (quoting *District of Columbia v. Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (interpreting the Second Amendment by seeking the original public understanding of the text, with majority and dissent disagreeing on content of public understanding)). "'The issue ought to be not what the legislature," or, in this case, the

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voting public, "meant to say, but what it succeeded in saying.'" *Thomas*, 130 Nev. Adv. Op. 52, 327 P.3d at 522 (quoting Lon L. Fuller, *Anatomy of the Law* 18 (Greenwood Press 1976)).

The Nevada minimum wage amendment commands, "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits." Nev. Const. Art. 15 § 16(A). An "employer" is defined as "any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, ***or other entity*** that may employ individuals or enter into contracts of employment. Nev. Const. Art. 15 § 16(C) (emphasis added). An "employee" is defined as "any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." In other words, the only persons exempt from the constitutional minimum wage requirements are those under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days.

Defendant argues that the phrase "other entity" does not include "governmental entities"; it contends that "other entity" only covers those entities in private enterprise. It does so primarily on the grounds that Nevada already has a statutory scheme for compensation and wages in the Nevada Revised Statutes, Chapter 284. A clone of this same argument was raised by the taxi cab company in *Thomas v. Nevada Yellow Cab Corp.*, and squarely rejected by the Nevada Supreme Court. In *Thomas*, the cab company argued that they were not subject to Nevada's minimum wage requirements because there was a statutory scheme contained in the Nevada Revised Statutes, Chapter 608, that exempted taxi drivers from the minimum wage. *Id.* The Nevada Supreme Court held that taxi drivers were not exempt under constitutional minimum wage amendment and declared that the minimum wage superseded and supplanted the exemption contained in the Nevada Revised Statutes.

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The same fate suffered by the taxi cab company must befall Defendant's argument. Even though NRS Chapter 284 governs state employees' wages and compensation (as Chapter 608 governs private employees' wages and compensation), the constitutional amendment clearly includes a state entity as an employer and subjects the amendment's mandate. The constitutional amendment exceeded many statutory provisions for wages and compensation. The voters of Nevada clearly desired more comprehensive minimum wage protections. Defendant may not skirt from paying its employees at least the minimum wage for performing compensable work activities.[7]

D. There Is No Administrative Exhaustion Requirement To Sue For Unpaid Compensation Under NRS 284.175-.265

Defendant contends that there is an administrative exhaustion requirement to submit a "grievance" for the failure to pay overtime pursuant to NRS 284.180. This is incorrect. Plaintiffs have not submitted a grievance nor are they required to do so. They have instituted a direct action against the employing authority—NDOC—which the plain text of the statutory authority allows them to do.

The "Compensation" provisions contained in NRS Chapter 284 are found at NRS 284.175-.265 and there is an express private right of action to sue for "the amount due" pursuant

[7] Defendant also argues that (1) it is not subject to the constitutional minimum wage requirement because it does not enter into contracts of employment with its correctional officers and (2) the minimum wage amendment's reference to collective bargaining indicates that the provision was limited to private employment. Both of these arguments are unavailing.

First, the ability to enter into contracts is not the test for determining an "employer" under the amendment. The test for employer status is whether an entity "employ[s] individuals" ***or*** "enter[s] into contracts of employment", in the disjunctive. Nev. Const. Art. 15 § 16(C). Thus, regardless of whether Defendant can enter into contracts of employment (which Plaintiffs dispute), an employer is any entity that "may employ individuals." Defendant cannot dispute that it employs Plaintiffs and all correctional officers.

Second, a lone reference to a waiver under a collective bargaining agreement does not support Defendant's drastic reading of the amendment. To be clear, the amendment first states that an individual and an employer (which is defined as any "entity") cannot waive the rights under the amendment. The only waiver of rights is allowed pursuant to a collective bargaining agreement. Since Defendant admits that state employees do not have collective bargaining rights, Defendant is unable to skirt liability under this constitutional provision.

to violations of NRS 284.180. NRS 284.195 provides as follows: "Any person employed or appointed contrary to the provisions of this chapter and the rules and regulations thereunder whose payroll or account is refused certification **shall have an action against the appointing authority employing or appointing or attempting to employ or appoint the person for the amount due by reason of such employment or purported employment, and the costs of such action**." Emphasis added. This provision provides for a direct private right of action to enforce the overtime provisions contained in NRS 284.180. Accordingly, Defendant's motion to dismiss Plaintiffs' Fourth Cause of Action must be denied.

E. Plaintiffs Have Adequately Alleged That Defendant Has Breached Its Agreement To Pay Overtime Pay For All Hours Worked Over Plaintiffs' Variable Work Schedule Agreement

Plaintiffs' breach of contract claim is premised upon the determination that the pre- and post-shift work is compensable under federal and state law. Defendant enters into signed agreements with correctional officers to work variable work schedules pursuant NRS 284.180(5)-(6). Those signed agreements provided that correctional officers would be compensated overtime when they worked over 40 hours in a workweek or over 80 hours in a biweekly pay period, depending on the variable work scheduled the employee chose. If Plaintiffs are ultimately successful in proving that they should have been paid for the pre- and post-shift work they performed during their employment with Defendant, they will have a cognizant breach of contract claim against Defendant pursuant to these agreements. Accordingly, Defendants' motion to dismiss Plaintiffs' breach of contract claim should be denied.

CONCLUSION

Based on the aforementioned, Defendant's Motion to Dismiss should be denied in its entirety.

Dated: June 5, 2017

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS NEVADA DEPARTMENT OF CORRECTIONS, and DOES 1-50,

Defendants.

Case No.: 3:14-cv-00320-MMD-WGC

PLAINTIFFS' OPPOSITION TO DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS

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I. INTRODUCTION

Defendant The State of Nevada, Ex Rel. Its Nevada Department of Corrections ("Defendants" or "NDOC") puts forth two (2) remarkably incorrect propositions—one legal and one factual—in its Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims ("Cross Motion for Summary Judgment"). First, with respect to its incorrect legal proposition, NDOC asserts that an employer does not have to compensate its employees unless employees affirmatively seek payment, despite employer knowledge that uncompensated work is being performed. In doing so, it cites to the seminal Ninth Circuit case of *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981), as support. *Forrester* does not support NDOC's argument. To the contrary, *Forrester* fully supports Plaintiffs position:

> [A]n employer who ***knows or should have known*** that an employee is or was working overtime must comply with the provisions of § 207. ***An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.***

Forrester v. Roth's I. G. A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981) (emphasis added). The Ninth Circuit's plain language in *Forrester* specifically states that an employer can only skirt FLSA liability if it did not have any knowledge (actual or constructive) that an employee was working without compensation. *Id.*

NDOC's faulty legal premise leads, in turn, to its second incorrect proposition—*i.e.*, that NDOC did not know that Plaintiffs and all other Opt-Ins were working without compensation. As set forth in Plaintiffs' Motion for Partial Summary Judgment on Liability for Unpaid Wages under the FLSA ("Motion for Partial Summary Judgment") (*see* ECF No. 256), not only did NDOC know that COs were performing work without compensation, NDOC created a series of written policies and procedures that required COs to perform work activities before and after their paid shifts. As this Court is well aware, COs are compensated on a shift basis; they are expected to be at their assigned post at the beginning of their shift until the end of their shift; but COs are not compensated for the pre- and post-shift activities that they perform outside of their regularly scheduled shift. As Plaintiffs set forth in their briefing on their Motion for Partial Summary

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Judgment, and repeated again in this Opposition below, COs were instructed to ***not*** seek payment for the pre- and post-shift activities.

The Tenth Circuit recently rejected the exact same argument in a virtually identical case to the one presented here. *See Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020) (attached hereto as Exhibit A). In *Aguilar*, the employer (MTC) argued that the prison guards should not receive compensation for the pre and post shift activities because they did not affirmatively request to be paid for that time and, as a result, it contended that it did not know that the officers were performing work. The Tenth Circuit resoundingly rejected this argument:

> MTC *requires* both the security screening and the passdown briefing. ***It cannot simultaneously require an activity and claim to be unaware that employees are engaging in that activity.*** Further, it is undisputed that MTC often has supervisors conduct the preshift briefing; knows the officers check out keys and equipment because the officers use the inventory-control procedures; and knows they walk to and from their posts because they show up for work.
>
> In sum, MTC pays the officers for the eight hours they are at their posts. But it knows that the officers are working outside those eight hours, on their way to and from post. And MTC "cannot stand idly by and allow [the officers] to perform overtime work without proper compensation, even if" the officers did not claim overtime compensation using the time-adjustment forms or sign acknowledgment forms. *Fairchild* , 815 F.3d at 964 (quoting *Harvill* , 433 F.3d at 441). We therefore reject MTC's contention that it did not "suffer or permit" the officers' work on their way to and from their posts. § 203(g).

Id. at 1287.

As the Tenth Circuit recognized in *Aguilar*, the FLSA does not permit a "bury your head in the sand" defense. Here, NDOC created and enforced the very policies and procedures that forced COs to work without compensation pre- and post-shift. Overwhelming evidence clearly establishes that NDOC knew that COs were working without compensation and actively prevented COs from seeking to be paid for this time. NDOC's attempt to shift the burden of the payment of wages for work performed from itself and blaming COs for not requesting overtime is as disheartening as it is disingenuous. Furthermore, NDOC's attempt to limit CO damages to

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the general 2-year statutory period, as opposed to the 3-year period, should be rejected as being premature (the question of whether NDOC's conduct violating the FLSA was "willful" should be left for trial) and not supported by the overwhelming evidence that NDOC has intentionally failed to comply with its obligations under the FLSA. The same is true for its attempt to avoid liquidated damages. Liquidated damages are presumed unless NDOC an demonstrate some sort of good faith defense to policy of not compensating COs for the pre and post shift activities at issue here. NDOC's refusal to inquire into the legality of its wage-hour policies, and continued refusal to change these unlawful practices, is not legally sufficient to avoid the imposition of liquidated damages. For these reasons and for the reasons set forth more fully below, NDOC's Cross Motion for Summary Judgment should be denied and Plaintiffs' Motion for Summary Judgment should be granted.

II. RELEVANT PROCEDURAL HISTORY

On May 12, 2014, Plaintiffs filed their complaint against NDOC in the First Judicial District for the State of Nevada, for alleged unpaid wages on behalf of themselves and similarly situated individuals under the FLSA and Nevada law including four causes of action. (ECF No. 1 at 7-21.) Plaintiffs alleged that NDOC required correctional officers and other non-exempt employees to perform work activities without compensation. *Id.* Plaintiffs alleged that NDOC failed to: (1) pay wages for all hours worked in violation of 29 U.S.C. § 201, et seq.; (2) pay overtime in violation of 29 U.S.C. § 207; (3) pay minimum wages in violation of the Nevada Constitution; and, (4) comply with the terms of its contract with Plaintiffs to pay an agreed upon hourly wage for all hours worked.

NDOC removed the action to federal court and filed an answer on June 24, 2014 (ECF Nos. 1, 3). Plaintiffs filed their motion for conditional certification under § 216(b) of the FLSA on August 6, 2014, (ECF No. 7), which this Court granted on March 16, 2015 (ECF No. 45). Out of a total potential Opt-In Class of Three Thousand and Seventy-Five (3,075) potential class members, five-hundred and forty-two (542) similarly situated persons joined the FLSA portion of this action after the initial mailing. (ECF No. 95 at ¶52 fn. 2.). Since the initial mailing of the

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FLSA Notice, an additional 182 similarly situated employees have attempted to join in this action. ECF Nos. 217, 225, 226, 228, 229, 231-239, 244-246, 248, 250, 252, 262, 263, 267, 268. As of the filing of this brief, Defendant has refused and continues to refuse to change its employment policies and practices of not compensating COs for work performed before and after arriving at their post.

This Court has already held that the facts asserted in Plaintiffs' complaint plausibly allege a claim for unpaid wages under the FLSA. *See* ECF No. 166. In doing so, the Court concluded that activities such as reporting for duty, receiving assignments, and passing a uniform inspection (these activities are also collectively known as "muster"), were compensable work activities, stating:

> As to the purported requisite preliminary activities of check-in and receipt of assignments, "a law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need." (ECF No. 105 at 12.) Moreover, "a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike)." (ECF No. 105 at 14.) The activities of check-in and receipt of assignments are therefore necessary to perform the officer's principal duties of safeguarding the prison during his shift.
>
> . . .
>
> As to the preliminary activity of uniform inspection, the FAC contends that "if [a correctional officer's] uniform was not up to standards" then the officer "could not proceed to their post[]." (ECF No. 95 at ¶ 31(b).) Defendant argues that because a uniform can be put on at home, this activity is not compensable under FLSA. (ECF No. 112 at 7 (citing *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094, 1100 (9th Cir. 2015)).) However, Plaintiffs do not contend that it is putting on a uniform at work that is compensable; rather, they state that uniform inspection by an officer's shift supervisor is a component of "muster" and is therefore compensable because it is required. (See ECF No. 95 at ¶ 31(b).) While the time spent by a supervisor visually inspecting an officer's uniform may itself be de minimus, it is a purported component of "muster" and therefore part of a continuous workday activity that is integral to the

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> officer's principal duty of ensuring the safety of the prison and monitoring its inmates.

Id. at pp. 12-13.

The Court further concluded that retrieving tools and gear was also compensable:

> As to the preliminary activity of retrieving tools and gear, correctional officers need specific items in order to perform assigned duties, for instance, handcuffs to transport inmates or tear gas to quell a potential riot. (See ECF No. 105 at 14.) Retrieving tools and gear, as described in the FAC (ECF No. 95 at ¶ 32), is distinguishable from the example Defendant identifies in its motion of "polishing shoes, boots and duty belts, cleaning radios and traffics vests, and oiling handcuffs." (ECF No. 99 at 15 (citing *Musticchi v. City of Little Rock, Ark.*, 734 F. Supp. 2d 621, 630-32 (E.D. Ark. 2010)).) As alleged, Plaintiffs are not cleaning gear; they are retrieving gear that is "necessary and required to complete their daily job tasks"—tasks which they are informed of only once they arrive at the prison and receive a work assignment from their supervisor. (See ECF No. 95 at ¶ 32.) As alleged, this activity is therefore indispensable to the officer's principal duties.

