No. 16-

In The Supreme Court of the United States

CITY OF SAN GABRIEL,

Petitioner,

v.

DANNY FLORES, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(e)(2), allows employers, when calculating the overtime rate, to exclude payments to an employee that are entirely unrelated to "his hours of employment," as other courts of appeals have held in conflict with the Ninth Circuit.

II. Whether the Ninth Circuit's outlier "willfulness" standard, triggered whenever a non-compliant employer "was on notice of its FLSA requirements" but failed to investigate further, contravenes this Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

PARTIES TO THE PROCEEDINGS

Petitioner City of San Gabriel was the defendant in the district court and the appellant/cross-appellee in the court of appeals.

Danny Flores, Robert Barada, Kevin Watson, Vy Van, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Shannon Casillas, James Just, Steve Rodrigues, Enrique Deanda, Cruz Hernandez, Gilbert Lee, and Rene Lopez were plaintiffs in the district court, with some of those individuals serving as appellees and/or cross-appellants in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 824 F.3d 890. The district court's opinion of August 29, 2013 (App., *infra*, 41a-93a) is reported at 969 F. Supp. 2d 1158. The district court's opinion of October 29, 2013 (App., *infra*, 94a-104a) is not reported, but is available at 2013 WL 5817507.

JURISDICTION

The court of appeals entered its judgment on June 2, 2016. The City of San Gabriel timely filed a petition for panel rehearing and rehearing en banc, which was denied on August 23, 2016. On November

7, 2016, Justice Kennedy extended the time for filing a petition for certiorari to and including December 21, 2016. On December 5, 2016, Justice Kennedy further extended the time for filing a petition for certiorari to and including January 20, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 111a-137a.

INTRODUCTION

Like many employers across the country, Petitioner City of San Gabriel provides health insurance benefits to its employees in a manner that allows those who purchase less coverage—because of a spouse's plan or other personal circumstances—to receive the balance in the form of "cash-in-lieu" payments. Despite the added expense it incurs, the City adopted this more expansive benefits plan so that all its employees could avail themselves of employment benefits equally. The Ninth Circuit's unfounded interpretation of the Fair Labor Standards Act (FLSA), however, marks the death knell for such expanded provision of employee benefits.

This case raises two important and recurring questions of law regarding the scope of the FLSA's overtime pay provisions. Although 29 U.S.C. § 207(e)(2) allows employers like the City to exclude payments that "are not made as compensation for [an employee's] hours of employment" when calculating

overtime pay, the Ninth Circuit—ignoring the plain statutory language and in conflict with other courts of appeals—interpreted section 207(e)(2) to bar exclusion of any payment made as compensation *even if entirely unrelated to an employee's hours of employment or services rendered*. The Ninth Circuit then compounded the effect of its interpretive error by finding the City's violation to be "willful" under a standard mirroring one that this Court already rejected in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

The upshot of those legal errors is to upend longstanding employee benefit programs for a large swath of the nation. Forcing employers to include cash-in-lieu payments in the overtime rate will drive employers—particularly cash-strapped public-sector employers facing substantial overtime obligations—to stop offering such benefit programs altogether. The Ninth Circuit's flawed interpretation also creates enormous potential overtime liability for employers offering other types of benefits packages that may result in payouts to their employees. Left undisturbed, the decision below punishes employers (like the City) for conferring *greater* benefits to members of their workforce. Congress enacted the FLSA to encourage that type of behavior, not to chill it.

This Court should grant certiorari to resolve widespread confusion among the courts of appeals regarding the scope of section 207(e)(2), to bring the Ninth Circuit's outlier "willfulness" standard in line with this Court's precedent, and to prevent the FLSA from imposing overtime obligations on employers that Congress never intended.

STATEMENT OF THE CASE

A. Legal Framework

Under the FLSA's overtime provisions, employers must pay employees one and a half times the "regular rate" of pay for any hours worked in excess of forty hours in a given week. 29 U.S.C. § 207(a). The "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee." *Id.* § 207(e).

That general definition is subject to several enumerated exclusions. *See* 29 U.S.C. § 207(e)(1)-(8). As pertinent here, section 207(e)(2) authorizes employers to exclude from the regular rate any

> payments made 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; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment*.

Id. § 207(e)(2) (emphasis added). In addition, section 207(e)(4) provides a separate exclusion for "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for *** health insurance or similar benefits for employees." *Id.* § 207(e)(4).

An employee seeking unpaid overtime wages under the Act must bring suit "within two years after the cause of action accrued." 29 U.S.C. § 255(a). That two-year statute of limitations may be extended to three years if the overtime claim arises out of "a willful violation" of the Act. *Id.* A willful violation is "not merely negligent"; it occurs when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin*, 486 U.S. at 133.

