No. 16-1189

In the
Supreme Court of the United States

E. I. DU PONT DE NEMOURS AND COMPANY
and ADECCO USA, INC.,

Petitioners,

– v. –

BOBBI-JO SMILEY, AMBER BLOW
and KELSEY TURNER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petition for Certiorari should be denied because:

1. DuPont waived its lead argument by not presenting it to the District Court or to the Third Circuit Panel that decided the case.

2. The Third Circuit decision is not in conflict with Supreme Court Precedent. The Third Circuit applied prevailing Supreme Court rules for interpreting the FLSA, but merely came to a conclusion DuPont disagrees with. And in any event DuPont is requesting Supreme Court review of unresolved factual matters intertwined with DuPont's argument.

3. There is no true conflict of Circuits involving the "same important question," as required. Instead, the mere two other circuit court decisions involve important factual differences that will not permit the Court to resolve any supposed "conflict."

4. Even without relying upon the DOL's interpretation, the Third Circuit's remains the same, for by its very terms it was independently based on "the FLSA … as well as our precedent in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005)." Appeal to the Supreme Court will not change the result in the case because the Third Circuit's decision rests on independent bases for which DuPont does not seek certiorari.

STATEMENT OF THE CASE

According to its written corporate Policy, Petitioner DuPont[1] "paid" the Respondents, 12-hour Shift Workers, for break time "as part of [the Shift Workers'] regular work shift." DuPont did this for many years.

The Shift Workers filed suit for unpaid overtime wages due for off-the-clock work consisting of "shift relief" (shift transition) work and donning and doffing uniforms and protective gear.

Then, DuPont asserted for the first time ever (and, even then, in a legal filing) that it had an unwritten "policy" that permitted it to (1) take a credit for the break time pay it had already paid over the years and (2) reallocate that already-paid money to the unpaid overtime pay it owed the Shift Workers under the FLSA -- thus eliminating DuPont's overtime pay obligations under the FLSA.

DuPont took, and takes, this "position" even though:

- DuPont included the pay in the Shift Workers' regular rate.
- DuPont admittedly told the Shift Workers in writing and otherwise that it would pay them wages for this time "as part of [their] regular work shift." [2]

---

[1] Petitioners DuPont and Adecco are referred to here as "DuPont."

[2] DuPont erroneously states that "Third Circuit left undisturbed the district court's findings that: […] there had been no contractual agreement to treat the meal breaks as 'hours

- DuPont called these payments wages for work.
- DuPont treated these payments as wages for work.
- DuPont documented these payments as wages for work.
- DuPont never once told the Shift Workers that these were not wages for work.
- DuPont never suggested that it could or would take a credit against these wages.
- DuPont never actually attempted to take such a credit for even a single Shift Worker before this lawsuit.[3]

The Third Circuit disagreed that DuPont could take the credit, and on three separate legal bases: "the FLSA and applicable regulations, as well as our precedent in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005), compel the opposite result." Pet. App. 3. The court noted that the District Court had "cited *Wheeler* in passing, [but] did not apply our holding[.]"

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worked'[.]" Pet. 13. In fact, however, the Third Circuit made no such determination. Instead, the Third Circuit expressly held that "inclusion in the regular rate is sufficient for our purposes, as noted above, *so the existence of an agreement is beside the point*." Pet. App. 21. The Third Circuit never reached this fact issue. As discussed below, this open issue of fact renders this case particularly inappropriate for grant of certiorari.

[3] Before the District Court, DuPont referred to a "policy" of taking the credit. Before the Third Circuit and this Court this "policy" had morphed into a "practice." Pet. App 6. But DuPont has never disputed that this litigation is the first time it ever mentioned or wrote of this "policy/practice" to anyone, much less implemented it.

Pet. App. 19.[4] Not incidentally, the Shift Workers made and developed a *Wheeler* argument to both the District Court and the Third Circuit.

The Third Circuit relied on its decade-old precedent in *Wheeler* that "at the point at which compensation is included in the regular rate (regardless of whether the Act required it be included), an employer may not use that compensation to offset other compensation owed under the Act. We determined that '[w]here the [FLSA] permits a credit the statute say so'" *Id*. *citing Wheeler*, 399 F.3d at 245.[5] And regarding DuPont's attempt to take a credit here, the Third Circuit found that the FLSA does not "say so."[6]

The Third Circuit hastened to add that "DuPont treated the compensation for meal breaks similarly to other types of compensation given to employees. It included the compensation given for paid meal breaks when it calculated employees' regular rate of pay, and meal break time was included in employees' paystubs as part of their total hours worked each week." Pet. App. 5.

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[4] The Shift Workers cited and argued *Wheeler* to both the District Court and the Third Circuit.

[5] The Third Circuit correctly recognized that "It is undisputed that the compensation paid for meal breaks was included in plaintiffs' regular rate of pay[.]" Pet. App 17.

[6] DuPont does not argue otherwise, nor could it.

NO ISSUE IN THIS CASE IS CERTWORTHY

DuPont now seeks Supreme Court review of the Third Circuit's decision on three grounds:

First, DuPont claims that the decision creates a conflict with *Williams v. Jacksonville Terminal Co.,* 315 U.S. 386 (1942) and *Christensen v. Harris County*, 529 U.S. 576 (2000). Pet. 17; *Second*, DuPont claims that the decision creates a Circuit conflict. Pet. 21; and *Third*, DuPont argues that the Third Circuit's decision conflicts with this Court's decisions concerning deference to DOL interpretations of regulations. Pet. 26.

As explained below, DuPont has waived the first; the third is academic; and all three are non-conflicts. And so the Court should deny the Petition.

I.

A. DuPont Did Not Timely Raise And Develop Their *Williams/Christensen* Conflict Argument Before The District Court Or The Third Circuit Panel, So The Argument Has Been Waived

DuPont's very first "reason" for granting certiorari is that the Third Circuit's decision "conflicts with *Williams* and *Christensen*." This is a brand-new argument DuPont never raised or developed before either the District Court or the Third Circuit Panel before their respective decisions.