Id. at 13.

The Court stated that since the muster activities and retrieval of tools/gear was compensable, walking to the assigned post was also a compensable work activity under the continuous workday doctrine:

> As to the preliminary activity of walking from check-in, receipt of assignment, and tool collection to an officer's assigned post for the day, this activity is compensable under the "continuous workday doctrine." *See IBP, Inc.*, 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded [from the Portal-to-Portal Act's travel exemption], and as a result is covered by FLSA.").

Id. at 14.

Lastly, the Court concluded that the post-shift activities of the CO briefing and returning of tools/gear were also compensable work activities:

> As to the postliminary activity of outgoing correctional officers briefing incoming officers, this is similarly necessary to the safety and security of the prison, and is an integral part of the officers' principal duties. (ECF No.

> 106 at 16-17.) Finally, as to the postliminary activities of walking back to and returning any tools or gear taken by an officer, the allegations in the FAC permit the Court to reasonably infer that Plaintiffs were not allowed to take these tools and gear home with them and so were required to return them. As Plaintiffs are purportedly required to take these tools and gear before starting their shifts in order to perform their assigned duties, the postliminary activity of returning tools or gear is also indispensable to their principal duties during their shifts.

Id.

In its Order, the Court concluded that Plaintiffs had alleged sufficient facts to support a claim under the FLSA. Plaintiffs have since filed a Motion for Partial Summary Judgment on Liability for Unpaid Wages under the FLSA because all the facts asserted in Plaintiffs' complaint have been backed up by the evidence obtained in this case. *See* ECF No. 256.

NDOC opposed Plaintiffs' Motion for Partial Summary Judgment without contradicting any of the undisputed facts that Plaintiffs put forth. *See* ECF No. 272. As a result, all of the undisputed facts asserted in Plaintiffs' Motion for Partial Summary Judgment must be accepted as true for the purposes of deciding that motion as well as the instant Cross Motion for Summary Judgement. *See* ECF No. 292. NDOC's main argument for opposing Plaintiffs' Motion for Partial Summary Judgment is the same as the issue presented in this Cross Motion. *See* ECF No. 272, pp. 21-24.

III. ISSUE PRESENTED BY NDOC'S CROSS MOTION FOR SUMMARY JUDGMENT

Whether NDOC has met its burden of proof that there is no genuine issue of material fact that NDOC had no actual or constructive knowledge that pre/post-shift work was being performed by COs without compensation.

IV. ANSWER TO ISSUE PRESENTED BY NDOC'S CROSS MOTION FOR SUMMARY JUDGMENT

The actual evidence submitted in support of Plaintiffs' Motion for Partial Summary Judgment (ECF Nos. 256, 292), and in opposition to the instant Cross Motion for Summary Judgment, proves that NDOC had actual and/or constructive knowledge of COs performing

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pre/post-shift work without compensation because: (1) NDOC created the policies that rendered pre- and post-shift work necessary, (2) NDOC required COs to be at their assigned post at the beginning of their shift and stay until the end of their shift, (3) NDOC compensated COs on a shift basis, and (4) NDOC received repeated complaints from COs to be paid for the pre/post-shift work at issue in this Action and repeatedly rejected those complaints.

V. PLAINTIFFS DISPUTE NDOC'S "STATEMENT OF UNDISPUTED FACTS"

Plaintiffs dispute NDOC's "Statement of Undisputed Facts"[1] as follows:

NDOC's "Undisputed Facts"	**Plaintiffs' Response**
1. The State of Nevada has a comprehensive regulatory and administrative system in place for overtime and overtime alternatives at NDOC.	Disputed. NDOC does not have a comprehensive regulatory and administrative system in place for overtime and overtime alternatives if the overtime being requested is for pre- and/or post-shift work. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
2. The overarching principle guiding the use of overtime within NDOC is for Wardens and Facility Managers "to ensure there is sufficient staff on duty to safely operate their institutions and facilities." [citation]. Thus, the safety of the public, the inmates, and Corrections employees drives overtime decisions.	Undisputed.
3. One of the essential functions of the Correctional Officer position is that "Extended hours may be required on short notice."	Undisputed.
4. Every Corrections employee, including each Plaintiff, is required to sign an acknowledgment that one of the essential functions of their position is that "Extended hours may be required on short notice."	Undisputed.
5. "Overtime must be authorized by the Director, appropriate Deputy Director, Division Head, Warden, or their designees."	Undisputed. This undisputed policy, along with the undisputed policies that COs are (1) compensated on a shift basis and (2) expected to be at their assigned post during their paid

[1] NDOC's list of "Undisputed Facts" can be found on pages 2-12 at ECF No. 283.

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	shift, renders the pre and post shift activities at issue here non-compensable.
6. Each Plaintiff is responsible for truthfully reporting the time they work, including all overtime. Specifically, "an employee shall provide an accurate accounting of the hours worked and leave used during a pay period in the NEATS Timekeeping System ("NEATS"), to include the specific times at which their shift starts and ends and regular days off."	Undisputed. A representative sample of Plaintiffs and Opt-Ins have attempted to include the pre- and post-shift activities at issue in this Action on numerous occasions in the past and have been repeatedly instructed that the pre- and post-shift activities at issue in this Action are not compensable and are not to be reported as time worked for overtime or any other sort of compensation (i.e., compensatory time off). *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
7. NDOC'S pay reporting is an "exception" reporting system. NEATS assumes that an employee has worked all hours in their scheduled shift, unless the employee has reported an exception. "Requests for Overtime must be submitted and approved on the Authorization for Leave and Overtime Request Form DOC-1000 or in NEATS as directed by the Human Resource Administrator."	Undisputed. It is further undisputed that the pre- and post-shift activities at issue in this Action are not included in "all hours in [a CO's] scheduled shift." *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
8. If there is an exception because of overtime for a non-exempt employee, that employee "must document this time on an Authorization for Leave and Overtime Request form (DOC-1000)."	Undisputed. A representative sample of Plaintiffs and Opt-Ins have attempted to include the pre- and post-shift activities at issue in this Action on numerous occasions in the past and have been repeatedly instructed that the pre- and post-shift activities at issue in this Action are not compensable and are not to be reported as time worked for overtime or any other sort of compensation (i.e., compensatory time off). *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
9. Employee exceptions are reported on timesheets, which the employee is required to input and submit into NEATS "at the conclusion of each reporting cycle (pay period) no later than 12 PM, Wednesday, of the non-pay week for each pay period."	Undisputed.

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10. Employees are subject to discipline under A.R. 339 if they falsify their timesheets.	Undisputed.
11. Eligibility for overtime for a particular shift depends on whether the employee has opted to work a standard workweek or a variable (innovative) work schedule using either a 40-hour or 80-hour variable.	Disputed. Whether an employee has opted to work a standard workweek or a variable workweek has no impact on whether an employee is eligible for overtime "at the conclusion of each reporting cycle." Because all COs are full time employees, so long as COs worked their full schedule, any additional work will be considered as overtime hours regardless of what work schedule the CO chooses. All COs ae eligible for overtime whenever they work excess hours in a particular shift ***unless*** they have asked for an exception to be paid less than their regular schedule because of an absence, sickness, etc.
12. Employees who work a standard workweek are eligible for overtime if they work more than eight hours in one calendar day.	Disputed, as applied to this Cross Motion and the remaining claims in this litigation. COs are not eligible for daily overtime under the FLSA.
13. Employees working a variable (or innovative) work schedule "do not accrue overtime until either (1) they have worked the 41st hour if they signed a 40-hour variable agreement or (2) they have worked the 81st hour, if they have signed the 80-hour variable agreement."	Undisputed.
14. Overtime eligibility also can depend on whether a particular employee has elected to accrue up to 120 hours of compensatory time off in lieu of a cash payment pursuant to 29 C.F.R. § 553.23.	Disputed. Overtime eligibility does not depend on whether an employee has elected to receive a cash payment or compensatory time in lieu of a cash payment. All COs are eligible for overtime credits at 1 ½ times their regular hourly rate of pay for all hours worked in excess of 40 hours in a workweek or 80 hours in a bi-weekly period in the form of either a cash payment or compensatory time off. *See* 29 C.F.R. § 553.23. Furthermore, a claim for unpaid compensation time off in lieu of cash is just as actionable under the FLSA as a claim

	for unpaid compensation in the form of cash payments.
15. Exhibit N demonstrates the many variations in work schedule and compensatory time choices among just the seven named Plaintiffs: [chart]	Undisputed.
16. Although all seven named Plaintiffs worked a variable (innovative) schedule, just two, Plaintiffs Dicus and Zufelt, used the same type of variable work schedule throughout their employment; the remaining five named Plaintiffs (Echeverria, Everist, Ridenour, Tracy, and Walden) switched between the 40-variable and 80-variable schedules multiple times.	Undisputed.
17. Three of the named Plaintiffs (Dicus, Ridenour, and Walden) opted to receive compensatory time throughout their employment and three (Echeverria, Everist, and Tracy) switched between the options one or more times. Only one named Plaintiff (Zufelt) opted not to participate.	Undisputed.
18. Even if claimed time is compensable, Plaintiffs may not be entitled to any overtime payments depending on their work schedule arrangement.	Disputed. Whether an employee has opted to work a standard workweek or a variable workweek has no impact on whether an employee is eligible for overtime "at the conclusion of each reporting cycle." Because all COs are full time employees, so long as COs worked their full schedule, any additional work will be considered as overtime hours regardless of what work schedule the CO chooses. Nevertheless, this is a question of damages that is not before the Court in this motion or in Plaintiffs' Motion for Partial Summary Judgment.
19. Each one of the Plaintiffs has acknowledged on multiple occasions that they received, read, and understood these procedures for when they are eligible for overtime and how to report it.	Undisputed. COs acknowledge that NDOC's policies and procedures prohibit them from reporting the pre- and/or post-shift activities at issue in this Action as overtime. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.

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20. At the time of hire, a New Employee Checklist was completed for each Plaintiff to include going over the Administrative Regulations.	Undisputed. AR 326 requires that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime."
21. Plaintiffs initialed that they had received and reviewed the State of Nevada Employee Handbook, which includes a summary of the policy requiring accurate reporting of all hours and overtime worked.	Undisputed.
22. Although NDOC has no records indicating that two of the named Plaintiffs, Walden and Zufelt, initialed receiving and reviewing the Handbook, all of the Plaintiffs including Walden and Zufelt acknowledged receiving, reviewing and understanding NDOC's overtime requirements and procedures through other documents.	Undisputed.
23. On one or more occasions, Plaintiffs signed and dated an Administrative Regulations Acknowledgment in which they acknowledged, "It is my responsibility to read and familiarize myself" with regulations including A.R. 320 and A.R. 339.	Undisputed.
24. Throughout their employment, on multiple occasions, each Plaintiff signed and dated the Employee Work Performance Standards Form for their position including Element #3, which provides that they "Have proficient knowledge of A.R.'s, I.P.'s and Administrative Directives."	Undisputed.
25. Every time each of the Plaintiffs received their written appraisal, they again acknowledged and were rated on whether they had proficient knowledge of the Administrative Regulations, including those pertaining to accurately reporting overtime.	Undisputed.
26. Plaintiffs who opt into the program receive compensatory time, or "comp time," in lieu of overtime wages.	Undisputed.
27. Compensatory time works both ways. When employees leave early, they do not notate that on their time report and are still paid for their full shift.	Disputed. Compensatory time has nothing to do with whether an employee leaves early.

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	Compensatory time is a concept for the payment of overtime hours in the form of time off versus the actual payment of cash. NDOC appears to be asserting here that NDOC's timekeeping policy of paying shift pay unless an exception is reported means that an employee would be paid for their full shift unless they report otherwise on their time report. This statement, as amended by Plaintiffs, would be undisputed. It is also true that based on NDOC's timekeeping policy of paying shift pay unless an exception is reported means that an employee would not be compensated for work performed outside of the regularly scheduled shift—for pre- and post-shift activities, for instance—unless they report otherwise on their time report.
28. Supervisors rely upon employees to tell them the amount of comp time to which they believe they are entitled for working longer than their scheduled shift. Paul Kluever's supervisors took him at his word on his "guesstimate" of how much comp time he was owed.	Undisputed. NDOC relies on exception reporting, which means that an employee will only be compensated above (or below) his or her normally scheduled shift if he or she reports an exceptions. Here, COs were not permitted to ask for compensation via exception reporting for the pre- and post-shift activities at issue in this Action. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
29. Jason Hanski explained, "…. There have been times where I was relieved late and maybe 15 to 20 minutes late and talked to my supervisor directly. Now, when I say this, this is something that happened a few good years ago, and the supervisor would say, oh, okay, I'll tell you what … I'll let you	Undisputed. However, Hanski further testified that it was NDOC's policy to deny overtime for the pre- and post-shift activities at issue in this Action: "You would get denied for that if you put in for that." *See Compendium of CO Deposition Testimony*, Hanski Dep. at 122:21-123:8.[2]

[2] As of January 31, 2018, NDOC has requested that all deposition testimony be marked "Confidential." Accordingly and pursuant to the Court's Protective Order, these documents have not been submitted to the Court at this time. The party seeking to maintain the confidentiality of the document—i.e., NDOC—must seek an order to seal this document. *See* ECF No. 73, at ¶ 11 (a). Plaintiffs will file these documents, either under seal or in open court, once this Court rules on NDOC's motion it file under

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go 15 or 20 minutes early in exchange for that."	
30. Nearly all of the Plaintiffs took advantage of overtime opportunities. Payroll data for 563 NDOC employees for the period of 12/31/2007 to 2/15/2016 was analyzed and compared with timekeeping data entered into NEATS. "Of the 555 Correctional Officers in the data, 529 or over 95% recorded some overtime totaling 125,726.9 hours."	Undisputed. Plaintiffs would file an exception for overtime when they were required to be on post past their regularly scheduled shift; however, Plaintiffs were not paid for pre- and post-shift work activities at issue in this Action.
31. According to that analysis, "the average total Overtime hours recorded was 226.5 hours," with the top three officers each reporting more than 2200 hours. [Id.] The average total dollars paid in overtime was $7,746. [Id. at ¶ 33.] "Across all [Correction Officer] periods, overtime was recorded on 10,904 of the 51,959 pay periods or 21.0%." [Id. at ¶ 34.] Every NDOC facility paid overtime. [Id. at ¶ 36.] The reasons for the overtime varied considerably between facilities and employees.	Undisputed. Overtime was paid to COs when they were required to be on post past their regularly scheduled shift; however, Plaintiffs were not paid for pre- and post-shift work activities at issue in this Action. If NDOC had paid Overtime to Plaintiffs and Opt-Ins then it should have reported overtime on 100% of the shifts and 100% of the pay periods. The fact that overtime is not reported on 100% of the pay periods, based on NDOC's records, further demonstrates that COs were not compensated for the pre and post shift work activities at issue in this Action.
32. All seven of the named Plaintiffs were paid overtime, as shown by each Plaintiff's Employee Paycheck Analysis.	Undisputed.
33. All of the opt-in Plaintiffs who were deposed likewise were paid overtime. When they complied with A.R. 320.01(2) by submitting an Authorization for Leave and Overtime Request Form ("Form DOC-1000"), their requests were approved and they were paid for that overtime.	Undisputed. However, a representative sample of Plaintiffs and Opt-Ins have attempted to include the pre- and post-shift activities at issue in this Action on numerous occasions in the past and have been repeatedly instructed that the pre and post shift activities at issue in this Action are not compensable and are not to be reported as time worked for overtime or any other sort of compensation (i.e., compensatory time off). *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.

seal (ECF No. 135). *See Id.* ("The confidential material will not be filed until after the Court has ruled on the party's Motion to File Documents Under Seal.")