B. Factual and Procedural History

1. Like many employers, the City offers a flexible benefits plan to its employees. App., *infra*, 7a-9a. Under the plan, which has been in effect since 1993, the City contributes a fixed sum of money that employees can spend on medical, vision, and dental benefits. *Id.* at 7a-9a, 57a. The City's annual contribution to the plan "is fixed and does not vary based upon the number of hours an employee works." *Id.* at 59a.

Employees who demonstrate that they have alternate medical coverage may decline coverage under the plan and receive a cash payment in lieu of their unused benefits. App., *infra*, 7a-8a. Similarly, employees who elect medical coverage through the plan but do not use their maximum allotment of benefits—*e.g.*, employees without eligible dependents—receive the unused portion of medical benefits in cash payments. *Id.* The amount an employee may receive in so-called cash-in-lieu payments under the plan "is based upon the extent of the employee's utilization of available benefits" and therefore is "not contingent upon the number of hours

worked or the employee's productivity." *Id.* at 59a. Many City employees have opted to receive such cash-in-lieu payments under the plan. In 2012, for example, such payments amounted to a little over $1.2 million (or 45%) of the City's total plan contributions. *Id.* at 8a-9a.

For as far back as the record indicates, the City has excluded benefits payments made under the plan—including the cash-in-lieu payments described above—from the "regular rate" of pay used to calculate employees' overtime compensation. App., *infra*, 9a; *see also id.* at 60a.

2. In 2012, Respondents, fifteen current and former City police officers, filed this FLSA action in the U.S. District Court for the Central District of California. Respondents alleged that the City's failure to include benefits payments in the regular rate was a "willful" violation of the FLSA's overtime provisions. Respondents sought recovery of the alleged unpaid overtime wages and liquidated damages. App., *infra*, 10a.

The district court granted in part Respondents' motion for summary judgment. App., *infra*, 42a. The court found "compelling" the City's contention that if cash payments could not be excluded from the overtime rate under section 207(e)(2), "employers will be less likely to allow employees to receive the surplus as cash." *Id.* at 70a-71a (internal quotation marks omitted). The court nevertheless concluded that "a narrow construction of the FLSA exemptions compels a finding that cash payments are not excludable under section 207(e)(2)." *Id.* at 71a. The court further held that the cash payments made

directly to employees could not be excluded under section 207(e)(4), but that plan contributions paid to trustees or third parties were excludable because the City's plan was "bona fide." *Id.* at 72a-74a, 83a-84a. Finally, the court rejected Respondents' assertion that the City's statutory violation was "willful." *Id.* at 84a-86a.

3. On cross-appeals from the district court's judgment, the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 5a-6a.

a. The court of appeals first held that the cash payments could not be excluded under section 207(e)(2), even though those payments were not "specifically tied to the hours an employee works." App., *infra*, 19a. Although deeming it "a close question," *id.* at 13a, the Ninth Circuit emphasized that section 207(e)(2), like any other FLSA exemption, must be narrowly construed in the employee's favor, *id.* at 11a-12a, 21a. The Ninth Circuit acknowledged that its constricted interpretation of section 207(e)(2) conflicted with the Third Circuit's "focus on a direct tie to hours worked or services provided." *Id.* at 18a-19a (citing *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456 (3d Cir. 1988)). But citing a Department of Labor interpretive bulletin, 29 C.F.R. § 778.224, the court of appeals rejected the City's argument that section 207(e)(2) permitted "exclusion of any payments that do not depend on when or how much work the employee performs." App., *infra*, 13a-15a.

The Ninth Circuit—again invoking the narrow-construction canon—held that section 207(e)(4), too,

did not permit the City to exclude from the overtime rate any cash-in-lieu payments made under the plan. App., *infra*, 21a-23a. The court of appeals further concluded, in disagreement with the district court, that the City's flexible benefits plan was not "bona fide"—thereby prohibiting exclusion even of contributions to third-party providers—because 40% of more of the plan's contributions are paid directly to employees. *Id.* at 23a-28a.

Finally, the Ninth Circuit disagreed with the district court's conclusion that the City did not willfully violate the Act. Adhering to its circuit precedent, the Ninth Circuit held that an FLSA violation is willful, and therefore a three-year statute of limitations applies, when the employer is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them." App., *infra*, 34a-35a (quoting *Alvarez v. IBP, Inc.* 339 F.3d 894, 909 (9th Cir. 2003)). Based on that standard, the Ninth Circuit determined that the City willfully violated the FLSA because it made no efforts to determine whether its treatment of benefits payments complied with the Act. *Id.* at 35a-37a.

b. Judge Owens (joined by Judge Trott) concurred in that willfulness finding, but noted that the Ninth Circuit's willfulness precedent is "off track" and in conflict with the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). App., *infra*, 38a-40a (Owens, J., concurring). The concurring judges stated that, absent binding circuit authority, they would have affirmed the

district court's judgment that the City's violation was not willful. *Id.* at 39a-40a.[1]

c. The Ninth Circuit denied panel rehearing and rehearing en banc. App., *infra*, 109a-110a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 207(e)(2) CONFLICTS WITH THE FLSA'S PLAIN TEXT AND THE DECISIONS OF OTHER CIRCUITS