DuPont never mentioned either *Williams* or *Christensen* in the District Court proceedings. This is determinative, for the Third Circuit could not later rightly entertain (and did not entertain) it on appeal. *United States v. Joseph*, 730 F.3d 336, 337 (3d Cir.

2013) ("We hold that for parties to preserve an argument for appeal, they must have raised the same argument in the District Court — merely raising an issue that encompasses the appellate argument is not enough.").

Then, again, on appeal to the Third Circuit, DuPont did not refer to the *Williams* case in any filing before the Panel, much less develop an argument based on *Williams*, depriving that Court of the opportunity to address this supposed "conflict."

Nor did DuPont ever mention the *Christensen* decision in its opening brief before the Panel, with the same consequence. DuPont referred to the *Christenson* decision only later in the appeal (in a letter brief in response to *Amicus* DOL's letter brief) and even then only incidentally, and in support of a different, unremarkable proposition, that was not at issue then or now: "[t]he statute is not ambiguous simply because it does not specifically reference the offset at issue. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000)." Resp. App. A-16. This is not the issue for which DuPont *now* invokes *Christensen*, i.e., for the proposition that if the FLSA does not expressly prohibit something, it permits it. Pet. 19. Below, DuPont never cited *Christensen* for *that* proposition, and did not develop any Christensen-based argument for this proposition. And so the Third Circuit Panel never considered or decided it. DuPont never gave the Panel the opportunity to do so.

The Third Circuit issued its decision, and then DuPont moved for rehearing and rehearing *en banc*. It was only then that DuPont belatedly raised its new *Williams*/*Christensen* "deference" argument. But the Panel's decision had already been handed down by then. It was too late.

"[The] jurisprudence is clear that 'an issue is waived unless a party raises it in its opening brief.'" *Tse v. Ventana Medical Systems, Inc.*, 297 F.3d 210, 225 n.6 (3d Cir. 2002) (quoting *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305 n.11 (3d Cir. 1999)). The Third Circuit has "made clear that raising an issue for the first time in a petition for rehearing *en banc* fails to preserve the issue for subsequent review. *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002)." *United States v. McCarrin*, 54 Fed. Appx. 90, 94 (3d Cir. 2002).

Accordingly, DuPont has waived this argument, and for this reason alone the Court should deny certiorari, as this Court's precedent dictates. "It is not the Court's usual practice to adjudicate … legal … questions in the first instance[.]" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. ___, ___, 136 S. Ct. 1642, 1653, 194 L. Ed. 2d 707, 722 (2016) (*quoted in Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. ___, 137 S. Ct. 1002, 197 L. Ed. 2d 354 (2017)).

B. The Supposed *Williams/Christensen* Conflict Is Fact Dependent (And Those Facts Were Not Resolved By The Third Circuit) And Is A False Conflict Anyway; Therefore, Grant Of Certiorari Would Accomplish Nothing

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. "It is not the Court's usual practice to adjudicate … predicate factual questions in the first instance[.]" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. at ___, 136 S. Ct. at 1653; *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. ___, 137 S. Ct. 1002, 197 L. Ed. 2d at 365.

DuPont argues that both *Williams* and *Christensen* "make abundantly clear that, unless the FLSA expressly prohibits an employer's pay practice, it is lawful." Pet. 17. But those decisions do not establish such a broad, black letter legal precedent. Instead they are based on factual issues regarding the existence of employer-employee agreements, and statutory interpretation methods the Third Circuit here applied, though not to DuPont's liking.

Despite its proposed reading of *Williams*, DuPont acknowledges that the Court held that "[g]iven 'the absence of statutory interference' ***[with] the parties' agreement***, this Court stated that 'no reason is perceived for its invalidity' under the FLSA. *Williams*, 315 U.S. at 397." Pet. 18. (emphasis added).

This is ironic, because the case here too involves just that: an alleged agreement between the parties -- embodied in DuPont's written Policy, Standard Operating Procedure B10 -- which provides that DuPont will pay the Shift Workers for break time "as part of [the Shift Workers'] regular work shift." Pet. App. 4-5. As noted above (*see* n. 2, *supra*.), the Third Circuit did not reach this issue,[7] instead holding that "inclusion in the regular rate is sufficient for our purposes, as noted above, so the existence of an agreement is beside the point." Pet. App. 21.

So, too, the *Christensen* decision rested on an intertwined finding of fact -- not challenged and not at issue there -- regarding whether there was an agreement between the employer and employee:

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[7] The Shift Workers preserved and argued his issue in the District Court and on appeal to the Third Circuit.

> ***We accept the proposition that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."*** *Raleigh & Gaston R. Co. v. Reid*, 80 U.S. 269, 13 Wall. 269, 270, 20 L. Ed. 570 (1872). But that canon does not resolve this case in petitioners' favor. The "thing to be done" as defined by § 207(o)(5) is not the expenditure of compensatory time, as petitioners would have it. Instead, §207(o)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper *expressio unius* inference is that an employer may not, ***at least in the absence of an agreement,*** deny an employee's request to use compensatory time for a reason other than that provided in § 207(o)(5).

Christensen v. Harris County, 529 U.S. at 583 (emphasis added).

What would grant of certiorari accomplish under these circumstances? Nothing more than to allow an appeal that would involve wrangling over an unresolved fact issue regarding the existence and terms of an agreement. This is not the stuff of Supreme Court review. Supreme Court Rule 10.

This Court does not engage in fact finding. "It is not the Court's usual practice to adjudicate … predicate factual questions in the first instance[.]" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. at ___, 136 S. Ct. at 1653; *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. ___, 137 S. Ct. 1002, 197 L. Ed. 2d at 365.[8]

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[8] Indeed, this Court does not even correct errors in fact finding. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review …

Cf. Rogers v. United States, 522 U.S. 252 (1998) (O'Connor, J., joined by Scalia, J. concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented.").