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34. For example, on May 20, 2014, Plaintiff Echeverria completed a Form DOC-1000 requesting one quarter hour of leave after he apparently worked 15 minutes past his scheduled shift ending at 1:00 p.m. His request for overtime was approved.	Undisputed. However, he would not be approved for overtime for the pre- and/or post-shift activities at issue in this Action. *See Compendium of CO Deposition Testimony,* Echeverria Dep. at 41:14-42:25.
35. Similarly, "Plaintiff Walden received 15 minutes of Overtime on November 26, 2010 and the timesheet note associated with the entry was 'HOLIDAY WORKED 15 MINUTES OF OVERTIME FOR BEING RELIEVED LATE.'"	Undisputed. However, he would not be approved for overtime for the pre- and/or post-shift activities at issue in this Action and complained about it for years: Q. That would be part of it, but I'm really asking you -- we are talking about activities which you claim that you do before your scheduled shift that you should be compensated for. So I'm asking you, have you ever made any request for overtime related to those activities that you did before your shift? A. Oh, absolutely. We complained about it for years. *See Compendium of CO Deposition Testimony,* Walden at Dep. at 43:21-44:04.
36. Likewise, Plaintiffs Everist, Ridenour, and Tracy were approved for multiple instances of overtime after submitting their Form DOC-1000s.	Undisputed. However, they would not be approved for overtime for the pre- and/or post-shift activities at issue in this Action. *See Compendium of CO Deposition Testimony,* Everist Dep at 48:25-49:3; Ridenour Dep. at 35:6-35:10; Tracy Dep. at 47:19-48:03; 55:05-11.
37. What is particularly notable about the NEATS data is that over ten percent of the segments recorded by Correctional Officers represented "time at or below an hour in duration," showing that even overtime of short duration was recorded.	Undisputed. Overtime may have been paid to COs when they were required to be ***on post*** past their regularly scheduled shift; however, Plaintiffs were not paid for pre- and/or post-shift activities at issue in this Action. If NDOC had paid Overtime to Plaintiffs and Opt-Ins then it should have reported overtime at "time at or below an hour in duration" on

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	100% of the shifts worked. The fact that overtime is not reported on 100% of the pay periods, based on NDOC's records, further demonstrates that COs were not compensated for the pre and post shift work activities at issue in this Action.
38. Supervisors prepare some overtime requests for Plaintiffs as part of their reports, such as when Corrections Officers have to respond to security incidents that extend their shift.	Undisputed.
39. Andre Natali testified, "And if you respond to [a security] incident everybody's name has to be taken down, whoever comes into the incident area, whoever leaves, what inmates were involved, the location, the time, and the place. All that stuff is put into reports. And generally I would come back to work that night and have one waiting for me. I didn't even have to request it….	Undisputed.
40. Plaintiffs consistently are paid overtime or given comp time when they request it.	Disputed. A representative sample of Plaintiffs and Opt-Ins have attempted to include the pre- and post-shift activities at issue in this Action on numerous occasions in the past and have been repeatedly instructed that the pre- and post-shift activities at issue in this Action are not compensable and are not to be reported as time worked for overtime or any other sort of compensation (i.e., compensatory time off). *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
41. Donald Riggs "always got paid for my time. Sometimes you were offered time off in lieu of being paid … I always got my overtime…. I would file the Doc 1000 and turn it in to my supervisor…. I have never seen a form that I turned in rejected."	Disputed. Riggs testified that he was not compensated for pre- and post-shift work: Q. You are seeking pre-shift activities; in other words, time spent before you got to your post for any particular day that you claim was compensable time that you weren't paid for, right? A. That's correct.

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	Compendium of CO Deposition Testimony, Riggs Dep. at 34:06-11. Q. So you're saying at High Desert, it was roughly 30 to 40 minutes every day that you worked that you spent extra time that you feel is compensable that you weren't paid for, correct? A. Correct. *Id.* at 48:07-12.
42. Jan Shultz admitted, "Whenever I asked for it, I would get it." There has never been an occasion when he requested it and did not receive it.	Disputed. Q. Okay. Getting a little bit to the meat of the lawsuit, do you claim that you performed any work activities before your regularly scheduled shift for which you were not compensated? A. Yes, Counsel. Q. Okay. How often? A. Every day I show up to work. *See Compendium of CO Deposition Testimony,* Shultz Dep. at 15:17-23.
43. Andre Natali's testimony highlights the absence of any unified policy or practice by NDOC to deny Correctional Officers overtime: Q: …Have you ever requested overtime pay or comp time for that time [when your relief is late]? A: Sure. Q: And have you been paid for it or given comp time for it? A: I would have to tell you that 99 percent of the times, yes, I was. There was only a couple of times that I caught attitude from somebody. I was like, you know what, I don't feel like arguing with you about it so I would have to say it's, yes, I have been when I requested it, yes. [Ex. FF, Natali Dep., 62:1-11 (emphasis added).]	Disputed. Natali's testimony actually demonstrates a unified policy or practice to deny COs overtime because the pre- and/or post-shift activities would have to be affirmatively requested each and every day: Q So we've been concentrating on Ely State Prison regarding the clock-in procedures. Do the Ely Conservation Camp CO's use the NEATS system, also? A Yes. Q And is the process similar for them, they have to affirmatively say that, yes, I worked those 80 hours? A Yes. Q And if they work any overtime, they also have to affirmatively get approval from their supervisor? A Yes.

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	See Compendium of CO Deposition Testimony, Baker Dep. at 17:12-17:18 (emphasis added)
44. The Plaintiffs' sworn testimony establishes that in the overwhelming majority of the instances in which they allege that they have not been paid overtime or other compensation they claim they are owed, it is because they did not follow NDOC's policies and procedures and submit an overtime request on a DOC-1000.	Disputed. A representative sample of Plaintiffs and Opt-Ins have attempted to include the pre- and post-shift activities at issue in this Action on numerous occasions in the past and have been repeatedly instructed that the pre- and post-shift activities at issue in this Action are not compensable and are not to be reported as time worked for overtime or any other sort of compensation (i.e., compensatory time off). *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
45. Plaintiffs have not submitted overtime requests to NDOC for the activities for which they are seeking compensation in this litigation.	Disputed. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
46. Many of the Plaintiffs have not applied for overtime for responding to security incidents when their supervisor does not do it for them.	Undisputed. Because COs have been instructed they will not receive compensation. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
47. Similarly, many of the Plaintiffs have not applied for overtime for being relieved late, with some Plaintiffs like Timothy Carlman admitting they have never reported it to their supervisors.	Undisputed. Because COs have been instructed they will not receive compensation. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8.
48. Administrative law governs the rate of overtime pay for NDOC employees.	Disputed. Federal law governs the rate of overtime pay for all public employees, including NDOC employees. *See* 29 U.S.C. § 201, et seq.
49. Nevada has an administrative procedure for addressing state employee "grievances," a term which includes "any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation…"	Undisputed.
50. [A] Under Nevada law, employees must grieve their compensation dispute with their supervisor (NAC 284.678), then to the head of that employee's department (NAC	There are numerous assertions in this "fact." Plaintiffs addressed them separately. 50[A]. Undisputed.

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284.686), then to the highest administrative level (NAC 284.690), and finally to the State of Nevada's Employee- Management Committee (NAC 284.695). [B] Nevada specifically adopted this multi-level grievance procedure, which is unlike the FLSA, precisely to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter.	50 [B]. Disputed. This "fact" has no evidentiary support. There is no basis to assert that Nevada has adopted an employee grievance process "to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter. To the contrary, the Nevada Legislature has specifically stated that the State of Nevada should be held liable to the same extent as persons and corporations, with the sole exception for certain torts brought against governmental actors. *See* NRS 41.031; ECF No. 299.
51. Plaintiffs admit that they have not followed the procedure for appealing overtime decisions by speaking to their supervisor or other managers in their chain-of-command or by filing a grievance.	Disputed. Numerous COs have challenged overtime decisions by speaking to their supervisor or other managers in their chain-of-command and several have submitted grievances on this issue. *See, e.g.*, Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-2 (speaking to supervisors) Facts Nos. 3-8 (grievance submissions).
52. Travis Zufelt illustrates the point. He admitted that he was able to obtain overtime compensation by speaking with his supervisor after one request was initially denied: Q: Do you remember what you've requested overtime for?.... A: I – right now I work overtime just about every day, so I fill out – put NDOC- 1000s every day just about right now. Q: So you know the process pretty well – A: Yes, sir. Q: … And what's that process? You just fill out the … DOC-1000? A: Fill out the DOC-1000. Take it to have a supervisor sign it. Get a copy of it. Put that copy in payroll's box. And out one in your box. Q: Okay. Have you ever had an overtime request denied? A: It was denied at first, but after I argued with the supervisor of why I wanted the overtime, then it wasn't.… So, yes, it was – denied it once. [Zufelt Dep., 118:1-119:3 (emphasis added)]	Disputed. Travis Zufelt does not illustrate the point that COs are paid for pre/post-shift work. He illustrates the opposite point: "That's just common knowledge that once you get there, that's when you're starting your shift.· If you've asked for overtime, they will say, "Your shift don't start until 5:00." *Compendium of CO Deposition Testimony,* Zufelt Dep. at 51:13-16: *see also* Zufelt Dep. at 126:3-126:8.

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53. Nevertheless, for subsequent overtime or other compensation issues, Zufelt admitted that he has not spoken about them with the Assistant Warden, or AWO. [Ex. FFF, Zufelt Dep., 131:25-132:2.] He also has not filed a grievance over any concerns he has with his compensation or overtime.	Undisputed. Zufelt testified that it would have been pointless to raise the issue of overtime for pre and/or post shift activities further up the supervisory chain: "And with that being said, with the overtime, that's prob -- and as bad as Clark, but if I would have went to any other supervisor and asked them for that overtime, I would have either been -- there would have been, like, are you serious? You're really filing overtime for this? And -- and you would either be like, yeah, I am, or they'd make you feel guilty about it." *See Compendium of CO Deposition Testimony,* Zufelt Dep. at 127:8-14.
54. The decision of these individuals not to comply with A.R. 320.01(2) by requesting overtime or compensatory time, or to appeal any request that is denied pursuant to NAC Chapter 284 is typical of the evidence before the Court at this time.	Disputed and Undisputed. Disputed. COs did not request overtime or compensatory time for the pre/post-shift work because NDOC told COs they would not be paid for this time. *See* Plaintiffs' Additional Undisputed Facts, Facts Nos. 1-8. Undisputed. The evidence that NDOC know or should have know that COs were performing pre/post-shift work is common and "typical evidence before the Court at this time."

VI. PLAINTIFFS' ADDITIONAL UNDISPUTED FACTS

In addition to NDOC's "Statement of Undisputed Fact", Plaintiffs assert the following Undisputed Facts that demonstrate NDOC knew or should have known that COs were performing pre/post-shift work without compensation.

1. COs have repeatedly requested to be paid for the pre and post-shift work and any contention that they were paid when they made a request for these work activities is false. *See Compendium of CO Deposition Testimony,* Shift Sergeant Carlman Dep. at 77:1-77:6; Krol Dep. at 14:12-14:17, 70:18-71:2, 77:5-77:14; Kluever Dep. 64:10-65:3; Jones Dep. at 31:25-32:8, 41:13-41:15; 86:13-87:7, 101:3-101:4,101:20-101:21; Hanski Dep. 69:13-70:6; 122:21-123:8, 124:10-124:13. Dicus Dep. at 39:1-39:11; Echeverria Dep. at 41:14-42:25; Everist Dep. at 48:25-

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49:3; Ridenour Dep. at 35:6-35:10; Walden Dep. at 44:1-44:6; Zufelt 126:3-126:8; Allen Dep. at 24:1-25:2; Banks Dep. at 17:23-17:25, 18:1-18:4; Baros Dep. at 59:8-59:11; Day Dep. at 28:6-28:7; Natali Dep. at 21:21-21:24, 56:1:56:6; Rocho Dep. at 19:6-19:9; Tyning Dep. at 19:19-19:24.

2. Below are a few examples of the attempts that COs have made to get paid for their legally mandated wages:

A. CO Tyning:

> **A. When I was new, a long time ago, I asked the supervisor, "Do we get briefing time for this?" It was an informal conversation, and the answer was "No."**
>
> Tyning Dep. at 19:19-19:24.