Section 207(e)(2) authorizes employers to exclude from the regular rate payments for idle time, reimbursements for work expenses, and "other similar payments *** not made as compensation for [an employee's] hours of employment." 29 U.S.C. § 207(e)(2). Invoking the much-maligned narrow-construction canon, the Ninth Circuit held that section 207(e)(2) does not permit employers to exclude cash-in-lieu payments wholly unrelated to an employee's "hours of employment." That erroneous interpretation contorts the statutory text and entrenches a divide among the circuits, as the Ninth Circuit itself recognized. This Court should grant review to bring uniformity and clarity to the construction of section 207(e)(2), and to avoid forcing

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[1] The Ninth Circuit (contrary to the district court, App., *infra*, 98a-104a) also determined that the City failed to show that it attempted to comply with the Act in good faith and therefore reversed the district court's denial of liquidated damages. App., *infra*, 31a-34a. This petition does not challenge that ruling.

employers to drop the type of more generous flexible benefit plans at issue.

A. The Decision Below Generates Conflict And Confusion Among The Courts Of Appeals Regarding The Proper Scope Of Section 207(e)(2)

The federal courts of appeals have developed at least three different interpretations of section 207(e)(2). The decision below exacerbates that troubling disarray among the circuits.

The Ninth Circuit adopts the narrowest reading of section 207(e)(2). In the decision below, the Ninth Circuit stated that section 207(e)(2) does not permit employers to exclude payments to employees *even if such payments are unrelated to an employee's hours of work or services performed*. App., *infra*, 19a. Instead, "when determining whether [a] payment falls under § 207(e)(2)'s 'other similar payments' clause," the Ninth Circuit "focus[es] [its] inquiry on whether a given payment is properly characterized as compensation, regardless of whether the payment is specifically tied to the hours an employee works." *Id.*

As the Ninth Circuit recognized, App., *infra*, 18a-19a, its construction of section 207(e)(2) is incompatible with the Third Circuit's opposite view that "payments not tied to hours of compensation" are excludable under section 207(e)(2). *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456, 1461 (3d Cir. 1988). In *Minizza*, the Third Circuit held that lump-sum payments made to employees under a collective bargaining agreement could be excluded from the regular rate because they were "not tied to hours of

compensation" or "services rendered." *Id.* at 1461-1462. The Third Circuit rejected the district court's conclusion that "the payments to be included in the phrase 'other similar payments' could be similar in character only to the two categories of payments specifically listed in section 207(e)(2)"—namely, "idle hours or reimbursements." *Id.* at 1461. The central inquiry in determining the reach of section 207(e)(2), the Third Circuit explained, is "whether the *** payment is compensation *for hours worked or service rendered*." *Id.* (emphasis added); *compare with* App., *infra*, 19a (focusing section 207(e)(2) inquiry on whether payment is compensation, "*regardless of whether the payment is specifically tied to the hours an employee works*") (emphasis added). In the Third Circuit's view, neither the Labor Department's interpretive bulletin, 29 C.F.R. § 778.224, nor the narrow-construction canon commanded a different reading of section 207(e)(2). *Minizza*, 842 F.2d at 1459, 1461.

If that stark disagreement between the Third and Ninth Circuits were not enough, the Sixth and Seventh Circuits take yet another view of section 207(e)(2)'s scope. On one hand, the Sixth and Seventh Circuits recognize (in line with the Third Circuit) that section 207(e)(2) permits exclusion of payments that are "unrelated to *** compensation for services and hours of services." *Featsent v. City of Youngstown*, 70 F.3d 900, 904-905 (6th Cir. 1995) (holding that section 207(e)(2) permits employers to exclude payments for unused sick leave because those payments are "unrelated to *** compensation for services and hours of services"); *see also Mutchler v. Dunlap Mem'l Hosp.*, 485 F.3d 854, 857 (6th Cir.

2007) (citing *Minizza* and stating that section 207(e) "expressly excludes several types of compensation *not* made for hours worked"); *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577-579 (7th Cir. 1995) (concluding that section 207(e)(2) permits employers to exclude from the regular rate compensation for abbreviated rest between work periods because such "payments *** do not depend at all on when or how much work is performed").[2]

On the other hand, the Sixth and Seventh Circuits also state that employers may not automatically exclude payments that are not "measured by" hours an employee works. *Featsent*, 70 F.3d at 904 (concluding that section 207(e)(2) "does not exclude every payment not measured by hours of employment"); *Reich*, 57 F.3d at 577 (explaining that section 207(e)(2) "cannot possibly exclude every payment that is not measured by the number of hours spent at work," including earned work credits paid to workers in lieu of giving them two consecutive days off in a given workweek).