Anyway, since the *Christensen* decision endorses the use of *expressio unius* in interpreting the FLSA, DuPont's Petition does not actually challenge *whether* the Third Circuit adhered to *Christensen*, but the *way* the Third Circuit adhered to it. The FLSA plainly speaks to credits and offsets, and as the Third Circuit determined in *Wheeler*, and again in this case, "[w]here a credit is allowed, the statute says so." *Wheeler*, 399 F. 3d at 245; Pet. App.16. Thus, the Third Circuit in *Wheeler* (decided after *Christensen,* n.b.) and the Third Circuit in this case used *expressio unius* to interpret the FLSA, but came to a conclusion DuPont simply disagrees with.

The Third Circuit's use of an interpretive canon this Court has endorsed, to reach a result DuPont is unhappy with, is not an "issue" worthy of Supreme Court review. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … misapplication of a properly stated rule of law.").

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findings of fact by … courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co. v. Sofec*, 517 U.S. 830, 841 (1996) (*quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)); *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) ("[W]e are not, and for well over a century have not been, a court of error correction.") (Scalia, J. dissenting, joined by Kagan, J.).

II.

A. There Is No True Conflict Of Circuits Involving The "Same Important Question," As Required Under The Supreme Court Rules

DuPont suggests that the Third Circuit's decision creates a circuit conflict, putting it at odds with the Seventh[9] and Eleventh[10] Circuits, which, according to DuPont, "both upheld the use of compensation paid for non-work time that was included in the regular rate as credits against overtime compensation owed for pre- and post-shift work time." Pet. 21. Not so.

Under Supreme Court Rule 10(a) a certworthy conflict may (but does not necessarily) occur where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals ***on the same important matter."***

But neither the Seventh Circuit's *Barefield* decision, nor the Eleventh Circuit's *Avery* decision involved, as here, an employer that had an agreement, custom, or practice of paying for lunch breaks and other breaks.

In *Avery,* the Plaintiffs argued "that they are in fact due compensation for the meal breaks[.]" *Avery,* 24 F.3d at 1344. But the court there held otherwise, after analyzing "the compensability of meal breaks for §7(k) law enforcement employees." The Shift Workers here do not disagree with that proposition: ordinarily, *bona fide* meal breaks are not compensable under the FLSA -- *unless* the employer and employees, as here,

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[9] *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996).

[10] *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994).

agree that they are compensable. Because of this, the Seventh and Third Circuit decisions may and do peacefully coexist in FLSA jurisprudence.

Barefield similarly involved claims by §7(k) law enforcement personnel, and, as in *Avery* there was no employer-employee agreement to pay for the lunch breaks and other breaks. Instead, the employer's payment was entirely "voluntary." *Barefield,* 81 F.3d at 711.

The absence of any alleged agreement, custom, or practice of paying for lunch breaks -- and the fact that *Barefield* involved public law enforcement employees, subject to different sections of the FLSA -- distinguishes it from the factory Shift Worker's case here. Thus, Eleventh Circuit law, too, is unaffected by the Third Circuit's decision.

For the more than ten years, *Wheeler* has coexisted with *Barefield* and *Avery*, without jurisprudential incident. The decisions did not prevent well-lawyered DuPont from adopting written wage payment policies in Pennsylvania or elsewhere. Just as DuPont was late to the "credit/offset policy" party (having announced its "policy/practice" only after the Shift Workers sued), it is a decade late to the anti-*Wheeler* party.

Since there is no "conflict with the decision of another United States court of appeals on the same important matter," the Third Circuit's decision is not a good candidate for Supreme Court review.

Furthermore, even if there were a pure legal issue conflict here, it is a shallow one. The decisions of three Circuit Court decisions, coexisting without incident for more than a decade -- recall that *Wheeler* is over

10 years old, and that the Third Circuit's decision here is based on *Wheeler* -- is hardly the kind of developed, dire "conflict" among the circuits that cries out for Supreme Court resolution. The sky is not falling.

III.

A. Supreme Court Review To Address The Deference To Be Given To The DOL's Interpretation Of The FLSA Would Not Change The Result Below. The Third Circuit Gave Proper Deference To DOL, And In Any Event The Court's Decision Was Also Independently Based On The FLSA And 10 Year Old Third Circuit Precedent

DuPont argues that Supreme Court review is necessary to address the deference to be given to the DOL's interpretation of the FLSA: "In light of the Third Circuit's recognition that the FLSA is unambiguous, it erred in according *Skidmore* deference to the DOL's statutory interpretation." Pet. 27.

This argument, however, is untenable because it proceeds from a false juridical premise, and because it ignores that the Third Circuit based its decision on two other independent grounds for which DuPont does not seek certiorari.

First, DuPont's statement that the Third Circuit "recogni[zed] that the FLSA is unambiguous" is demonstrably erroneous. In fact, the word "unambiguous" does not even *appear* in the Third Circuit's opinion, and DuPont does not cite to any part of the Third Circuit's opinion in support of its erroneous statement. So there is no good reason to question the Third Circuit's *Skidmore* deference.

Second, as the Third Circuit made explicit, its decision was based upon two other independent grounds: "the FLSA … as well as our precedent in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005)[.]" Pet. App. 3.

Since the Court based its decision on its independent analysis of the FLSA, resolving the deference given to the DOL would resolve nothing here. The result would stay the same.

And since the Court based its decision on *Wheeler*, yet another independent basis, again, nothing would be achieved by granting certiorari. The decision would stand on independent grounds.

The Third Circuit's decision was based on three independent grounds, only one of which DuPont challenges. DuPont's "DOL deference" challenge is therefore inevitably inconsequential, and therefore an especially unworthy candidate for certiorari.

IV.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No.