B. CO Walden:

> Q. So I'm asking you, have you ever made any request for overtime related to those activities that you did before your shift?
> **A. Oh, absolutely. We complained about it for years.**
> Q. And how did you complain about it?
> A. Verbally.
>
> Walden Dep. at 44:1-44:6 (emphasis added).

D. CO Ridenour:

> Q. Did you ever complete a DOC 1000 for any of these activities?
> **A. I have tried before, but the sergeant usually would just throw them away in the trash.**
>
> Ridenour Dep. at 35:6-35:10 (emphasis added).

E. CO Jones:

> Q. I am just talking about before, and we will get to the after. Have you applied for overtime for any of
> these preshift activities?
> A. Preshift, no.
> Q. Have you completed a DOC 1000 for any of these preshift activities?
> **A. No, I have not. I was told not to.**
> Q. Who told you?

A. Shift supervisor. I believe it was Lieutenant Figueroa and a couple of others.
Q. How long ago did they tell you; do you know the time frame?
A. That was when I first started.
Q. You have been there 11 years?
A. Ah-huh. So I went with that because I know how the department is.
Q. Since that time are you aware of anyone telling you not to apply for overtime for those preshift activities?
A. Yeah, for preshift they told us you are not allowed to, you can't get overtime.

Jones Dep. at 31:25-32:8 (emphasis added).

Q. Have you applied for overtime for any of the activities that we discussed that you performed after your regularly scheduled shift?
A. No.
Q. And why not?
A. Because, once again, I was told by shift command not to, it was on me.

Jones Dep. at 41:13-41:15 (emphasis added).[3]

[3] CO Jones further testified at his second deposition as follows:

Q. I'm going to take a step back. I tend to jump around more than other lawyers. So when you were hired, if I understand correctly from your deposition transcript from the previous deposition couple years ago, you tried to submit pre-shift time for which you thought you weren't being compensated, and you were told initially not to do that, you're not permitted to do that. Is that correct?
A. That's correct.
Q. And then after that, for pre-shift time, you never attempted to do that again --
A. Right.
Q. -- to either seek it or ask somebody, right?
A. I asked, but supervisor said no, so...
Q. I'm saying after 2004, after that first time or first time or two, when you first got hired. Did you, for the years after then, ask again or ask other people?
A. No, because they were told no as well.
. . .
Q. And then in the transcript, I'm looking at page 32, line 18, they talk about 2014. That would be a typographical error, right? You weren't told again ten years later; you were only told in 2004 not to request overtime for pre-shift activities, right?
A. I was much pretty told the whole time I was there not to ask for pre-shift.

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F. CO Dicus:

Q. Did you ever submit a time sheet including that time?
A. No.
Q. Did you ever complete a DOC asking for that time, a DOC 1000?
A. No. We are told that we can't do a DOC 1000 unless we have approval to do one. Overtime has to be preauthorized is what they say, but if you show up right on time they will dock your time.
Q. How do you know that?
A. Because it's happened to me.
Q. When?
A. In 2009.
Q. How late were you?
A. I showed up right on time to the muster room, and I was docked the five minutes it takes to walk to the post, twice. But I wasn't late, I was on time, by the way.

Dicus Dep. at 39:1-39:11.

G. CO Krol:

Q. Okay. Now, have you ever applied for overtime for any of these activities?
A. No.
Q. And why not?
A. You cannot. You would have to fill out the form, the DOC 1000, and nobody does it. It's actually not permitted. It would look kind of ignorant. Hey, Sarge, it's a quarter to one, I need overtime for 15

Q. Okay. Well, I'll ask you that again. But I just want to make it clear; I think this was a typo. And so, other than Lieutenant Figueroa, were you -- did you make a specific request to anybody after that 2004 conversation?
A. I inquired about it over and over again, yeah.
Q. Who --
A. They gave me the same generic answer, all the shift commanders.
Q. Okay. So you inquired of it of shift commanders?
A. Uh-huh.
Q. Do you remember any that gave you responses similar to Lieutenant Figueroa?
A. Just the very cut-and-dried generic answer, "You're not being paid for that time."

Jones Dep. at 86:13-87:7; 101:20-101:21 (emphasis added).

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minutes; you cannot do it. They probably would – you would be fired.

Krol Dep. at 14:12-14:17, 77:5-77:14 (emphasis added).

Q. Do you think that NDOC purposefully or willfully didn't compensate you for the pre- and post-shift activities in this lawsuit?
[OBJECTION].
THE WITNESS: Yes, some of them make a decision, and starting from the academy, we were trained to come half an hour earlier pre-shift to be ready on your post on time. So somebody make the decision, which who that was, I have no idea.

Krol Dep. at 77:5-77:14.

H. CO Echeverria:

Q. So we have talked about a lot of things that you do before your regularly scheduled shift. Did you ever request to be compensated for these activities?
A. No. It's widely known that any time anybody says anything about it it's -- you don't start getting paid until you are on shift, until you are at your post on your shift per -- they say per OP 326. So basically you are just told to not even bother asking. And then if you were to try to ask then -- or to try to put it on your time sheet, then they are going to take your time sheet back and you take the chance of getting a straight 80 paycheck instead of a proper paycheck because they are not going to approve you for your extra time.

Echeverria Dep. at 41:14-42:25 (emphasis added).

I. CO Everist:

Q. Did you ever ask to be compensated for those activities?
A. I have asked supervisors about that and I have pretty much just been told it's an essential function of the job.

Everist Dep at 48:25-49:3 (emphasis added).

J. CO Zufelt:

Q Okay. And what makes you think it was pointless?
A Because it's happened -- couple other people who have had the same -- or same problem I was having went to their supervisor, and you just -- it's just a common knowledge that they're not going to give it to you, that it's going to be a hassle to get.

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Zufelt 126:3-126:8.

K. CO Allen:

Q. Have you applied for overtime for these activities to get paid overtime by the Department of Corrections?
A. At the beginning, yes, then I just stopped.
Q. When you say at the beginning, are you talking about 2001?
A. Yes, for like the first four, five years and then you -- I just stopped. I got tired of arguing with them.
Q. Okay. Explain to me what you did to apply for overtime.
A. I filled out a DOC 1000, said 15, 20 minutes overtime, late relief, and it would be denied.
Q. Late relief, what do you mean by that; what does late relief mean?
A. Like the officer that was relieving me, he got held up in operation being briefed, and by the time he got to me it was 15, 20 minutes after.
Q. As far as any preshift activities, have you filed -- requested overtime for those activities?
A. Same.
Q. You did?
A. Same thing.
Q. Okay. What did you do for that?
A. DOC 1000, you know, start work -- came in early for work, getting briefed and stuff and it was denied.
Q. How often would you fill out a DOC 1000?
A. At the beginning, about every day.
Q. And you said this was for the first four or five years?
A. Yes.
Q. And each one was denied?
A. Yes.
Q. Were you provided a reason?
A. Yeah, they said they are not going to pay it. That's the only answer we got.

Allen Dep. at 23:13-25:2 (emphasis added).

L. CO Banks:

Q. Have you applied for overtime for these activities?
A. No, I haven't.
Q. And why is that, why haven't you applied?
A. Well, they teach us that this is what you have to do, and you have to do it before you get to your post. So I just haven't put in any paperwork for it.

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Banks Dep. at 17:23-18:4.

M. CO Baros:

Q.· So you've talked about not requesting overtime, not doing a DOC-1000.· Have you ever kept any notes about days or times --
A.· I'm --
Q.· -- that you worked long or --
A.· I'm not going to put a target on my back. It's an unspoken thing; you don't need -- I'm not·going to ask for something I'm not going to get paid for.

Or essentially, I guess, if I took it to·the next level, yeah, they'd by law have to pay me,·but it's -- that's not something that I'm going to do at that point.

· · For one, it wasn't -- the sergeant wasn't authorized to give overtime that day, so that, in itself, is a trickle-down effect; it would get him in trouble and me in trouble.

Baros Dep. at 59:8-59:11.

N. CO Day:

Q. At Florence McClure have you applied for overtime for any of these activities?
A. I have not.
Q. Why not?
A. Because it would be denied. They wouldn't sign off on my DOC 1000.
Q. So I understand, you haven't completed a DOC 1000 for any of these activities?
A. Not for the prework activities, no, ma'am.

Day Dep. at 28:6-28:7.

O. CO Rocho:

Q. Do you apply for overtime for these activities?
A. No.
Q. And why don't you?
A. Because it's told that this is part of your job.

Rocho Dep. at 19:6-19:9.

3. COs have also filed grievances pursuant to the grievance procedure contained in NRS Chapter 284 seeking to be paid for the time they spent performing pre- and post-shift work activities. *See generally* Declaration of Joshua D. Buck ("Buck Dec.").

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4. For example, CO Kelly filed a grievance to be compensated for the pre- and post-shift activities that are at issue in this action. *See* Buck Dec. at ¶ 5, Exhibit A (Kelly Declaration and Exhibits).

5. CO Kelly attached a detailed account of the activities that he believes he should be paid for and provided relevant legal authority to support his right to payment. *Id* at ¶ 4.

6. At each step of the grievance process, NDOC summarily denied CO Kelly's grievance. *Id.* at ¶ 5.

7. CO Kelly appealed NDOC's determination to the Employee-Management Committee ("EMC"). The EMC rejected CO Kelly's grievance on the grounds that a wage claim that is based on federal law "does not fall within [the EMC's] jurisdiction." *Id.* at pp. 14-15.

8. Other COs have likewise filed grievances seeking payment for pre- and post-shift activities. *See, e.g.*, Buck Dec. at ¶ 6, Exhibit B (CO Eckard Grievance) and ¶ 7, Exhibit C (CO Haines' Grievance). At each step of the grievance process, NDOC has summarily denied CO Eckard and Haines' grievances. *Id.*

VII. ARGUMENT

A. NDOC'S ATTEMPT TO SKIRT FLSA LIABILITY ON THE GROUNDS THAT COs DID NOT AFFIRMATIVELY REQUEST COMPENSATION FOR PRE/POST SHIFT WORK IS A CALLOUSLY DISINGENOUS ARGUMENT—AND LEGALLY IRRELEVANT

Under the FLSA, an employer must compensate its employees for work that is performed ***with the knowledge and acquiescence of management***. *See* 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." (*citing Handler* v. *Thrasher,* 191, F. 2d 120 (C.A. 10, 1951); *Republican Publishing Co.* v. *American Newspaper Guild,* 172 F. 2d 943 (C.A. 1, 1949; *Kappler* v. *Republic Pictures Corp.,* 59 F. Supp. 112 (S.D. Iowa 1945), aff'd 151 F. 2d 543 (C.A. 8, 1945); 327 U.S. 757 (1946); *Hogue* v. *National Automotive Parts Ass'n.* 87 F.

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Supp. 816 (E.D. Mich. 1949); *Barker* v. *Georgia Power & Light Co.*, 2 W.H. Cases 486; 5 CCH Labor Cases, para. 61,095 (M.D. Ga. 1942); *Steger* v. *Beard & Stone Electric Co., Inc.*, 1 W.H. Cases 593; 4 Labor Cases 60,643 (N.D. Texas, 1941))). The key factual inquiry is whether the employer knew, or through use of reasonable diligence should have known, that a person was performing work on the employer's behalf. *See Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). The knowledge can be imputed if the employer should have known the time worked even if an employee underreports hours worked. *See Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008); *see also Pforr v. Food Lion*, 851 F.2d 106, 109 (4th Cir. 1988).

In fact, "[a]n employer who has knowledge that an employee is working, and who does not desire the work be done, ***has a duty to make every effort to prevent its performance***." *Chao*, 514 F.3d at 288 (emphasis added); *see also Forrester,* 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation...."); *Mumbower v. Callicott,* 526 F.2d 1183, 1188 (8th Cir.1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13 ("In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed."). Ultimately, "[t]he reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted." *Reich v. Dep't of Conservation & Natural Res., State of Ala.,* 28 F.3d 1076, 1082 (11th Cir. 1994).

Here, not only was NDOC aware that COs were working without compensation from the point in time when they reported for duty to the beginning of their shift (and until they returned their gear at the end of their shift), NDOC specifically instructed COs to perform this work via written regulations! To now place the blame on COs for failing to report the pre and post-shift work is the epitome of disingenuity. When work is required to be performed by an employee, at the direction of the employer and via the employer's own policies and procedures, the employee must be compensated for the time whether or not he or she formally requests payment

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for these hours worked. Furthermore, sheer common sense exposes NDOC's argument for what it is—a post-hoc plea for leniency from the Court. NDOC has not disputed that its relevant policies cited by Plaintiffs required each and every CO who worked at NDOC's Prison facilities to report for duty to receive assignments upon arriving at the institution, pick up necessary gear for the assigned post, engaged in a passdown of information from the outgoing officer, and then repeat much of those same tasks at the end of the shift. It is further undisputed that all COs were paid per shift and the shift did not begin until the CO arrived at his or her assigned post and that COs were only paid until the end of their shift at their assigned post. Therefore, via its own policies and procedures, NDOC required COs to perform work without compensation.

Requiring each and every CO to report the pre and post shift time for performing the activities at issue here would be a nonsensical administrative burden on state payroll department. Every day, thousands of overtime requests would flood the payroll department for overtime requests because the overtime occurs every shift. Exception reporting is supposed to minimize the paperwork—not add administrative headaches. The problem that NDOC has created is that it has failed to have the beginning of the shift equal the beginning of the compensable workday and the end of the shift equal the end of the compensable workday. Ultimately, NDOC's "bury your head in the sand" defense is no defense at all to FLSA liability under the facts presented here. As all this evidence clearly indicates, COs have been battling NDOC for years to get paid what they are rightfully owed. NDOC's continued attempts to frustrate COs' pursuit to be paid the overtime owed can be viewed as nothing less than a willful, systematic attempt to circumvent the wage mandates of the FLSA.