The significant differences among the courts of appeals with respect to their interpretation of section 207(e)(2) are often outcome-determinative, as this case amply demonstrates. The City argued that its cash-in-lieu payments could be excluded because

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[2] The Eighth and Tenth Circuits, though ultimately denying exclusion of unused sick-leave payments on their facts, likewise look to whether the payments are "tantamount to payment for services rendered," *Acton v. City of Columbia*, 436 F.3d 969, 978-979 (8th Cir. 2006), or "compensation for additional service or value received by the employer," *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1310 (10th Cir. 2011).

(undisputedly) they were not in any way tied to hours worked or amount of services rendered. Although the Ninth Circuit rejected that argument (under its view that any sort of "compensation," irrespective of tie to hours worked, cannot be excluded), the Third Circuit plainly would have accepted it under *Minizza*. As the Ninth Circuit acknowledged, "[a]dmittedly, the Third Circuit's greater focus on a direct tie to hours worked or services provided hews more closely to the interpretation that the City urges here." App., *infra*, 18a-19a. The City would have likely also prevailed in the Sixth, Seventh, Eighth, and Tenth Circuits, all of which permit employers to exclude payments that are "unrelated to *** compensation for services and hours of services." *Featsent*, 70 F.3d at 904-905; *see Reich,* 57 F.3d at 577-579; *Acton,* 436 F.3d at 978-979; *Chavez*, 630 F.3d at 1310.

B. The Ninth Circuit's Interpretation Of Section 207(e)(2) Is Incorrect

Beyond the conflict and confusion wrought by the decision below, the Ninth Circuit's narrow reading of section 207(e)(2) cannot be squared with the text and structure of the statute. Rather than interpret the Act according to its terms, the Ninth Circuit invoked the precarious (and in this case wholly inapposite) narrow-construction canon to resolve what it deemed "a close question." App., *infra*, 13a. But the question is not close. As the Third Circuit correctly holds, section 207(e)(2) unambiguously permits employers to exclude "payments not tied to hours of compensation" or "services rendered." *Minizza*, 842 F.2d at 1461-1462.

1. The text and structure of section 207(e)(2) foreclose the Ninth Circuit's interpretation.

The plain language of section 207(e)(2) permits employers to exclude from the regular rate payments for non-working time, work-related reimbursements, and other similar payments "not made as compensation *for [an employee's] hours of employment*." 29 U.S.C. § 207(e)(2) (emphasis added). That statutory language comports with Congress's desire to tie overtime compensation to the amount of hours worked and services performed by an employee. *See* 29 U.S.C. § 207(a)(1); *cf. Albers v. Bd. of Cty. Comm'rs of Jefferson Cty.*, 771 F.3d 697, 704 (10th Cir. 2014) ("The purpose of the FLSA's overtime provisions is 'to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost.'") (quoting *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948)).

The Ninth Circuit ignored that statutory directive and asked instead whether a payment is compensation "regardless of whether the payment is specifically tied to the hours an employee works." App., *infra*, 19a. That interpretation rewrites section 207(e)(2) to strike the modifying phrase "for his hours of employment" and thereby carves out of the exclusion payments that are entirely unrelated to hours worked.

This is a case in point. Cash-in-lieu payments are not related to hours worked or services rendered

in any manner. Rather, such payments are distributed to employees when a spouse or domestic partner provides alternative healthcare coverage, or when employees use less than the maximum allotment of medical benefits under the plan. App., *infra*, 7a-8a, 57a-59a. In either circumstance, the cash-in-lieu payments are not paid to City employees as compensation based on hours worked or services provided. *See Minizza*, 842 F.2d at 1462 ("If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided."). Indeed, it is undisputed that the amount of cash-in-lieu payments disbursed to employees under the plan "is based upon the extent of the employee's utilization of available benefits" and is "not contingent upon the number of hours worked or the employee's productivity." App., *infra*, 59a. It therefore defies logic to call such payments "compensation for [an employee's] hours of employment." 29 U.S.C. § 207(e)(2). Yet that is precisely the conclusion reached by the decision below.

Section 207(e)(2)'s structure further underscores the Ninth Circuit's interpretive error. The provision consists of three clauses, each of which sets forth a category of payments that employers may exclude from the regular rate: (1) "payments made for occasional periods when no work is performed due to vacation, holiday, illness *** or other similar cause"; (2) "reasonable payments for traveling expenses, or other expenses"; and (3) "other similar payments *** not made as compensation for *** hours of employment." 29 U.S.C. § 207(e)(2). As the Third

Circuit explained, the "other similar payments" language in clause (3) "does not mean just other payment for idle hours or reimbursements, *** but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples." *Minizza*, 842 F.2d at 1461. That common-sense reading "gives independent meaning" to each clause of section 207(e)(2). *Id.* at 1461-1462 Interpreting the "other similar payments" clause solely as "an embellishment of the first two" clauses of section 207(e)(2)—as the Ninth Circuit did, App., *infra*, 19a-20a—renders the "other similar payments" clause superfluous because the first "two clauses" of the provision "contain 'other similar' language as well."[3] *Minizza*, 842 F.2d at 1461-1462 & n.7; *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting[.]") (internal quotation marks omitted).