E. I. DU PONT DE NEMOURS AND COMPANY
and ADECCO USA, INC.,

Petitioners,

– v. –

BOBBI-JO SMILEY, AMBER BLOW
and KELSEY TURNER,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the opposition to petition for a writ of certiorari contains 3,398 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d),

I declare under penalty of perjury that the foregoing is true and correct.

_____
Nikolina Gurfinkel

Sworn to on this _____ day of
_____, 20____

APPENDIX

Appendix A —
Letter Brief of Defendants E. I. du Pont de Nemours and Company and Adecco USA, Inc., in the United States Court of Appeals for the Third Circuit, Filed December 18, 2015

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December 18, 2015

By Electronic Filing

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United States Court of Appeals
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James A. Byrne Courthouse
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Re: Smiley, et al. v. E. I. du Pont de Nemours and Company, et al.

Docket No. 14-4583

Dear Ms. Waldron:

Pursuant to the Court's November 10, 2015 and November 18, 2015 Orders, Appellants E. I. du Pont de Nemours and Company ("DuPont") and Adecco USA, Inc. ("Adecco") (collectively, "Defendants") hereby submit this letter brief in response to the *amicus curiae* letter brief of the United States Department of Labor (the "Department").

Taken to its logical conclusion, the rationale of the Department in its *amicus curiae* brief leads to the result that no offset is permissible under the Fair Labor Standards Act ("FLSA") except in three narrow circumstances, for certain premium payments. This position is inconsistent with the statute and the Department's own interpreting regulations, and thus not entitled to deference. The Department's position is likewise at odds with its silence on this issue until asked for its opinion here, and the unequivocal blessing numerous District Courts and two Circuit Courts have given this widespread practice in the twenty-one years this issue has been brought before them. Plaintiffs do not dispute that Defendants paid them for all hours worked. As every court to consider this issue over the last two decades save one has concluded, this is all that the FLSA requires.

A. The Offset is Consistent with the FLSA

1. Contrary to the Department's Contention, Section 207 of the FLSA Does Not Preclude the Offset.

The Department first argues that Section 207(e) of the FLSA, in conjunction with Section 207(h), prohibits Defendants from using paid, bona fide meal breaks to offset other compensable time. The Department's contention is inconsistent with the plain language of those provisions.

Section 207(e) of the FLSA defines the "regular rate" as all sums paid to employees, such as Defendants' pay for meal breaks, with the exception of eight enumerated categories of payments. The only potentially applicable exception in this case is Section 207(e)(2) (*see* DOL Br. at 2), which exempts "payments for ***occasional*** periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . . ." 29 U.S.C. §207(e)(2) (emphasis added).

However, meal breaks, which occur consistently each day (here, three times during each 12 hour shift), are not "occasional," nor are they akin to vacations, holidays, illnesses or failure to provide work, which are unplanned and/or irregular in occurrence. Therefore, meal breaks do not fall within the plain language of Section 207(e)(2). Ignoring this key distinction, the Department inexplicably contends that Section 207(e)(2) encompasses the pay for meal breaks at issue here. DOL Br. at 2-4. This position is directly at odds with the Department's own regulation, which states that Section 207(e)(2) does not include pay for meal breaks. 29 C.F.R. §778.218 ("section 207(e)(2) deals with the type of absences

which are infrequent or sporadic or unpredictable. It has no relation to regular 'absences' ***such as lunch periods*** nor to regularly scheduled days of rest.") (emphasis added).[1]

Because the meal breaks do not fall within one of the enumerated exceptions in Section 207(e), Section 207(h) is inapplicable, a conclusion to which the Department acquiesces (*see* DOL Br. at 5 ("Section 7(h) does not address, however, payments that are included in the regular rate and whether those payments can be used as a credit against required overtime compensation."). Indeed, the title of Section 207(h) is "Credit toward minimum wage or overtime compensation of ***amounts excluded from regular rate.***" (emphasis added). Section 207(h)(1) provides that amounts excluded from the regular rate pursuant to Section 207(e) may not be credited towards minimum wage and overtime obligations. Section 207(h)(2) provides an exception to this general rule for certain types of "extra compensation" ***other than*** compensation for meal breaks. Section 207(h) does not speak to amounts required to be included in the regular rate, such as Defendants' pay for bona fide meal breaks. Consequently, contrary to the Department's argument, Section 207(h) does not prohibit the offset.

The Department also quotes from 29 C.F.R. §778.201 to argue that only the credits discussed in Section 207(h) are permissible under the FLSA. DOL Br. at 3, 8. In addition to being contrary to the plain language

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[1] The Department provides no explanation for its conclusion that meal breaks constitute an "other similar cause" pursuant to 29 C.F.R. §778.224 (*see* DOL Br. at 5, n.3) when the regulation on point, 29 C.F.R. §778.218, states to the contrary.

of the statute, as outlined above, this is a misreading of the regulation that fails to account for the Department's regulations as a whole. *See Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole") (internal quotations and citations omitted); *In re Visteon Corp.*, 612 F.3d 210, (3d Cir. 2010) ("It is a cardinal rule of statutory interpretation that a statute is to be read as a whole.") (internal quotations and citations omitted); *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994) ("Another fundamental rule of construction is that effect must be given to every part of a statute or regulation, so that no part will be meaningless.").

The Department's regulations addressing "[p]rovisions governing inclusion, exclusion, and crediting of particular payments" appear at 29 C.F.R. Part 778, Subpart C, 29 C.F.R. §§778.200-778.225. The regulation cited by the Department, Section 778.201, entitled "Overtime premiums," by its terms, addresses the types of extra compensation identified in Sections 207(e)(5), (6) and (7). 29 C.F.R. §778.201(a), (b). A different regulation under this subpart, Section 778.223, discusses "[p]ay for non-productive hours," such as "meal periods." Read together, the quoted language from Section 778.201(c), that no other credits are permitted, cannot reasonably be interpreted to apply to all credits, but rather refers to Section 207(h).