B. DEFENDANT WILLFULLY VIOLATED THE FLSA DESPITE THE EXISTENCE OF LONG-STANDING CASE LAW AND FEDERAL REGULATIONS RECOGNIZING THE COMPENSABILITY OF THE ACTIVITIES AT ISSUE IN THIS CASE

Defendant argues that the general 2-year statute of limitations should apply on Plaintiffs and Opt Ins' claims. The determination of willfulness for statute of limitations purposes is an issue of fact for the trier of fact and is not appropriate at this time. *See Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 163 (4th Cir. 1992). Nevertheless, Defendant's conduct prior to the

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filing of this lawsuit and throughout the course of this litigation has been to shun the well-established case law and regulations that have consistently held that these activities are compensable. Asking for lenience now, after refusing to change its policies to pay its COs for tall the hundreds of thousands of unpaid hours would be an injustice.

A violation is willful when "the employer either knew or showed reckless disregard for . . . whether its conduct was prohibited by the [FLSA.]" *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *see also* 5 C.F.R. § 551.104 (2011) ("The Code of Federal Regulation defines reckless disregard as the "failure to make adequate inquiry into whether conduct is in compliance with the Act.").

Here, NDOC has established policies and procedures whereby COs have been continually denied compensation for activities that have been held to be compensable by this Court and other courts across the county for years.[4] Federal regulations have similarly held that that very activities engaged in by COs are to be deemed compensable. NDOC intentionally failed to consult the basic wage and hour laws of the country when it required its COs to report for roll call, receive assignments and pick up gear, and debrief the outgoing officer, and then perform those same activities after the end of the paid shift. *See* 29 C.F.R. § 553.221(b); 29 C.F.R. § 785.38. Furthermore, NDOC and its agents ridiculed COs who had the gall to ask for payment for these activities by telling them that these activities were not compensable and repeatedly rejecting grievances on the topic. In sum, all the evidence submitted in support of Plaintiffs' Motion for Partial Summary Judgment on Liability for Unpaid Wages, in addition to the evidence submitted in opposition to this Motion, demonstrate that Defendant has recklessly "disregarded the very possibility that it was violating the [FLSA]." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908–09 (9th Cir. 2003) (internal quotation marks omitted). Accordingly, Defendant's request to cut down the liability period and CO damages by a third should be rejected.

[4] *See, e.g.*, *Albright v. United States,* 161 Ct.Cl. 356 (1963); *Baker v. United States*, 161 CT.CL. 356 (1963); "To the Sec'y of the Treasury," 44 Comp. Gen. 195, 197 (Oct. 8, 1964); *Riggs v. United States*, 21 Cl. Ct. 664, 677 (1990); *Whelan Security Co. v. United States*, 7 Cl.Ct. 496 (1985); *IBM v. United States*, 11 Cl.Ct. 588 (1987); *Dole v. Enduro Plumbing, Inc.*, 1990 WL 252270, at *5 (C.D. Cal. Oct. 16, 1990); *Brubach v. City of Albuquerque*, 893 F. Supp. 2d 1216, 1229 (D.N.M. 2012).

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C. LIQUIDATED DAMAGES ARE PRESUMED AND DEFENDANT BEARS THE BURDEN OF DEMONSTRATING THAT THEY SHOULD NOT BE AWARDED

FLSA mandates liquidated damages in an amount equal to the unpaid overtime compensation claims unless the employer proves that it acted in "good faith" and had "reasonable grounds" to believe it was not violating FLSA. 29 U.S.C. §§ 216(b), 260. To prove subjective good faith, the employer must show it had "an honest intention to ascertain what [the Act] requires and to act in accordance with it." *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 (11th Cir. 1991). The employer must shoulder the additional objective good faith requirement of showing it had reasonable grounds for believing its conduct comported with the Act. *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). This "reasonableness" requirement is objective, and ignorance alone does not exonerate the employer. "Absent . . . a showing [of both the subjective and objective elements of the good faith defense], liquidated damages are mandatory." *Dybach*, 942 F.2d at 1566–67 (quoting *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985). For all the reasons stated above as to why the 3-year statute of limitations applies here, Defendants must also be held liable for liquidated damages following a trial on damages. Defendant has not, at this point, demonstrated by a preponderance of the evidence that it had "good faith" or a "reasonable ground" for failing to compensate COs for the work activities at issue in this Action.

VIII. CONCLUSION

For all the aforementioned reasons, NDOC's Cross Motion for Summary Judgment on the Merits of Plaintiffs' FLSA Claims must be denied. Similarly, Plaintiffs' Motion for Partial Summary Judgment on Liability for Unpaid Wages under the FLSA should be granted.

DATED: May 20, 2020.

Respectfully Submitted,

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/s/Joshua D. Buck
Joshua D. Buck

Attorneys for Plaintiffs

EXHIBIT A

Aguilar v. Mgmt. & Training Corp.,
948 F.3d 1270 (10th Cir. 2020)

EXHIBIT A

No. 17-2198
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Aguilar v. Mgmt. & Training Corp.

948 F.3d 1270 (10th Cir. 2020)
Decided Feb 4, 2020

No. 17-2198

02-04-2020

Marisela AGUILAR; Miguel Blanco ; Francisco J. Carranza; Rafael Gallegos ; Benjamin Guerrero, Jr.; Vaughn D. Hayes, Sr.; Jose R. Hernandez; Rogelio Hernandez; Roman Jauregui; Efren Jimenez ; Flavio Lara; Sixto Navarrete; Anthony Guadalupe Ordaz; Armando Pacheco, Jr.; Alan Perez; Rigoberto Rodarte; Antonio Vasquez; Adrian Villalobos, a/k/a Jose Adrian Villalobos; Maria Acevedo ; Angel Aguilar ; Ezequiel Alvarado; Ricardo Angulo ; Fernando Apodaca; Rene Arreola; Annette Baeza; Juan Baeza ; Reymundo Balderrama; Justin Barba; Ramon Baxter; Stephanie Bertolli; Pedro Blanco; Daniel Boado; Anthony Calla; Leslie Camarillo; Yolanda Campos; Stefany Carranza; Jennifer Cooper; Edward Dang; Luis Dorado ; Luz Duarte; Miguel Duenas; Jim Escalera; Hiram Escobar; Jaime Escobar; Martin L. Espinosa; Carolina Estrada; Guadalupe Estrada ; Christine Fierro; Jose Fuentes ; Michelle Gallegos; Albert Garcia; Anthony Garcia; Arturo Garcia; Edward Garcia; Caesar Gonzalez; Juan Gonzalez; Raul Guzman; David Hernandez; Jesus Hernandez; Paul Hernandez; Gino Hijar; Jun Koo; Rocio D. Leza; Christopher Macias; Angel Maldonado; Arturo Mares ; Daniel Marquez; Pedro Martinez; Saul Martinez; Yvonne Martinez; Juan Matamoros ; Yareth Mireles; Gabriel Molina; Arturo Montero; Carlos Montesinos; Cecilia Morales; Jesus Morales; Yvette Morehead; Norma Muniz; Sandra Neria; Hernan Nevarez ; Erica Nieto; Erik Ontiveros; Gary Lee Orozco; Luis Ortiz; Robert Ortiz; David Padilla ; Juan Parra; Veronica Pena ; Carlos Ponce; Jorge Portillo; Oscar Portillo ; Jose I. Prospero; Isela Quezada; Edgar Ramirez ; Miguel Ramirez; Ygnacio Ramirez; Gustavo Ramon; Rodolfo Rincon, Sr.; Rodolfo Rincon, Jr.; Alberto Rivera; Jennifer Rivera ; Daniel Rodriguez; Oscar Rodriguez; Ruben Rodriguez; Vince Roman ; Carlos Rosales ; Abel Saenz; Lila Saenz; Belinda Sanchez; David Sanchez; Abraham Sandoval ; Gabriela Sifuentes; Salvador Sifuentes ; Irma Soto; Irene Terrazas-Rubio; Manuel Vasquez; Adriana Villalobos; Karina Villalobos; Sasha Villalva; Meagan Villigan, Plaintiffs - Appellants, v. MANAGEMENT & TRAINING CORPORATION, d/b/a MTC, Defendant - Appellee.

John P. Mobbs, El Paso, Texas, for Plaintiffs-Appellants. Aaron C. Viets, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico (Charles J. Vigil, with him on the brief), for Defendant-Appellee.

MORITZ, Circuit Judge.

John P. Mobbs, El Paso, Texas, for Plaintiffs-Appellants.

Aaron C. Viets, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico (Charles J. Vigil, with him on the brief), for Defendant-Appellee.

Before BACHARACH, EBEL, and MORITZ, Circuit Judges.

1274MORITZ, Circuit Judge.*1274 A group of 122 detention officers (the officers) who work or worked at Otero County Prison near Chaparral, New Mexico, allege that their employer, Management & Training Corporation (MTC), fails to pay them for certain activities that they engage in before they arrive at, when they arrive at, and after they leave their posts within the prison. According to the officers, these activities constitute compensable work, so MTC's failure to pay violates both the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201 – 19, and the New Mexico Minimum Wage Act, N.M. Stat. Ann. §§ 50-4-1 to 50-4-33.[1]

[1] Below, the district court concluded that the officers "concede[d] that if summary judgment was granted to their federal claims, it would also apply to the state law claims." App. vol. 5, 1184. The officers take a different position on appeal, insisting that state and federal law treat compensability differently, such that even if their federal claims fail, their state claims survive summary judgment. Because we ultimately find in the officers' favor under federal law, we need not address the officers' argument on appeal or separately discuss their state-law claims.

As explained below, we conclude that in this context, these activities constitute compensable work. Further, we reject MTC's arguments that (1) the time the officers devote to these activities is de minimis and (2) it need not pay the officers for these activities because it did not know the officers were engaging in them. Additionally, we conclude that the officers' rounding claim survives summary judgment. As such, we reverse the district court's order awarding summary judgment to MTC and remand for further proceedings.

Background

The officers are "[r]esponsible for the custody and discipline of detainees." App. vol. 3, 573. Among other duties, the officers "[s]earch for contraband and provide security"; "[c]ount, feed[,] and supervise detainees in housing, work[,] and other areas"; and "prepare and maintain records, forms[,] and reports." *Id.* The officers generally work eight-hour shifts, five days a week. There are three shifts, beginning at 6 a.m., 2 p.m., and 10 p.m. Each officer is typically assigned to work his or her shift at a specific post, and there are more than 30 posts within the prison.

Because this case concerns the activities that the officers engage in before they arrive at and after they leave their posts, as well as one activity at post, we begin by briefly outlining the officers' undisputed daily routine. (We will later describe certain of these activities in greater detail, as necessary to our analysis.)

When the officers arrive at the prison, they initially undergo a security screening. Then—in what the parties characterize as a "pre[ ]shift briefing"—some officers receive post assignments from a supervisor. App. vol. 5, 1158. During the preshift briefing, officers sometimes receive paperwork or additional information about their post for that day. Next, some officers obtain the keys they need for the day's post from a fingerprint-activated box. And some or most officers collect any equipment they need for the day, such as handcuffs, a radio, or pepper spray, from the prison's inventory-control system. The officers then walk to their posts, where they receive a "pass[ ]down briefing" from the officer leaving the post. Aplt. Br. 5. After working their shifts, departing officers complete several of the same tasks in reverse: they provide a passdown briefing to an incoming officer, walk back from 1275their post, and *1275 return their keys and equipment to the fingerprint-activated box and the prison's inventory-control system, respectively.[2]

[2] The precise amount of time the officers devote to these activities is disputed. The district court concluded that the officers devote no more than eight minutes per shift to completing these activities; the officers

> contend that the time exceeds ten minutes per day. But as we explain later, this dispute is not material to our analysis.

MTC requires the officers to use a time clock to precisely record their arrival and departure times; officers clock in after undergoing the security screening and clock out after returning their keys and equipment. Nevertheless, MTC generally pays the officers based on their scheduled eight-hour shifts rather than on the precise times at which they clock in and out. The one exception to this policy is the ten-minute adjustment rule: if an officer clocks in or out more than ten minutes before or after his or her shift start or end time, MTC will pay the officer based on the time clock rather than on his or her scheduled shift. That is, if an officer clocks in for a 6 a.m. shift at 5:58 a.m. and clocks out at 2:09 p.m., MTC will pay that officer for the eight-hour shift (i.e., from 6:00 a.m. to 2:00 p.m.); but if an officer clocks in for that same shift at 5:45 a.m. and clocks out at 1:49 p.m., MTC will pay that officer based on the time clock (i.e., for eight hours and four minutes). This rule applies on either end of the shift time, so that if an officer clocks in at 5:49 a.m. and clocks out at 1:56 p.m., MTC will pay that officer for time worked from 5:49 a.m., the clock-in time, to 2 p.m., the shift-end time (i.e., for eight hours and 11 minutes). In addition, MTC provides officers with time-adjustment forms, which the officers can complete to request payment if they devote time outside of their scheduled shift to compensable work.

The officers contend that MTC's compensation system deprives them of overtime pay in two ways. First, they allege that because MTC typically pays them based on shift time rather than clock time, it fails to pay them for the time they devote to undergoing the security screening, receiving the preshift briefing, checking keys and equipment in and out, walking to and from post, and conducting passdown briefings. Second, the officers allege that MTC's ten-minute adjustment rule routinely rounds down their work time, resulting in systematic underpayment.

Following discovery, MTC moved for summary judgment. It argued that officers do not perform compensable work under the FLSA when they undergo the security screening, receive the preshift briefing, check keys and equipment in and out, walk to and from post, and conduct passdown briefings. Further, MTC alternatively argued that if any of that time was compensable, it was de minimis and thus not recoverable. *See* 29 C.F.R. § 785.47 (providing that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded"). MTC additionally (1) insisted that it did not impermissibly round off the officers' working time and (2) raised an estoppel defense, arguing that it need not pay the officers because it did not know the officers were engaging in these activities.

The district court ruled that of the activities the officers described, only the passdown briefing was integral and indispensable to the officers' principal activities and therefore compensable. But the district court ultimately concluded the officers were not entitled to compensation for the time devoted to conducting passdown briefings because
1276 that time was de minimis. *1276 It further rejected the officers' rounding claim. As such, the district court granted MTC summary judgment on all of the officers' claims (without reaching MTC's estoppel defense). The officers appeal.