Accordingly, the statutory structure makes clear that all payments excludable under section 207(e)(2)—including payments for non-working time and reimbursements for work-related expenses—share one "essential characteristic": "they are not payments relating to hours of employment or service." *Minizza*, 842 F.2d at 1462; *see Reich*, 57 F.3d at 578 ("The word 'similar' then refers to other payments that do not depend at all on when or how

[3] The first clause permits exclusion of "payments made for occasional periods when no work is performed due to vacation, holiday, illness *** *or other similar cause*," and the second permits exclusion of "reasonable payments for traveling expenses, or *other expenses*." 29 U.S.C. § 207(e)(2) (emphasis added).

much work is performed."). So long as a payment possesses that feature (as the cash-in-lieu payments here do), it can be excluded from the regular rate under section 207(e)(2). The Ninth Circuit eschewed that straightforward construction of section 207(e)(2) in favor of one that finds scant support in the statute's text or structure.

2. Neither the Department of Labor's bulletin nor section 207(e)(4) supports the Ninth Circuit's decision.

Unable to ground its interpretation in the text of section 207(e)(2), the Ninth Circuit looked elsewhere: the Department of Labor's bulletin interpreting section 207(e)(2) and a neighboring statutory exclusion, section 207(e)(4). Neither authority salvages the Ninth Circuit's misreading of section 207(e)(2). To the contrary, a proper application of section 207(e)(2) requires vacatur of the Ninth Circuit's confounding conclusion under section 207(e)(4) that even direct plan contributions to third-party providers cannot be excluded from the overtime rate.

a. Tellingly, the Ninth Circuit afforded no *Chevron* deference to the Labor Department's interpretive bulletin and declined to express any opinion on the bulletin's persuasiveness. *See* App., *infra*, 13a-14a & n.1 ("consider[ing]" the bulletin "without expressing an opinion on its persuasiveness"). Even if it had, the agency's bulletin cannot trump section 207(e)(2)'s clear statutory command. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

The bulletin clarifies, consistent with the statutory text, that section 207(e)(2) permits exclusion of certain payments that "are not made as compensation for hours of work." 29 C.F.R. § 778.224(a). To be sure, the bulletin states "that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not *directly attributable* to any particular hours of work are, nevertheless, clearly understood to be compensation for services." *Id.* (emphasis added). But a payment can be tied (or related) to an employee's hours of work, even if not "directly attributable" to such hours. In other words, the agency did not say, as the Ninth Circuit apparently assumed, that an employer may not exclude payments—like the cash-in-lieu payments at issue here—*entirely unrelated* to the hours worked or services rendered by an employee.

b. The Ninth Circuit also labored under the misconception that Congress's inclusion of section 207(e)(4), which authorizes employers to exclude certain benefits payments, meant that section 207(e)(2) was not intended to cover "payments related to benefits." App., *infra*, 20a-21a. That argument is a non sequitur. As the Ninth Circuit acknowledged, nothing in the FLSA suggests that the subsections of section 207(e) are mutually exclusive. *Id.* That a payment, like the cash-in-lieu payments at issue, "can be excluded under one subsection does not imply that every other subsection is inapplicable." *Reich*, 57 F.3d at 578 ("Doubtless the subsections of [section 207(e)] are not mutually exclusive *** ."). It therefore makes little sense to narrow the scope of

section 207(e)(2) based on the fact that section 207(e)(4) may permit exclusion of the same benefits payments. That is especially true here because the Ninth Circuit rejected exclusion of cash-in-lieu payments under 207(e)(4) because they were not directed to "a trustee or third person." App., *infra*, 21a-23a.

Notably, the Ninth Circuit's invocation of section 207(e)(4) lays bare a related error in the decision below. The Ninth Circuit concluded that non-cash contributions paid directly into the City's plan—in addition to the cash-in-lieu payments—must be included in the overtime calculation because the plan was not "bona fide." App., *infra*, 23a-28a. That startling conclusion warrants reversal in its own right—all the more so if this Court corrects the Ninth Circuit's flawed interpretation of section 207(e)(2), which undergirded and infected the court's subsequent analysis of section 207(e)(4). The Ninth Circuit concluded that the City's benefits plan was not "bona fide" because more than 40% of the City's contributions to the plan were cash-in-lieu payments made directly to employees. *Id.* at 27a-28a. But if (as the City urges) employers may in fact exclude those cash-in-lieu payments from the overtime calculation under section 207(e)(2), *see* pp. 13-17, *supra*, it would be incongruous—indeed, incomprehensible—to treat the City's *non-cash* plan contributions as non-excludable under section 207(e)(4). In other words, it would be backwards to force the City to include plan contributions made directly to third parties in the overtime rate, but then permit the City to exclude the very cash-in-lieu payments that, in the Ninth Circuit's view, rendered

the plan not *bona fide* in the first place. The Ninth Circuit's section 207(e)(4) ruling that the plan is not "bona fide" therefore necessarily falls if its interpretation of section 207(e)(2) is corrected.