In sum, Section 207(e) applies to all payments made to employees and divides them into two groups — the eight categories that may be excluded from the regular rate and all others, which must be included in

the regular rate. For the eight categories that may be excluded from the regular rate, Section 207(h) divides them into two types — those that may be credited against minimum wage and overtime obligations and those that may not be so credited. With respect to the payments that must be included in the regular rate, as the District Court (and every other court, save one) correctly concluded, there is nothing in the text of the FLSA that prohibits using those payments, if made for non-compensable time, to offset other unpaid, compensable time. Because Defendants' pay for bona fide meal breaks must be included in the regular rate pursuant to Section 207(e), the FLSA does not prohibit using that pay as an offset.

2. Defendants' Pay Practice Otherwise Meets the Requirements of the FLSA.

The FLSA requires employers to compensate employees for all hours worked at the applicable minimum wage or overtime rate. 29 U.S.C. §207(a). *See* DOL Br. at 1. Defendants' use of the paid, non-compensable meal breaks to offset unpaid, compensable pre- and post-shift time meets these requirements. As the charts in Defendants' opening brief make clear, Plaintiffs receive pay for all hours worked; in fact, they are paid in excess of the compensable hours they work.

The fact that Defendants compensate Plaintiffs for the entire twelve hour shift at their applicable rates does not alter this conclusion. The analysis is no different if, instead of paying employees for the three, 30 minute bona fide meal breaks, Defendants paid employees an extra 90 minutes of pay each day to ensure that all potentially compensable pre- and post-shift time was compensated, a practice that would be

lawful under the FLSA. Consider the following example.

- Employer pays Employee A $10 per hour. She works 10½ hours during her regularly scheduled 12 hour shift (the remaining 90 minutes is comprised of three 30 minute bona fide meal breaks), and she spends anywhere from 5 to 30 minutes engaged in compensable pre- and post-shift activities. Employer pays Employee A $120 for this 12 hour shift.
- Employer also pays Employee B $10 per hour. He likewise works 10½ hours during his regularly scheduled 12 hour shift and receives three 30 minute bona fide meal breaks, but the meal breaks are unpaid. He also spends anywhere from 5 to 30 minutes engaged in compensable pre- and post-shift activities. Employer pays Employee B $105 for 10½ hours of time spent working during the 12 hour shift and a stipend of $15 (equivalent to pay for 90 minutes of work) to compensate him for any compensable pre- and post-shift activities.

In both cases, the employees receive $120 of pay for 11 hours of potentially compensable time — 10½ hours of work during the shift and up to 30 minutes of potentially compensable time pre- and post-shift. In both cases, Defendants have satisfied the requirements of the FLSA.

A contrary result makes no sense. Consider another scenario. An employer states in its handbook that employees will work and be paid for eight hours each day, five days per week. In a particular week, the employee works eight hours Monday through

Wednesday, but then seven hours on Thursday and nine hours on Friday, for forty hours total. The employer pays the employee for eight hours each day. The FLSA does not require that the employer pay the employee for the eighth hour on Thursday because that is the published schedule. Nor does the FLSA require that the employer pay the employee for 41 hours when the employee worked only 40 hours simply because the handbook stated the employee would be scheduled for and work eight hours each day. The relevant inquiry under the FLSA is the total amount of compensable time during the workweek and whether time paid is equivalent to or exceeds time worked.

This Court's decision in *Wheeler* does not alter this conclusion. In *Wheeler*, pursuant to a collective bargaining agreement, the employer included pay for holidays, personal days, vacation and sick days, which may be excluded from the regular rate under Section 207(e)(2), in the regular rate, but excluded incentive/expense pay, which must be included. *Wheeler v. Hampton Twp.*, 399 F.3d 238, 241 (3d Cir. 2004). The plaintiffs contended that the failure to include incentive/expense pay affected the regular rate, which resulted in overtime violations. *Id.* at 241-242. This Court held that the employer could not contract around the FLSA and was required to include incentive/expense pay in the regular rate. *Id.* at 243. It rejected the alternative argument, that the holiday/personal/vacation/sick pay could be credited against the incentive/expense pay because both were required to be paid, the former pursuant to the collective bargaining agreement and the latter pursuant to statute. *Id.* at 243-44.

Here, in contrast, the issue is not whether Defendants compensated Plaintiffs at the correct regular rate but whether they paid Plaintiffs for all compensable hours worked. Here, as addressed more fully in Section II.B. below, Defendants are not required to compensate Plaintiffs for the meal breaks. Finally, here, the pay for meal breaks does not fall within Sections 207(e)(2)/ 207(h), unlike in *Wheeler*, where the holiday/personal/ vacation/sick pay at issue fell within Section 207(e)(2) and, therefore, the Section 207(h)(1) prohibition on crediting the pay toward minimum wage or overtime compensation applied. Consequently, *Wheeler* does not prohibit the offset.

B. The Court Should Not Look to the Regulations, As Defendants Comply with the FLSA. Even if Considered, the Offset is Permissible.

1. The Statutory Language Controls, and it Permits the Offset.

In the event its Section 207 analysis is rejected, the Department argues alternatively that the parties agreed to treat the meal breaks as compensable work time, citing Section 778.320 of the FLSA implementing regulations, and thus, Defendants may not use the pay for the meal breaks to offset unpaid, compensable pre- and post-shift time. As an initial matter, the Court should not turn to interpretation of the regulations where, as here, the plain language of the statute is clear and permits Defendants' pay practice. *Ingalls Shipbuilding v. Dir.*, 519 U.S. 248, 261 (1997) (plain language of statue controls unless it leads to results that are "absurd or glaringly unjust"); *Shalom Pentecostal Church v. Acting Sec'y, United States Dep't of Homeland Sec.*, 783 F.3d 156, 165, 167 (3d Cir. 2015) (stating, "[i]f Congress has directly and

clearly spoken to the question at issue, our *Chevron* analysis is complete at step one, and Congress's unambiguous intent controls."); *Parker v. Nutrisystem, Inc.*, 620 F.3d 274, 277 (3d Cir. 2010) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end.").