Analysis

"We review the district court's summary[-]judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.* , 862 F.3d 1040, 1046 (10th Cir. 2017). "Under these standards, '[s]ummary judgment is proper if, viewing the evidence in the light most favorable to the non[ ]moving party,

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (first alteration in original) (quoting *Peterson v. Martinez* , 707 F.3d 1197, 1207 (10th Cir. 2013)).

I. Compensable Work

The FLSA requires an employer to pay employees for their work, but it does not define what kinds of activities qualify as compensable work. *See* 29 U.S.C. §§ 206 – 07 ; *Integrity Staffing Sols., Inc. v. Busk* , 574 U.S. 27, 31, 135 S.Ct. 513, 190 L.Ed.2d 410 (2014). Confronting that absence, the Supreme Court initially defined compensable work as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Busk* , 574 U.S. at 31, 135 S.Ct. 513 (quoting *Anderson v. Mt. Clemens Pottery Co.* , 328 U.S. 680, 690–691, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)). But Congress narrowed that definition when it enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251 – 62, which carves out two exclusions from the FLSA's definition of compensable work. *See Busk* , 574 U.S. at 32–33, 135 S.Ct. 513. First, the Act provides that the time an employee devotes to "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not compensable. 29 U.S.C. § 254(a)(1). Second, the Act provides that the time devoted to "activities which are preliminary to or postliminary to [the employee's] principal activity or activities" is not compensable. § 254(a)(2).

Determining whether an activity is "preliminary to or postliminary to ... [a] principal activity or activities" requires deciding what constitutes an employee's "principal activity or activities." *Id.* Courts have defined this phrase to include both the principal activities themselves and "all activities which are an 'integral and indispensable part of the principal activities.' " *Busk* , 574 U.S. at 33, 135 S.Ct. 513 (quoting *IBP, Inc. v. Alvarez* , 546 U.S. 21, 29–30, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005)); *see also* 29 C.F.R. § 790.8(b), (c). In turn, an activity is "integral and indispensable ... if it is an intrinsic element of those [principal] activities and one with which the employee cannot dispense if [the employee] is to perform his [or her] principal activities." *Busk* , 574 U.S. at 33, 135 S.Ct. 513. Critically, the integral-and-indispensable inquiry does not turn on whether the employer requires the activity or whether the activity benefits the employer.[3] *1277 *Id.* at 36, 135 S.Ct. 513. Instead, the question is "tied to the productive work that the employee is *employed to perform* ." *Id.*

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[3] Before the Supreme Court decided *Busk* , courts routinely decided the integral-and-indispensable issue by asking these two questions: whether the employer required the activity or whether the activity benefited the employer. *See, e.g.* , *Whelan Sec. Co. v. United States* , 7 Cl. Ct. 496, 498–99 (1985). But the *Busk* court specifically rejected those approaches as "overbroad." *Busk* , 574 U.S. at 36, 135 S.Ct. 513. Accordingly, *Busk* effected a change in the law. Thus, to the extent a pre-*Busk* case turned on these now-disapproved rationales, its analysis of the integral-and-indispensable issue is inapposite. *See Bridges v. Empire Scaffold, L.L.C.* , 875 F.3d 222, 227–28 (5th Cir. 2017) (rejecting reliance on pre-*Busk* cases whose rationales were no longer applicable). However, to the extent that a pre-*Busk* case did not turn on these now-disapproved rationales, it remains on point. So, throughout this opinion, we disclaim reliance on pre-*Busk* cases that turned on these now-disapproved rationales but continue to rely on pre-*Busk* cases that did not.

Here, the parties agree that the officers' principal activities include maintaining "the custody and discipline of inmates," "supervising detainees," "searching for contraband[,] and providing security." App. vol. 3, 446. But the officers argue that the district court erred when it concluded that

the officers' activities before they reach their posts and after they leave their posts are noncompensable preliminary and postliminary activities that are not integral or indispensable to these principal activities. For the reasons explained below, we conclude that all these activities—undergoing the security screening, receiving the preshift briefing, picking up and returning keys and equipment, and walking to and from post—are integral and indispensable to the officers' principal activities.[4]

[4] We also conclude, albeit for a different reason than the district court did, that the one activity occurring *at* post, the passdown briefing, is integral and indispensable to the officers' principal activities.

A. Preshift Activities [5]

[5] For ease of reference, we refer to the security screening, preshift briefing, key and equipment pickup, walk to post, and preshift passdown briefing as "preshift activities." Likewise, we refer to the postshift passdown briefing, walk back from post, and key and equipment return as "postshift activities."

We begin with the first activity of the officers' day: the security screening. During the security screening—which occupies between three and eleven minutes—the officers empty their pockets, remove their jackets and all metal, sometimes remove their boots, present any briefcases, lunchboxes, or bags for inspection, and walk through a metal detector before reclaiming their possessions. MTC requires and conducts the security screening to ensure "the overall safety of the prison" and to prevent officers from inadvertently or intentionally bringing contraband like weapons or cell phones into the prison. App. vol. 3, 559.

The district court determined that the screening was "a preliminary security measure" that was not integral or indispensable to the officers' principal activities. App. vol. 5, 1158. In reaching this conclusion, the district court relied on *Busk* , in which the Supreme Court held that a postshift security screening was not compensable under the FLSA. *See* 574 U.S. at 36, 135 S.Ct. 513. *Busk* involved warehouse employees whose job functions included "retriev[ing] products from warehouse shelves and packag[ing] those products for shipment." *Id.* at 35, 135 S.Ct. 513. To deter theft, the employer required the employees to undergo a postshift security screening. *Id.* The Supreme Court held that the screening was not compensable work because it was not integral or indispensable to the employees' principal activity of retrieving and packaging items from warehouse shelves. *Id.* In fact, the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id.*

But as the officers point out, *Busk* did not hold that a security screening can never be compensable. Instead, the Court explained that whether an activity is compensable depends on "the productive work that the employee is employed to perform." *Id.* at 36, 135 S.Ct. 513. 1278 And that *1278 "productive work" marks the critical distinction between *Busk* and this case. *Id.* There, the theft-prevention, postshift security screening was not "tied to" the work of retrieving items from warehouse shelves. *Id.* Indeed, there was no connection at all between the work and the screening.

We cannot say the same here. MTC conducts the security screening to prevent weapons and other contraband from entering the prison. And keeping weapons and other contraband out of the prison is necessarily "tied to" the officers' work of providing prison security and searching for contraband. *Id.* Indeed, the security screening and the officers' work share the same purpose.

MTC resists this connection, encouraging us to adopt the district court's reliance on *Busk* 's suggestion that neither "searches conducted for the

safety of the employees [nor] those conducted for the purpose of preventing theft" were integral or indispensable. *Id.* This statement in *Busk* concerned an opinion letter issued by the Department of Labor in 1951. *Id.* at 35, 135 S.Ct. 513. The Department's letter explained that for employees in a rocket-powder plant, neither a preshift search aimed at preventing matches and cigarette lighters from entering the plant nor a postshift search aimed at preventing theft was compensable. *Id.* So, the *Busk* court reasoned, the Department drew no distinction between searches for employee safety and searches to prevent theft. *Id.* at 35–36, 135 S.Ct. 513.

But the Department based its opinion letter on significantly different circumstances than those presented here. The screenings here are obviously not aimed at preventing theft. Neither are they necessarily analogous to the safety searches at the rocket-powder plant. And notably, neither the Department's opinion letter nor the Court in *Busk* clearly outlined the principal activities of the employees at the rocket-powder plant. But the *Busk* Court explained that the plant's preshift search was aimed at "the safety of employees." *Id.* Standing on its own, an employer's general desire to keep its employees safe has no clear or obvious connection to the particular activities those employees are employed to perform. Here, by contrast, the officers' principal duties include "searching for contraband and providing security." App. vol. 3, 446. So even if this security screening relates in part to overall prison safety, what matters is that the screening is "tied to" the productive work that MTC employs the officers to perform, rendering it integral and indispensable to those duties.[6] *Busk* , 574 U.S. at 36, 135 S.Ct. 513.

> [6] MTC also urges us to adopt the district court's distinction between "searching for contraband" and "being searched for contraband." App. vol. 5, 1157. But we find this distinction immaterial. Both "searching for" and "being searched for" contraband involve keeping contraband out of the prison and maintaining a secure prison environment. *Id.* Moreover, if MTC means to suggest that the officers are not performing work simply because they are passively undergoing screening rather than actively performing some duty, we reject that suggestion as well. The Court could have relied on such a distinction in *Busk* , but it did not—likely because such a distinction simply is not relevant to the integral-and-indispensable issue. Indeed, exertion typically is not part of the compensability analysis. *See Alvarez* , 546 U.S. at 25, 126 S.Ct. 514.

Moreover, unlike the employer in *Busk* , MTC could not "have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id.* at 35, 126 S.Ct. 514 ; *see also id.* at 37–38, 126 S.Ct. 514 (Sotomayor, J., concurring) (explaining that the question is *1279 whether employees "could not dispense with [the security screening] without impairing [their] ability to perform the[ir] principal activit[ies] safely and effectively"). Arguing against this conclusion, MTC contends that an officer "can obviously maintain custody and discipline of inmates whether or not the officer walked through a metal detector earlier." Aplee. Br. 17. But indispensability does not depend upon whether the officers could perform some aspect of their jobs in the absence of the activity; the question is whether the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work," *Busk* , 574 U.S. at 35, 135 S.Ct. 513 ; *see also id.* at 37–38, 135 S.Ct. 513 (Sotomayor, J., concurring).

Here, if MTC were to forego officer screening, officers could inadvertently or intentionally bring weapons or other contraband into the prison. The introduction of weapons or other contraband into the prison would most certainly result in a less secure prison. But more importantly, it would "impair[ ]" the officers' ability to provide security and search for contraband, *id.* at 35, 135 S.Ct. 513,

as well as their ability to do so "safely and effectively," *id.* at 37–38, 135 S.Ct. 513 (Sotomayor, J., concurring); *see also Steiner v. Mitchell* , 350 U.S. 247, 249–53, 255–56, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (holding that time spent changing clothes and showering was compensable because without doing so, battery-plant workers could not *safely* perform principal activity of producing batteries in highly toxic environment); *Mitchell v. King Packing Co.* , 350 U.S. 260, 262–63, 76 S.Ct. 337, 100 L.Ed. 282 (1956) (holding that time spent sharpening knives was compensable because butchers could not *effectively* cut meat without sharpening). Stated more plainly, an officer cannot safely and effectively maintain "custody and discipline of inmates" and "provid[e] security" while also bringing weapons or contraband into the prison. App. vol. 3, 446; *see also Busk* , 574 U.S. at 37–38, 135 S.Ct. 513 (Sotomayor, J., concurring). The security screening in this case is therefore indispensable to the officers' principal activities.

Additionally, preventing weapons or other contraband from entering the prison, by way of the security screening, is "an intrinsic element of" the officers' security work. *Busk* , 574 U.S. at 33, 135 S.Ct. 513. Again, the security screening and the officers' work share the same goal: maintaining a secure prison environment by preventing contraband from inadvertently or intentionally entering the prison. Thus, under these factual circumstances, we conclude that the screening is an integral part of what MTC employed the officers to do. *See id.* And because the screening is both integral and indispensable to the officers' principal activities, the district court erred in ruling otherwise and in granting summary judgment to the officers on this issue.

Because the time the officers devote to undergoing the security screening is integral and indispensable to their principal activities, that activity begins their workday. *See id.* at 33, 135 S.Ct. 513 (defining principal activities to include those activities that are integral and indispensable to principal activities); *Alvarez* , 546 U.S. at 28, 126 S.Ct. 514 (noting that workday begins with commencement of principal activities). And under the continuous-workday rule, "[o]nce the work[ ]day starts, all activity is ordinarily compensable until the work[ ]day ends." *Castaneda v. JBS USA, LLC* , 819 F.3d 1237, 1243 (10th Cir. 2016) ; *see also* 29 C.F.R. § 790.6(a) (providing that Portal-to-Portal Act does not apply to activities performed "after the employee commences to perform the first principal activity on a particular 1280*1280 workday and before [the employee] ceases the performance of the last principal activity on a particular workday"). Thus, we further hold that the time the officers devote to receiving the preshift briefing, picking up keys and equipment, walking to post, and conducting the preshift passdown briefing is also compensable under the FLSA.

B. Postshift Activities

Because the continuous-workday rule makes compensable all activities that occur from the moment that "the work[ ]day starts ... until the work[ ]day ends," *Castaneda* , 819 F.3d at 1243, we begin our postshift analysis with the last activity of the officers' day: returning keys and equipment. If that activity is compensable, then so is the walk from post and the postshift passdown briefing. *See id.*

Not every officer returns keys and equipment, but many do. The district court found that "the number of officers who pick up equipment at central control [and therefore must return it] varies from less than 50% ... to less than 83%." App. vol. 5, 1162. The keys are stored in a fingerprint-activated box, and MTC maintains a key log indicating who possesses each key and when the keys are checked in and out. Access to the equipment is similarly controlled; officers use "individualized metal coins, called 'chits' " to record who checks particular pieces of equipment in and out. App. vol. 3, 957. Importantly, these

processes help ensure that inmates do not obtain possession of keys or equipment and thus are necessary to maintain the security of the prison.

The district court found that the keys and equipment were "to be sure, useful and helpful to the officers in doing their jobs." App. vol. 5, 1168. In particular, the district court specifically noted that the officers "use keys to guard the inmates and to lock and unlock doors to ensure security"; "use radios to communicate with officers at their posts and to give them directions and instructions throughout the day"; and use "[h]and restraints and pepper spray ... as both a deterrent and if necessary, to control unruly inmates." *Id.* at 1164. Based on these findings, we have little difficulty concluding that picking up and returning the keys and equipment is indispensable to the officers' ability to perform their work. If MTC were to eliminate the keys and equipment (or the corresponding inventory-control systems), the officers' ability to maintain custody and discipline of inmates and provide security in the prison would be "impair[ed]." *Busk* , 574 U.S. at 35, 135 S.Ct. 513 ; *see also id.* at 37–38, 135 S.Ct. 513 (Sotomayor, J., concurring). Indeed, an officer "cannot dispense" with the keys and equipment "if [the officer] is to perform his [or her] principal activities" of maintaining custody and discipline of inmates and providing security. *Id.* at 37, 135 S.Ct. 513.