3. The Ninth Circuit mistakenly relied on the narrow-construction canon.

Believing that the reach of section 207(e)(2) presented a "close question," the Ninth Circuit interpreted the provision "in light of the command that [courts] interpret the FLSA's exemptions narrowly in favor of the employee." App, *infra*, 11a-13a, 21a. But the narrow-construction canon used to construe FLSA overtime *exemptions* has no bearing on section 207(e)'s baseline definition of the "regular rate" of pay. As this Court recently made clear, "[t]he exemptions from the Act generally reside in [29 U.S.C.] § 213, which is entitled 'Exemptions' and classifies certain kinds of workers as uncovered by various provisions"—including section 207. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014). As such, the canon is "inapplicable" to the FLSA's definitional provisions. *Id.*; *see Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012) (holding that narrow-construction canon "is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA"). At the very least, this Court should stem the continued application of the canon beyond its moorings.

More broadly, the canon is fundamentally flawed and has no place in this Court's FLSA jurisprudence. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J.,

dissenting). It "appears to 'res[t] on an elemental misunderstanding of the legislative process,' viz., 'that Congress intend[s] statutes to extend as far as possible in service of a singular objective.'" *Id.* (Thomas, J., dissenting) (quoting Br. for Chamber of Commerce et al. as Amici Curiae 7) (alterations in original); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) (noting that Congress amended the FLSA "to curtail employee-protective interpretations" of the FLSA). Because "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam), the narrow-construction canon tells us precious little about Congress's intent in enacting section 207(e)(2).

Additionally, the narrow-construction canon is "made-up" and cannot supplant the clear language of the statute. *Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J., dissenting). As this Court has recently admonished, courts have "no roving license *** to disregard clear language simply on the view that *** Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). It is therefore unsurprising that this Court has declined to apply that canon on two recent occasions. *See Christopher*, 132 S. Ct. at 2170, 2172 n.21; *Sandifer*, 134 S. Ct. at 879 n.7.

This case starkly illustrates the defects of the narrow-construction canon, particularly in the FLSA context. The canon, at least as formulated by the Ninth Circuit, dictates that courts construe FLSA exemptions "narrowly in favor of the employee," App., *infra*, 21a, presumably on the theory that Congress enacted the FLSA to protect workers from abusive employers and provide those workers with some

measure of relief. But even accepting that theory, the Ninth Circuit's application of the narrow-construction canon in this case actually weakens those statutory safeguards. As explained below (p. 24, *infra*), the Ninth Circuit's decision will drive employers like the City to stop offering cash benefit programs to its workforce altogether—to the detriment of many employees.

Because the application of that extra-textual canon determined the outcome in what the Ninth Circuit thought was a "close" case, the petition provides the Court with an ideal vehicle to drive home the canon's limited scope or to abrogate it once and for all. *Compare Sandifer*, 134 S. Ct. at 879 n.7 ("We need not disapprove [the narrow-construction canon] to resolve the present case.").

C. The Scope Of Section 207(e)(2) Is An Important And Recurring Question Of National Importance

The scope of section 207(e)(2)'s "other similar payments" clause is an issue of exceptional importance that affects employers and employees nationwide. The Ninth Circuit's erroneous decision deepens a conflict among the courts of appeals in an area of federal law where national uniformity and consistency is paramount. As a result, employers in California and Washington offering cash benefit programs to their employees face higher overtime costs than their counterparts in New Jersey and Pennsylvania. The impact of that intolerable disparity will be particularly acute for public employers like cities and states, which routinely rely upon the overtime work of their employees (especially

officers and other first responders) to cover staffing shortages or to respond to emergencies.

What is worse, the decision below enables plaintiffs to use the FLSA as a sword to punish employers that offer generous cash-benefits programs to their employees. This is one such case. And there are many more in the offing. To date, the Ninth Circuit's decision in this case has spawned no less than 25 similar FLSA actions in the state of California alone.[4] Absent this Court's intervention,