However, even if considered, the Department's arguments are unpersuasive.

2. The Offset is Consistent with the Department's Own Regulations.

The Department has promulgated two related regulations — one addressing rest breaks, 29 C.F.R. §785.18, and one addressing meal periods, 29 C.F.R. §785.19. The first states that, "[c]ompensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time." 29 C.F.R. §785.18. In comparison, the Department's regulation regarding bona fide meal periods is silent as to the ability to use them to offset compensable time. 29 C.F.R. §785.19. The Department's silence is significant. If it intended to preclude the use of paid, non-compensable meal breaks to offset compensable time, it knew how. Thus, the Department's position in this litigation that its regulations somehow preclude an offset is untenable.

3. Defendants' Payment of the Meal Breaks and Inclusion of That Pay in the Regular Rate Does Not Reflect an Agreement to Treat Them as Compensable Time.

Section 778.320 of the regulations states that an agreement to compensate hours that are otherwise non-working time may convert them into compensable time if "it appears from all pertinent facts that the parties have agreed to treat such time as hours worked." 29 C.F.R. §778.320. The Department points to three "pertinent facts" it contends establish an agreement to treat the non-compensable meal breaks here as hours worked: (1) Defendants pay employees for the meal breaks; (2) the pay for the meal breaks is included in the regular rate; and (3) the Break/Lunch Periods policy evidences an intent to render the time compensable. DOL Br. at 9-10. The District Court correctly held that "plaintiffs have failed to establish that the parties had an agreement to treat the non-work meal periods as 'hours worked.'" Op., D.E. #144 at 20.

The first two factors cited by the Department — payment of the breaks and inclusion of pay in the regular rate — are nonstarters. Section 778.320 assumes that the time at issue is paid. Conflating payment for the meal periods and compensability puts the rabbit in the hat. The question under Section 778.320 is whether those paid, otherwise non-compensable periods are nonetheless compensable pursuant to an agreement between the parties. Further, the Department itself has previously rejected the same interpretation now advanced, as noted by the District Court, by including a preamble to the section stating that paid time is not equivalent to

compensable time. Defs' Br. at 13-14; Op., D.E. #144 at 13-14.

The second factor similarly proves too much — Defendants must include pay for the meal breaks in the regular rate pursuant to Section 207(e). Therefore, the second factor merely establishes an intent to follow the statute, not an intent to render the time compensable, a conclusion emphasized by the Department's own regulations. 29 C.F.R. §778.223 ("Where payment is ostensibly made as compensation for [non-productive hours] ***as are not regarded as working time*** . . . the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion" under Section 207(e)) (emphasis added).

4. The Break/Lunch Periods Policy is Not an Agreement to Treat the Meal Breaks as Compensable Time.[2]

The third factor — the policy — also fails to establish an agreement to treat the time as compensable work hours. Section 778.320 contemplates that there will be "an agreement [to] provide[ ] for compensation" for otherwise non-compensable hours. The question posited by Section 778.320 is whether the "agreement of the parties to provide compensation for such hours . . . convert[s] them into hours worked . . . ." 29 C.F.R. §778.320. Thus, the mere fact that DuPont maintains a policy establishing paid meal breaks for certain

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[2] On this point, as a threshold matter, the Department's identification of the existence of an agreement as a factor to consider does not render it expert to opine on whether the existence of an employer policy establishes an enforceable agreement, which is a matter of state law. *See* discussion in this Section II.B.4. and Section II.C.3 below.

employees does not provide evidence of an intent to render the meal breaks compensable.

Nor does an analysis of the language of the Break/Lunch Periods policy support the Department's position. The policy states that "[e]mployees [like Plaintiffs] working in areas requiring 24 hour per day staffing and [who] are required to make shift relief will be paid for their lunch time as part of their scheduled work shift." JA228. The Department latches onto the phrase "as part of their scheduled shift." DOL Br. at 10. But this phrase does not establish an intent to treat the meal breaks as compensable time. Rather, it merely articulates the fact that the 12-hour, regularly-scheduled shift includes three paid meal breaks. As discussed above, an agreement to pay for non-compensable time does not convert it into compensable time.

In focusing on the last phrase of the policy, the Department ignores the key language of the entire policy, that only employees who are required to perform shift relief activities — compensable pre- and post-shift time — are entitled to paid meal breaks. The "Non-Paid Lunch" provision of the policy reinforces this distinction, stating, "[e]mployees who work a straight shift schedule without adjoining shifts shall not be paid for their lunch time." JA228. This division between employees eligible and ineligible for paid meal breaks based on whether the employee is required to engage in shift relief outside of the regularly-scheduled shift demonstrates that the purpose of the paid breaks is to compensate employees for time spent in shift relief activities.

Viewing the language as a whole, the Break/Lunch Period policy is merely an articulation of Defendants' offset practice — an intent to use the paid meal breaks

to compensate employees for compensable pre- and post-shift time not captured in regularly-scheduled hours.

The Department finds facile Defendants' argument that they must include pay for the meal breaks as part of the regularly scheduled hours to meet their obligations under the FLSA, claiming that "there is considerably more than mere payment in this case." DOL Br. at 10. Yet, it is the Department that unnecessarily seeks to complicate matters.

To expand on Defendants' prior analysis (*see* Defs' Br. at 14), assume Plaintiffs are paid $10 per hour; Plaintiffs are scheduled to work four, 12 hour shifts during the applicable workweek; and they spend 30 minutes each shift performing compensable pre- and post-shift activities. Including pay for the meal periods in the 12 hour, regularly-scheduled shift (as Defendants must, under Section 207(e)), Plaintiffs have a regular rate of $10 per hour ($10 per hour x 48 hours ÷ 48 hours). If the meal break pay is not included in the regularly-scheduled shift, Defendants will not capture the compensable pre- and post-shift time, resulting in a skewed hourly rate of $9.55 per hour ($10 per hour x 42 hours ÷ 44 hours), which will result in an incorrect overtime rate for hours worked in excess of 40.