Despite this indispensability, the district court concluded that picking up and returning keys and equipment was not "an 'intrinsic element' of the officers' principal activities." App. vol. 5, 1168 (quoting *Busk* , 574 U.S. at 35, 135 S.Ct. 513). The district court began its analysis by distinguishing or rejecting each of the cases that the officers cited in support of finding compensability. In so doing, it emphasized that "the type of tools and equipment carried by the officers are small in size and not burdensome to carry." *Id.* Then, without additional analysis, the district court concluded that although "certain pre[ ]shift activities are *necessary* for employees to engage in their principal activities," that fact "does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity.' " *Id.* (quoting *Alvarez* , 546 U.S. at 40, 126 S.Ct. 514).

1281*1281 On appeal, the officers argue that checking keys and equipment in and out is integral and indispensable to their principal activities. In support, they first cite a variety of cases in which courts have held that picking up equipment is a compensable activity. *See Von Friewalde v. Boeing Aerospace Operations, Inc.* , 339 F. App'x 448, 454–55 (5th Cir. 2009) (unpublished); *Whelan Sec.* , 7 Cl. Ct. at 498–99 ; *Baylor v. United States* , 198 Ct. Cl. 331, 357–58 (1972) ; *U.S. Dep't of Justice v. Am. Fed'n of Gov't Emps. Local 919* , 59 F.L.R.A. 593, 597–98 (2004). But each of these cases was decided before the *Busk* Court refined the integral-and-indispensable test by rejecting formulations of this test that turn solely on whether "an employer required a particular activity" or "whether the activity is for the benefit of the employer." 574 U.S. at 36, 135 S.Ct. 513. And each of these cases turn specifically on one or both rejected rationales. *See Von Friewalde* , 339 F. App'x at 454–55 (finding that "checking specialized tools in and out of the tool crib" was compensable activity for airplane mechanics because it was for employer's benefit); *Whelan Sec.* , 7 Cl. Ct. at 498–99 (finding time that security guards spent picking up weapons was compensable because it was for employer's benefit); *Baylor* , 198 Ct. Cl. at 357–58 (same); *Am. Fed'n of Gov't Emps.* , 59 F.L.R.A. at 597–98 (finding that time federal correctional officers spent picking up keys and equipment was compensable because employer required such activities). Thus, we do not rely on these cases because their reasoning does not survive *Busk* . *See Bridges* , 875 F.3d at 227–28 ; *supra* , note 3.

But the officers' argument extends beyond these superseded cases. The officers contend that "when an employee must pick up *specialized equipment* from his [or her] employer to perform his [or her] duties, that [activity] is part of his [or her]

principal work activity." Aplt. Br. 34 (emphasis added). In support, they rely on *Brantley v. Ferrell Electric, Inc.* , 112 F. Supp. 3d 1348 (S.D. Ga. 2015), and *Alvarado v. Skelton* , No. 3:16-3030, 2017 WL 2880396 (M.D. Tenn. July 6, 2017) (unpublished). In *Brantley* , the district court held that "collecting and loading the specific parts necessary to complete" electrical work was "intrinsic in installing, servicing, and repairing electrical equipment." 112 F. Supp. 3d at 1371. And in *Alvarado* , the district court found that time spent picking up and loading required landscaping tools and equipment onto work trucks triggered the start of the workday for landscaping employees. *See* 2017 WL 2880396, at *5.

Here, as in *Brantley* and *Alvarado* , the close connection between (1) the keys and equipment and (2) the nature of the officers' work convinces us that checking out and returning these items is "an intrinsic element" of providing security in the prison. *Busk* , 574 U.S. at 37, 135 S.Ct. 513 ; *see also Peterson v. Nelnet Diversified Sols., LLC* , 400 F. Supp. 3d 1122, 1135 (D. Colo.) ("Court[s] have long held that pre[ ]shift preparation of tools or equipment is considered integral and indispensable to the principal activities when the use of such tools in a readied or activated state is an integral part of the performance of the employee's principal activities."), *appeal docketed* , No. 19-1348 (10th Cir. Sept. 17, 2019). In particular, we note that the specialized nature of the keys and equipment ties the act of picking them up and returning them more closely to the officers' productive work. *See D A & S Oil Well Servicing, Inc. v. Mitchell* , 262 F.2d 552, 554–55 (10th Cir. 1958) ("[E]mployees who transport equipment without which well servicing could not be done[ ] are performing an activity which is so closely related to the work which they and the other employees perform[ ] that it must be considered an integral and indispensable part 1282*1282 of their principal activities."); *cf. Smith v. Aztec Well Servicing, Inc.* , 462 F.3d 1274, 1289 (10th Cir. 2006) (finding that activity of putting personal, nonspecialized equipment into van was not compensable activity).

Moreover, the specialized nature of the keys and equipment in this case is further reinforced by the mandatory procedures that each officer must comply with when obtaining or returning keys and equipment. Recall that in the interest of overall prison safety, the keys are stored in a fingerprint-activated box, and MTC maintains a log of when each key is checked out, who checks it out, and when it is returned. Further, in order to check in or out particular pieces of equipment, officers must use individualized metal coins—or "chits"—that record who possesses the equipment. App. vol. 5, 957.

Not only does this inventory-control system emphasize the specialized nature of keys and equipment in the prison context, it further buttresses our conclusion that the process of checking the keys and equipment in and out is intrinsic to the officers' principal activities of maintaining custody and discipline of inmates and providing security. Similar to the security screening, the inventory controls exist to ensure the overall safety of the prison environment. Indeed, "inmates are never allowed access to keys for security reasons," and the equipment-monitoring system exists "to monitor the equipment and make sure it does not get into the hands of inmates." App. vol. 5, 956–57. So the keys and equipment are not just necessary to the officers' work—the time devoted to checking those items in and out of the inventory-control systems is also closely aligned with their principal activities of maintaining custody and discipline of inmates and providing security. *Cf. Peterson* , 400 F. Supp. 3d at 1130 (noting that "activities which are necessary to perform one's work but not substantively connected to the actual performance of such work are not considered compensable").

Not to be deterred, MTC argues that we should find this activity not compensable based on the distinction the district court drew between the easy-to-carry keys and equipment at issue here and the heavy and burdensome equipment at issue in cases like *Brantley* and *D A & S Oil Well Servicing* . But exertion is not typically considered as part of the compensability analysis. *See Alvarez* , 546 U.S. at 25, 126 S.Ct. 514 (noting that " 'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA" (quoting *Armour & Co. v. Wantock* , 323 U.S. 126, 132, 65 S.Ct. 165, 89 L.Ed. 118 (1944))). Nevertheless, MTC argues "the case[ ]law suggests that the simpler, faster, and easier it is to get and carry the items, the more likely these actions are to be preliminary" and not compensable. *See, e.g.* , *D A & S* , 262 F.2d at 555 n.5 (citing with approval regulation that distinguished between carrying power saw versus carrying "ordinary hand tools"); *Clay v. Huntington Ingalls, Inc.* , No. 09-7625, 2011 WL 13205917, at *10 (E.D. La. Sept. 29, 2011) (unpublished) ("[T]he act of merely retrieving and toting a pair of pliers and a screwdriver is not going to trigger the start of the continuous workday.").

But MTC's argument overlooks the distinct circumstances of this case: although the keys and equipment may be easy to carry, they are not simple or easy to obtain; officers must collect the keys from a fingerprint-protected box, check the equipment out using chits, and maintain responsibility for those items until they are checked back in at the end of the shift. And perhaps more importantly, this easy-versus-burdensome distinction is not particularly helpful
1283 in determining the connection *1283 between the tools and the work the officers are employed to perform. *See Busk* , 574 U.S. at 36, 135 S.Ct. 513 (noting that integral-and-indispensable question turns on whether activity "is tied to" work employee performs); *D A & S Oil Servicing* , 262 F.2d at 555 (noting that transporting tools was integral and indispensable because tools were "closely related" to work performed).

We thus decline MTC's implicit invitation to stray from the Supreme Court's direction in *Busk.* That direction requires us to determine whether an activity is integral and indispensable by considering how closely the activity "is tied to the [employee's] productive work." 574 U.S. at 36, 135 S.Ct. 513. Generic tools and equipment like screwdrivers and paperwork are common to a variety of jobs and therefore play no specialized role in most types of work, no matter how necessary they might be to a particular job. But items like handcuffs, pepper spray, and prison-door keys are closely connected to the work of providing prison security.

Indeed, the district court specifically noted that some of the officers' "essential functions" were to "[t]ransfer and transport detainees"; "[r]estrain and secure assaultive detainees"; and "perform use of force procedures, including the use of chemical agents to control detainees." App. vol. 5, 1168. It seems obvious that an officer could not effectively complete these "essential functions" if the officer had not checked out the keys needed to move a detainee, the handcuffs needed to restrain or secure a detainee, or the pepper spray used to control a detainee. *Id.* ; *see also King Packing Co.* , 350 U.S. at 262, 76 S.Ct. 337 (holding that time butchers spent sharpening knives was compensable because dull knives would "slow down production," affect meat quality, and lead to "accidents"). Further, the inventory-control system from which the officers obtain the keys and equipment is essential to the officers' principal activities of providing prison security because it prevents inmates' access to the keys and equipment.

As such, because of the specialized nature of the keys and equipment, the inventory-control systems, and the officers' principal activities in the prison environment, we hold that checking keys

and equipment in and out of the prison's inventory-control systems is integral and indispensable to the officers' principal activities of maintaining custody and discipline of the inmates and providing security. *See Busk* , 574 U.S. at 37, 135 S.Ct. 513. And because returning the keys and equipment is the last principal activity in the officers' workday, the postshift activities that take place before that—the postshift passdown briefing and walking back from post—are also compensable. *See Castaneda* , 819 F.3d at 1243. Thus, the district court erred in granting summary judgment to MTC on this issue.

II. De Minimis Doctrine

We next consider whether the amount of time that the officers devote to these compensable pre- and postshift activities is de minimis and therefore not compensable. But before undertaking this analysis, we pause to note that MTC's briefing on the de minimis issue assumes that only the passdown briefings are compensable. As such, MTC never makes the argument necessarily presented by our conclusion that all the pre- and postshift activities are compensable: that the de minimis doctrine applies even in these circumstances. Accordingly, because MTC did not address this argument in its principal brief, we could decline to consider the de minimis doctrine at all. *See Bronson v. Swensen* , 500 F.3d 1099, 1104 (10th Cir. 2007). Yet assuming MTC did 1284 make such an argument, *1284 we reject it on the merits for the reasons explained below. *See Kellar v. Summit Seating Inc.* , 664 F.3d 169, 176 (7th Cir. 2011) (noting that employer bears the burden of establishing that de minimis doctrine applies).

The de minimis doctrine provides that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." § 785.47. At the same time, "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time [the employee] is regularly required to spend on duties assigned to [the employee]." *Id.* The de minimis doctrine applies to "the amount of *daily* time spent on the additional work." *Reich v. Monfort* , 144 F.3d 1329, 1333 (10th Cir. 1998) (emphasis added) (quoting *Lindow v. United States* , 738 F.2d 1057, 1062 (9th Cir. 1984)); *see also Hootselle v. Mo. Dep't of Corrs.* , No. WD 82229, 2019 WL 4935933, at *4 & n.6 (Mo. Ct. App. Oct. 8, 2019) (aggregating, for purposes of de minimis analysis, time devoted to compensable pre- and postshift activities). We apply a three-factor test to determine whether work time is de minimis and therefore not compensable: "(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the [employees] performed the work on a regular basis." *Castaneda* , 819 F.3d at 1243 (quoting *Monfort* , 144 F.3d at 1333–34).

Before applying the three factors, we must first estimate the amount of time at issue. *Monfort* , 144 F.3d at 1333 n.1. "There is no precise amount of time that may be denied compensation as de minimis." *Id.* at 1333. And we have approvingly cited cases finding that "as little as ten minutes of working time goes beyond the level of de minimis." *Id.* (quoting *Reich v. IBP, Inc.* , 38 F.3d 1123, 1126 (10th Cir. 1994)).

Here, the amount of time that officers spend daily on compensable pre-and post-shift activities is not entirely clear. The district court concluded that the amount of time was "substantially less than ... eight minutes per shift." App. vol. 5, 1181. The district court appears to have derived that number from the parties' summary-judgment briefing: MTC calculated eight minutes per shift as the most favorable number for the officers, and the officers likewise estimated eight minutes per shift (although they elsewhere argued that the amount of time was more than ten minutes). Because the district court concluded that only the passdown briefing was compensable, it accordingly found

that the time was "*substantially less* than ... eight minutes per shift." *Id.* (emphasis added). But because we have concluded that all of the officers' pre- and postshift activities are compensable, we assume that the amount of time is at least eight minutes per shift.[7]

7 Indeed, it is likely more than eight minutes per shift. As MTC acknowledges, its ten-minute adjustment rule is based on the approximate amount of time it takes to get from the time clock—immediately following the security screening—to the posts. And because those ten minutes occur at both ends of an officer's shift, the amount of time could be as much as 20 minutes. (It is likely not more than 20 minutes because if an officer works more than ten additional minutes on either end of a shift, MTC pays him or her for that time under the ten-minute adjustment rule.)

The first de minimis factor, "the practical 1285 administrative difficulty of recording *1285 the additional time," weighs in the officers' favor—the time clock already tracks most of the time at issue.[8] *Monfort* , 144 F.3d at 1334 (quoting *Reich v. N.Y.C. Transit Auth.* , 45 F.3d 646, 652 (2d Cir. 1995)). The time clock is located just past the metal detector and captures all of the compensable activities except the screening itself. Further, it is possible to estimate the average time the officers devote to screening. *See Kellar* , 664 F.3d at 176–77 (noting that because employees performed the same activities every day, "it would have been possible to compute how much time" employee spent on them); *Rutti v. Lojack Corp., Inc.* , 596 F.3d 1046, 1059 (9th Cir. 2010) (noting that even though "it may be difficult to determine the actual time" at issue, "it may be possible to reasonably determine or estimate the average time"). Thus, because MTC already records the majority of the time at issue and could reasonably estimate the time that it does not record, this factor weighs in the officers' favor.