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[4] *E.g.*, Compl., *Alder v. Cty. of Yolo*, No. 2:16-cv-01682-VC (E.D. Cal. July 20, 2016); Compl., *Alviso v. City of San Rafael*, No. 3:16-cv-07056-MEJ (N.D. Cal. Dec. 9, 2016); Compl., *Barreiro v. City of West Sacramento*, No. 2:16-cv-01328-TLN-AC (E.D. Cal. June 15, 2016); Compl., *Baskin v. City of San Luis Obispo*, No. 2:16-cv-08876-DSF-JPR (C.D. Cal. Nov. 30, 2016); Compl., *Beidleman v. City of Modesto*, No. 1:16-cv-01100-DAD-SKO (E.D. Cal. July 28, 2016); Compl., *Brunker v. Bay Area Rapid Trans. Dist.*, No. 3:16-cv-03399-HSG (N.D. Cal. June 17, 2016); Compl., *Drobish v. City of Citrus Heights*, No. 2:16-cv-01460-WBS-CKD (E.D. Cal. June 27, 2016); Compl., *Fein v. City of Benicia*, No. 2:16-cv-01461-MCE-CKD (E.D. Cal. June 27, 2016); Compl., *Feyh v. City of Sacramento*, No. 2:16-cv-01274-TLN-EFB (E.D. Cal. June 10, 2016); Compl., *Fisher v. City of Galt*, No. 2:16-cv-01329-TLN-AC (E.D. Cal. June 15, 2016); Compl., *Hilliard v. City of Upland*, No. 5:16-cv-01272-SJO-AFM (C.D. Cal. June 15, 2016); Compl., *Hoffman v. Cty. of Butte*, No. 2:16-cv-01487-MCE-AC (E.D. Cal. June 30, 2016); Compl., *Kerzich v. Cty. of Tuolumne*, No. 1:16-cv-01116-DAD-SAB (E.D. Cal. July 28, 2016); Compl., *Knight v. City of Tracy*, No. 2:16-cv-01290-WBS-EFB (E.D. Cal. June 10, 2016); Compl., *Lewis v. Cty. of Colusa*, No. 2:16-cv-01745-VC (E.D. Cal. July 25, 2016); Compl., *MacCracken v. City of Lincoln*, No. 2:16-cv-01680-WHO (E.D. Cal. July 20, 2016); Compl., *Meinhardt v. City of Sunnyvale*, No. 5:16-cv-05501 (N.D. Cal. Sept. 27, 2016); Compl., *Mraz v. City of Manteca*, No. 2:16-cv-02614-TLN-KJN (E.D. Cal.

employers (both public and private) across the country face significant unpredictability in calculating the applicable overtime rate for employees and increased exposure to FLSA litigation.

Those deleterious effects are not felt just by employers. Employees will bear the brunt of the Ninth Circuit's misinterpretation of section 207(e)(2). As a result of the decision below, employers will almost certainly cease offering cash-in-lieu benefit programs to their employees to avoid the significant increase in overtime costs dictated by Ninth Circuit's ruling. That means certain employees that already possess adequate health coverage, for example, will no longer be able to reap the benefit of employer contributions—reverting to the inequitable situation that plans like the City's were meant to redress.

Nov. 2, 2016); Compl., *Mustard v. City of Vallejo*, No. 2:16-cv-01485-KJM-CKD (E.D. Cal. June 30, 2016); Compl., *Nevin v. City of Ontario*, No. 5:16-cv-01273-PSG-KK (C.D. Cal. June 15, 2016); Compl., *Olson v. City of Woodland*, No. 2:16-cv-01477-JAM-AC (E.D. Cal. June 29, 2016); Compl., *Seguin v. Cty. of Tulare*, No. 1:16-cv-01262-DAD-SAB (E.D. Cal. Aug. 25, 2016); Compl., *Slezak v. City of Palo Alto*, No. 5:16-cv-03224-LHK (N.D. Cal. June 13, 2016); Compl., *Spiller v. City of Petaluma*, No. 3:16-cv-04717-JD (N.D. Cal. Aug. 17, 2016); Compl., *Stewart v. Cty. of Amador*, No. 2:16-cv-02410-WBS-AC (E.D. Cal. Oct. 10, 2016); Compl., *Thomas v. City of Folsom*, No. 2:16-cv-02038-WBS-KJN (E.D. Cal. Aug. 25, 2016); Compl., *Weist v. City of Davis*, No. 2:16-cv-01683-LEK (E.D. Cal. July 20, 2016); Compl., *Winkle v. Cty. of Modoc*, No. 2:16-cv-01486-KJM-GGH (E.D. Cal. June 30, 2016); Compl., *Wolfe v. City of Yuba City*, No. 2:16-cv-01557-MCE-AC (E.D. Cal. July 7, 2016).

II. THE NINTH CIRCUIT'S WILLFULNESS STANDARD CONFLICTS WITH THIS COURT'S PRECEDENT

The Ninth Circuit compounded the effect of its legal error as to section 207(e)(2) with another: extending the statute-of-limitations period from two to three years on the view that the City committed a "willful" violation of the FLSA. App., *infra*, 34a-37a; *see* 29 U.S.C. § 255(a); p. 8, *supra*. As a majority of the panel below acknowledged, the City's violation could be deemed "willful" only under the Ninth Circuit's resurrection of a watered-down standard that this Court put to rest nearly three decades ago in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). App., *infra*, 38a-40a (Owens, J., concurring, joined by Trott, J.). In light of that departure from this Court's precedent, this Court's intervention is again necessary to preserve the distinction Congress drew between willful and nonwillful violations of the FLSA.