Finally, as the District Court noted, and neither Plaintiffs nor the Department challenge, there is no evidence in the record of an intent to create a binding contract through the policy. Op., D.E. #144, at 16; *see also Fralin v. C & D Sec., Inc.*, 2007 U.S. Dist. LEXIS 39107, at *11 (E.D. Pa. May 30, 2007) ("an employee handbook or manual only forms the basis of an implied contract if the employee shows that the employer affirmatively intended that it do so. The

mere fact that the employer distributed the handbook, or that the employee believed the handbook was legally binding cannot give rise to the presumption that an employer intended to be legally bound.") (internal quotations and citations omitted); *Luteran v. Loral Fairchild Corp.*, 455 Pa. Super. 364, 371-372 (1997) ("in analyzing the employer's handbook, we should neither presume that the employer intended to be bound legally by distributing the handbook nor that the employee believed that the handbook was a legally binding instrument" and noting, "[i]t is well-settled that to find that…a handbook has legally binding contractual significance, the handbook or an oral representation about the handbook must in some way clearly state that it is to have such effect.") (internal quotations and citations omitted). Therefore, Defendants are not bound by the statements in the Break/Lunch Periods policy.

5. The Most "Pertinent Fact" is Plaintiffs' Admission that the Breaks Are Bona Fide, a Fact the Department Ignores.

Finally, the Department overlooks perhaps the most significant "pertinent fact" — that Plaintiffs admit the breaks are bona fide meal breaks during which they are required to perform no work and are therefore non-compensable under the Department's own regulations. 29 C.F.R. §785.19. This Court has recently joined the majority of courts in adopting the predominant benefit test to determine whether meal breaks are compensable. *Babcock v. Butler County*, No. 14-1467, 2015 U.S. App. LEXIS 20393 (3d Cir. Nov. 24, 2015) (adopting predominant benefit test and holding that because the plaintiffs receive the predominant benefit of the time at issue, they "are not entitled to compensation for it under the FLSA").

See also Reich v. Lucas Enters., No. 92-3624, 1993 U.S. App. LEXIS 20669, at *7-8 (6th Cir. Aug. 12 1993) (holding where plaintiffs performed no work during meal periods, including meal break time in calculating time credited towards bonus did not establish an agreement to treat meal periods as compensable time). Therefore, the conduct of the parties does not suggest an intent to treat the meal breaks as compensable time.

C. The Department's Construction of the Statute is Not Entitled to Deference.

1. Where, as Here, the Statutory Language is Clear, the Statute Controls.

Courts look to agency interpretation of a statute only where the statute is ambiguous. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" and declining to consider agency interpretation where text of ADEA clear under general principles of statutory interpretation); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Shalom Pentecostal Church*, 783 F.3d at 165, 167. The statute is not ambiguous simply because it does not specifically reference the offset at issue. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (finding practice of requiring employees to schedule time off to reduce accrued compensatory

time permissible where nothing in FLSA prohibited this practice).

As explained above and in Defendants' opening brief, Defendants comply with all provisions of the FLSA. As required by Section 207(e), they include payment for the meal breaks in the regular rate. Section 207(h) is, therefore, inapplicable. Although the FLSA does not speak to Defendants' pay practice specifically, it establishes the requirements applicable to all pay systems — that they compensate employees for all hours worked at the applicable minimum wage or overtime rate. Defendants' offset practice meets these requirements. Because Defendants' offset is lawful under the plain language of the FLSA, the Court should not consider the Department's position to the contrary. *Id.* (declining to follow DOL opinion letter which would prohibit practice not precluded by plain language of FLSA).

2. The Department's Interpretation is Not Entitled to Deference Where, as Here, It is Unreasonable.

The Department argues for an interpretation of the FLSA that is inconsistent with the plain language of the statute and its own regulations. Thus, even if considered, the Department's construction of the statue is unreasonable and not entitled to deference. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (stating that, even if entitled to deference, agency interpretation must still be reasonable); *Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("No deference is due to agency interpretations at odds with the plain language of the statute itself.").

The Department contends that an employer must either exclude payment for bona fide meal breaks and be precluded from using the payment as a credit under Section 207(h)(1), or include the payment in the regular rate, which converts the meal break into compensable time. The plain language of the FLSA does not compel this catch-22. As explained above, Section 207 does not prohibit the offset, and Defendants otherwise meet their obligation to compensate employees for all hours worked. Consequently, the Department's interpretation to the contrary is not entitled to deference. *See Shalom Pentecostal Church*, 783 F.3d at 165, 167 (stating, "[a]s the statute is clear and unambiguous and the Regulation is inconsistent with the statute, the Regulation is *ultra vires* and we do not reach the second step of the *Chevron* analysis."); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166, 2169 (2012) (holding agency interpretation not entitled to deference where interpretation plainly erroneous or inconsistent with its regulations and declining to defer to DOL's position in *amicus* brief, in part, because interpretation inconsistent with FLSA).[3]

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[3] This case is similar in certain respects to *Christopher*. Like pharmaceutical companies' classification of their sales representatives in *Christopher*, DuPont's rotating shift schedule for continuously operating areas of its plant is longstanding and widespread throughout industries with 24/7 operations. *See* http://www.circadian.com/solutions-services/publications-a-reports/newsletters/managing-247-enewsletter/managing-247-article-2-213.html ("the DuPont" shift schedule, "[n]amed after the company where it originated in the late 1950s," is "frequently seen in the chemical, power, and manufacturing industries") (last visited December 8, 2015); http://www.bmscentral.com/learn-employee-scheduling/dupont-shift-schedule/ ("DuPont Shift Schedule" used in several manufacturing industries and police

Furthermore, the Department's position is inconsistent with its own regulations. As noted above, the Department's regulations do not preclude offsetting pay for meal breaks against compensable time despite including such a prohibition as to paid rest periods. Contrary to the Department's contention in its *amicus* brief, the preamble to Section 778.320 of the regulations makes clear that payment for non-work time does not necessarily render the time compensable. Further, in direct contravention of the position it now takes, the Department's own regulation, Section 778.223, contemplates non-work time that will be included in the regular rate that is not compensable.