8 The district court found otherwise, but that is because it considered only the passdown briefing. We reach a different conclusion on this factor because we consider all of the officers' compensable activities, beginning with the security screening and ending with the return of keys and equipment.

Next, "the aggregate amount of compensable time"—a factor that considers both the aggregate claim for each individual officer as well as the aggregate claim for all the officers combined—also weighs in the officers' favor. *Monfort* , 144 F.3d at 1334. The district court did not make an express finding about the aggregate amount of compensable time; instead, it concluded that the aggregate claim for all the officers combined was substantially less than the amount that MTC provided in its summary-judgment motion, $355,478, because that number included compensation for time devoted to noncompensable activities.[9] The district court then weighed that finding in MTC's favor because a number less than $355,478 was substantially less than the $1.6 million that we weighed in the plaintiffs' favor in *Monfort* .

9 MTC calculated this amount based on an officer who worked eight additional overtime minutes per shift, five days a week, for three years, and then multiplied that figure by 122 plaintiffs.

But we cannot rely upon the district court's less-than-$355,478 conclusion because that conclusion turned on the underlying determination that only the passdown briefing was compensable. Because we have concluded that all of the officers' pre- and postshift activities are compensable, we assume that the aggregate claim is *at least* $355,478.[10]

10 Indeed, as with the amount of time at issue, the aggregate claim could be higher. On appeal, the officers provide a higher per-officer claim estimate "[b]ased on a representative sample of 15% of the

officers" over "the four-year time period covered by this suit." Aplt. Br. 56. According to the officers, each officer's back-pay claim for this four-year time period averages $7,093.28. Although the officers do not provide an estimated aggregate amount in their briefing, multiplying their per-officer estimate by 122 plaintiffs results in an estimated total aggregate claim of $865,380.16. We need not accept this estimate to complete our analysis here. But we acknowledge it in order to emphasize both that (1) we base our de minimis analysis on assumptions and estimates, rather than definitive numbers, and (2) those assumptions and estimates are arguably conservative.

And more importantly, the district court erred in treating *Monfort* as if it set a baseline below which all claims are negligible; rather, the court there merely noted that a $1.6 million claim "was very large." *Monfort* , 144 F.3d at 1334. In fact, more moderately sized claims are not automatically negligible. *See* *1286 *Perez v. Mountaire Farms, Inc.* , 650 F.3d 350, 374 (4th Cir. 2011) (noting that in case involving 280 employees, individual claims for $425 per year or $2,550 over six years were "significant"); *Lindow* , 738 F.2d at 1063 (suggesting $1 per week for 50 weeks would not be de minimis claim). Indeed, MTC cites no cases in which a court weighed a claim of this size in the employer's favor. Thus, we conclude that the aggregate size of the officers' claims is substantial and weighs in their favor.

As to the third factor, we conclude that the regularity with which the officers perform this work also favors the officers. *See Monfort* , 144 F.3d at 1334. The district court found that this factor balanced equally between the parties because (1) "[i]t is apparent that all officers receive pass[ ]down briefing[s]," but (2) "there is no fixed time any of them *must* show up on post for these briefings." App. vol. 5, 1182. We, of course, look at more than just the passdown briefings. And it seems clear that most officers perform most of these activities during most shifts. Indeed, MTC requires both the security screening and the passdown briefings, and it designed the ten-minute adjustment rule to account for the time it takes to get from the security screening to post. *See Monfort* , 144 F.3d at 1334 (weighing regularity factor in employees' favor where activities took about ten minutes each day); *Jimenez v. Bd. of Cty. Comm'rs of Hidalgo Cty.* , 697 F. App'x 597, 599 (10th Cir. 2017) (unpublished) (rejecting de minimis doctrine for required five-minute briefing period because time was regular and ascertainable). As such, we weigh this factor in the officers' favor.

In sum, and contrary to the district court's conclusions, all three factors weigh in favor of the officers: MTC already records most of the time at issue, the aggregate claim is substantial, and the officers regularly engage in these activities. As such, we find that the time at issue is not de minimis and conclude that the district court erred in granting summary judgment to MTC on this basis. *See Monfort* , 144 F.3d at 1334 (finding that time was not de minimis based on size of claim and regularity of work and despite administrative difficulty of recording time).

III. Suffer or Permit to Work

Next, MTC argues that even if the officers' activities are compensable, the officers should not be allowed to claim compensation for them because MTC did not know that the officers were doing this work. The district court did not reach this argument because it ruled against the officers on compensability. But we have reached the opposite conclusion. Thus, we address—but ultimately reject—MTC's position that it need not compensate the officers because it did not know the officers were engaging in this work.

The FLSA requires employers to pay employees when the employers "suffer or permit [employees] to work." 29 U.S.C. § 203(g) ; *see also Mencia v. Allred* , 808 F.3d 463, 470 (10th Cir. 2015). This provision creates a kind of FLSA estoppel

doctrine: if an employer does not know that an employee is doing certain work, then the employer is not required to pay the employee for that work. *See Mencia* , 808 F.3d at 470. But if the employer is aware of the work and therefore "suffer[s] or permit[s]" the work, it must pay the employee. § 203(g) ; *see also Mencia* , 808 F.3d at 470. Stated differently, "[a]n employer who is armed with [knowledge that an employee is working overtime] cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." *Fairchild v. All Am. Check Cashing, Inc.* , 815 1287F.3d 959, 964 (5th Cir. 2016) *1287 (second alteration in original) (quoting *Harvill v. Westward Commc'ns, L.L.C.* , 433 F.3d 428, 441 (5th Cir. 2005)).

Here, MTC argues that it did not know the officers were working outside of their scheduled shifts because the officers (1) did not complete time-adjustment forms to request overtime pay and (2) signed an acknowledgement form included with each paycheck stating that they submitted such a form for any overtime work conducted before or after their shift. In other words, MTC maintains that it does not owe the officers compensation because it did not know they were working before and after their shift times. But as the officers point out, the facts here do not permit a logical leap from the absence of time-adjustment forms to MTC's lack of knowledge.

Indeed, the cases that MTC cites to support its position—that an employee's failure to use an overtime-compensation system always means that the employer does not know about the work being done—involve an employer's constructive knowledge. *See White v. Baptist Mem'l Health Care Corp.* , 699 F.3d 869, 873–77 (6th Cir. 2012) (discussing whether employer should have known employee was working during lunch break); *Hertz v. Woodbury Cty.* , 566 F.3d 775, 781–82 (8th Cir. 2009) (discussing appropriateness of jury instruction about whether employer should have known, based on nonpayroll records, that employees were working during commutes and meal breaks); *Newton v. City of Henderson* , 47 F.3d 746, 748–50 (5th Cir. 1995) (discussing whether employer should have known employee was working overtime despite employer's express denial of overtime authorization and employee's failure to report overtime). These cases are not relevant here because, as the officers point out, this case involves MTC's *actual* knowledge that the officers are engaging in these activities. In particular, MTC *requires* both the security screening and the passdown briefing. It cannot simultaneously require an activity and claim to be unaware that employees are engaging in that activity. Further, it is undisputed that MTC often has supervisors conduct the preshift briefing; knows the officers check out keys and equipment because the officers use the inventory-control procedures; and knows they walk to and from their posts because they show up for work.

In sum, MTC pays the officers for the eight hours they are at their posts. But it knows that the officers are working outside those eight hours, on their way to and from post. And MTC "cannot stand idly by and allow [the officers] to perform overtime work without proper compensation, even if" the officers did not claim overtime compensation using the time-adjustment forms or sign acknowledgment forms. *Fairchild* , 815 F.3d at 964 (quoting *Harvill* , 433 F.3d at 441). We therefore reject MTC's contention that it did not "suffer or permit" the officers' work on their way to and from their posts. § 203(g).

IV. Rounding

Finally, we consider the officers' rounding claim, in which they allege that MTC's ten-minute adjustment rule routinely rounds down their work time, resulting in systematic underpayment. Rounding is the practice of "recording the employees' starting time and stopping time to the nearest [five] minutes, or to the nearest one-tenth or quarter of an hour," or to some other consistent time increment. § 785.48(b); *see also McDonald v.*

Kellogg Co. , No. 2011 WL 6180499, at *12–13 (D. Kan. Dec. 13, 2011) (unpublished) (considering rounding claim based on ten-minute
1288 adjustment rule); *1288 *Russell v. Ill. Bell Tel. Co.* , 721 F. Supp. 2d 804, 819–20 (N.D. Ill. 2010) (considering rounding claim based on eight-minute adjustment rule). Federal regulation permits rounding as long as "it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.* ; *see also Corbin v. Time Warner Entm't-Advance/Newhouse P'ship* , 821 F.3d 1069, 1075 (9th Cir. 2016) (noting that federal regulation has endorsed use of rounding for over 50 years). Stated differently, a valid rounding policy must be "neutral, both facially and as applied." *Corbin* , 821 F.3d at 1076 (quoting *See's Candy Shops, Inc. v. Superior Court* , 210 Cal.App.4th 889, 148 Cal. Rptr. 3d 690, 701 (2012)). It must allow for rounding both up and down, so that an employee is sometimes compensated for time not spent working, and sometimes not compensated for time spent working. *See id.* at 1077.

Recall that under MTC's ten-minute-adjustment rule, if an officer clocks in or out more than ten minutes before or after his or her shift time, MTC will pay the officer based on the time clock rather than on his or her scheduled shift. But if an officer clocks in or out fewer than ten minutes before or after his or her start time, MTC will pay the officer based on his or her scheduled eight-hour shift rather than the clock time—in other words, MTC rounds this time off. This rule is facially neutral because it rounds both up and down. *See id.* That is, an officer assigned to a 6 a.m. shift who clocks in at 5:51 a.m. and clocks out at 2:09 p.m. will be paid for eight hours, even though he or she worked at least an 18 additional minutes (nine on either side). Similarly, an officer who clocks in at 6:09 a.m. and out at 1:51 p.m. will also be paid for eight hours, even though he or she worked 18 fewer minutes (nine on either side).

But the officers presented evidence suggesting that the ten-minute adjustment rule is not neutrally applied. In particular, they submitted a representative sample showing that about 94% of the time, the officers were clocked in—and therefore were performing compensable pre- and postshift activities—for longer than their eight-hour shift time. And a rounding policy that works in the employer's favor 94% of the time is probably not neutrally applied.

Yet the district court rejected the officers' rounding claim. The basis for its decision is not entirely clear, but it concluded that because the officers are paid for their scheduled shifts under the ten-minute adjustment rule, their "theory of 'rounding' ... violations is incongruous with" their other claims. App. vol. 5, 1155. In other words, the district court appears to have decided that because this case involves claims for *overtime* compensation—that is, for work completed outside of the eight-hour shift—MTC's ten-minute adjustment rule "does not constitute 'rounding' as that concept is used in wage[-]and[-]hour law."[11] *Id.*

[11] The district court's ruling may also have turned at least in part on its conclusion that the officers' activities after clocking in but before arriving at their posts were not compensable: the district court noted that "under a true rounding system, employees are working immediately upon clocking in." App. vol. 5, 1154. Yet because we conclude here that these activities are compensable, the district court's rounding ruling is flawed to the extent that it turned on its compensability ruling.

We disagree that rounding can never be relevant when considering claims for overtime compensation. The district court cited no authority to support this proposition, and we have found at least some authority to the contrary. Specifically, in *Russell* , the district court denied summary judgment to the employer defendant on the

1289 employees' *1289 rounding claim because if the employer's "time[-]rounding and log[-]out policies often caused [employees] to work *unpaid overtime* in increments of under eight minutes, then these company-wide practices *may have resulted in unpaid overtime work* ." 721 F. Supp. 2d at 820 (emphases added).

Indeed, the district court's conclusion that rounding is never relevant to overtime claims appears to bypass the ultimate issue in this case. We are not concerned here with whether MTC pays the officers for their full eight-hour shifts; instead, we are concerned with whether MTC compensates them for work completed outside of those eight-hour shifts. And if the ten-minute adjustment rule routinely rounds off that compensable overtime, as the officers' evidence suggests, then the officers' rounding theory remains viable.

At this stage of the litigation, MTC has not countered the officers' evidence on the non-neutrality of its ten-minute adjustment rule. Indeed, MTC's only argument against the rounding claim, both below and on appeal, is that the ten-minute adjustment rule does not amount to rounding because the officers are not doing compensable work during the time that is rounded off the time clock. We have found to the contrary. Thus, although "employees who voluntarily come in before their regular starting time or remain after their closing time[ ] do not have to be paid for such periods" as long as "they do not engage in any work," those are not the facts of this case. § 785.48(a). And because it appears that the officers have met their initial burden to show that they are routinely paid only for their shift time even though they regularly arrive early, leave late, and do work during that time, the district court erred in granting summary judgment to MTC on the officers' rounding claim.

Conclusion

For these detention officers, undergoing the security screening and checking specialized keys and equipment in and out of a centralized inventory-control system are integral and indispensable parts of the principal activities that they are employed to perform: maintaining custody of inmates, searching for contraband, and providing security. As such, those two activities are compensable under the FLSA, and they begin and end the officers' workday. Accordingly, the pre- and postshift activities that occur in between —the preshift briefing, walking to and from post, and the passdown briefings—are part of the officers' continuous workday and are therefore compensable.

The officers devote at least eight minutes per shift to conducting these pre- and postshift activities—more than a de minimis amount of time under all the relevant factors. Further, at least two of these activities, the security screening and the passdown briefings, are required by MTC policy, so MTC knows that the officers are engaging in this work. Additionally, because MTC's compensation system appears to routinely round down the time that the officers are working, the officers' rounding claim survives summary judgment. Accordingly, we reverse the district court's order awarding summary judgment to MTC and remand for further proceedings.