Consequently, the Court should not accord any weight to the Department's interpretation of the FLSA or its regulations in this matter.

3. The Department is Not Entitled to Deference on Matters of Contract Interpretation.

Setting aside its interpretation of Section 207 of the FLSA and its contentions regarding payment of time and inclusion in the regular rate as evidence of

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departments) (last visited December 8, 2015). In fact, it is so ubiquitous, it has earned its own moniker. *See* https://en.wikipedia.org/wiki/Shift_plan#DuPont_12-hour_rotating_plan, entry for "DuPont 12-hour rotating plan") (last visited December 8, 2015); http://community.bmscentral.com/learnss/ZC/c4tr12-3 ("DuPont Shift Schedule" or "DuPont 12-hour rotating shift schedule"). So too, as in *Christopher*, the offset practice employed by many of the employers who use the DuPont shift schedule has long been accepted practice. Indeed, as discussed in Defendants' opening brief, with one distinguishable outlier, for more than two decades, every circuit and district court to consider the issue has sanctioned the practice.

compensability, the Department is left with its argument that the Break/Lunch Periods policy constitutes an agreement to treat the meal breaks as compensable time under Section 778.320 of the regulations. However, the Department is not entitled to deference on an interpretation of an alleged contract between the parties, which is a matter of state law. *See* Section II.B.4, above. And, as the Department is not a party to the alleged agreement, it has no particular knowledge of the intent of the parties. Therefore, the Department's assertions concerning the meaning and interpretation of the Break/Lunch Period policy are entitled to no weight.

D. Conclusion.

For the foregoing reasons and as set forth more fully in their opening brief, Defendants E. I. du Pont de Nemours and Company and Adecco USA, Inc., hereby respectfully request that the Court affirm the Order of the District Court granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

/s/ David S. Fryman

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Appendix B —
Standard Operating Procedure:
B10 Shift Relief Guidelines

STANDARD OPERATING PROCEDURE

SPECIFIC: B10 Shift Relief Guidelines

PURPOSE:

→ The intent of Shift Relief Guidelines is to manage proper shift relief, how to prepare a station for shift relief and targeted starting times in the B10 Operating Areas.

REFERENCES: ***History***

BASIS OF POLICY:

→ To set guidelines for shift relief for the B10 Operating Areas and when workers should be on the floor after shift relief is given.

→ In principle, all employees are expected to be at their work areas ready to work from their scheduled starting time until their scheduled quitting time.

Shift Relief Preparation

→ After last break restock all supplies (boxes, filler, shims, paper, news board) clean bander if due and straighten up area.

→ The Chief or A will print the production for the day at 20 minutes before shift change.

Note: Print production regardless of where operators are in an order. Only record production numbers that have been corked. If each crew prints 20 minutes

before shift change the production in the last 20 minutes of the shift should even out at the end of the day. All production in the last 20 minutes would go on the next crew's totals. After printing the production close current production file and open a new one with next crews file name.

→ Continue working on orders until 6:15, at this time stop and tie up all lose ends with the intent of giving the incoming shift the necessary information they need to pick up the order where it was left off.

Note: The intent is to leave the order in such a way that it could sit through multiple shifts and still be picked up at a later date without any confusion around its condition. Newer operators may need to take more time to prepare for proper shift relief. Likewise more experienced operators can box right up until shift relief arrives, just finish filling out the shift relief flier with the count they left off at.

The key to leaving an order so it is self explanatory is documentation. Ask yourself what information would I want to see so that I could pick the order up with no instruction and have what I need to complete it?

→ The current Special Instructions sheet attached to the front of the VL10 will double as the shift relief flier. The flier has additional rows at the bottom for entering information about the book currently being working on, number of clads in the box being filled and additional details that might be helpful to the incoming operator.

→ Fill out the remainder of the special instructions and place on the top of the open box.

SHIFT RELIEF:

→ According to plant policy shift relief can start between 30 and 10 minutes before the official shift change time and should be completed by the official start time of the on-coming shift. Area Leadership determines the exact time.

→ The B10 areas have decided they would like to leave as early as possible so they have elected to make shift relief so they can leave 30 minutes prior to the official start time (0700). (See Example below) Shift relief may take anywhere from 1 minute to 10 minutes depending on the complexity of the day. The relieved individuals may leave their work area when shift relief is completed, but no earlier than 6:30 per computer time.

LATE FOR WORK/SHIFT RELIEF:

→ Individuals who badge in at the gate house at 6:15 am/pm or later or who come to the area to make shift relief later than 6:20AM/PM, will be considered late. It is up to the Chief Operator to make the proper contact with the individual. If there are repetitive incidents the Chief will inform the FLM and together they will take the appropriate disciplinary action.

ON THE FLOOR READY TO WORK:

→ When shift relief is completed and after getting the days starting assignments, the incoming crew should then move to the floor and begin

work. This should typically be no more than 15 minutes for most individuals.

Example:

Time card shows:	7:00 AM starting time
Shift relief starts:	6:20 AM
Operator Late if:	Gate house log in is 6:15am/pm or later or on floor after 6:20 AM
Shift relief lasts:	1–10 minutes (6:21 AM – 6:30 AM)
Earliest time a person can leave the area after making proper shift relief:	6:30 AM