A. The Ninth Circuit's Willfulness Determination Cannot Be Reconciled With *McLaughlin*

1. Since enacting the FLSA in 1938, Congress has twice limited the scope of civil actions brought under that statute by enacting statutes of limitations. In 1947, "as part of its response to this Court's expansive reading of the FLSA, Congress enacted the 2-year statute to place a limit on employers' exposure to unanticipated contingent liabilities," but "drew no distinction between willful and nonwillful violations." *McLaughlin*, 486 U.S. at 131-132. In 1966, Congress took that further step by

enacting a "3-year exception [to the 2-year statute of limitations] for willful violations." *Id.* at 132.

That bifurcated statutory scheme remains in effect today:

> [I]f the cause of action accrues on or after May 14, 1947—[it] may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

29 U.S.C. § 255(a).

"The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin*, 486 U.S. at 132. To that end, this Court in *McLaughlin*—looking to the "common usage of the word 'willful,'" as well as its recent explication of a willfulness provision in the Age Discrimination in Employment Act of 1967 (ADEA) in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)—made clear that a violation could be deemed willful only where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." 486 U.S. at 133.

The Court rejected the notion that an FLSA violation could be "willful" under the so-called *Jiffy*

June standard, which "merely requires that an employer knew that the FLSA 'was in the picture.'" *Id.* at 132; *see id.* at 130 (discussing *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971)). Such a standard "virtually obliterates any distinction between willful and nonwillful violations" because "it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability," thus leaving the two-year statute of limitations to apply to only "ignorant employers." *Id.* at 132-133 (quoting *Thurston*, 469 U.S. at 128).

This Court further rejected an "intermediate alternative" in which a violation would be "willful" when "the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute." *Id.* at 134 (internal quotation marks omitted). Although that standard differed from *Jiffy June* in the sense that willfulness would "turn on whether the employer sought legal advice concerning its pay practices," it would nonetheless "permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects." *Id.* at 134-135. As such, like the *Jiffy June* standard, the alternative formulation of the willfulness test "fails to give effect to the plain language of the statute of limitations." *Id.* at 135.

2. As a majority of the panel below underscored in a separate concurring opinion, although the Ninth Circuit in this and other cases purports to apply *McLaughlin*, in reality Ninth Circuit precedent has strayed "off track." App., *infra*, 38a (Owens, J.,

concurring, joined by Trott, J.). In the Ninth Circuit alone, an FLSA violation is willful merely because "an employer disregarded the very 'possibility' that it was violating the statute," *id.* at 35a (majority opinion) (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-909 (9th Cir. 2003)), or because an employer "was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them" or "could easily have inquired into the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith," *id.* at 39a (Owens, J., concurring, joined by Trott, J.) (internal quotation marks omitted) (quoting *Alvarez*, 339 F.3d at 909). But those are the very "in the picture" and "sought legal advice" tests for willfulness that this Court—and for that matter, the courts of appeals in the wake of *McLaughlin*[5]—held were inconsistent with the FLSA's willfulness provision.

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[5] *See, e.g.*, *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 33-34 (1st Cir. 2003) (explaining that *McLaughlin* "rejected two other tests for determining willfulness: the *Jiffy June* test that asked only whether the employer knew the Act 'was in the picture,' and another test that asked if the employer acted unreasonably in believing it was complying with the statute") (citations omitted); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-703 (3rd Cir. 1994) (affirming district court's finding of nonwillfulness under *McLaughlin* in case presenting "close questions of law and fact" and "also a case of first impression"); *Martin v. Deiriggi*, 985 F.2d 129, 135 (4th Cir. 1992) ("The standard for determining willfulness is whether the employer either knew, or showed reckless disregard, as to whether his conduct violated the Act."); *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir. 1990) ("To re-examine the *Jiffy June* test would be an exercise in futility; *McLaughlin* squarely batted *Jiffy June* from a plaintiff's reach; and we have more than once

Consequently, the Ninth Circuit erred in imposing a willfulness finding just because the City, though "aware of its obligations under the FLSA," took no "affirmative actions *** to ensure that its classification of its cash-in-lieu of benefits payments complied with the FLSA" or to "investigate whether its exclusion of cash-in-lieu of benefits payments from the regular rate of pay complied with the FLSA." App., *infra*, 36a. Nor was it appropriate for the Ninth Circuit to require the City to "put forth *** evidence of any actions it took to determine whether its treatment of cash-in-lieu of benefits payments complied with the FLSA." *Id.* at 37a. *McLaughlin* imposes a "tougher standard" for a finding of willfulness. *Id.* at 39a (Owens, J., concurring, joined by Trott, J.). And this Court should not let stand the Ninth Circuit's lax view of willfulness that "comes very close to a qyburnian resurrection of the *Jiffy June* standard." *Id.*

B. The Ninth Circuit's Willfulness Standard Creates Unintended Liability For Employers

This case presents an ideal vehicle to correct the Ninth Circuit's course on an important issue that cuts across FLSA cases and other statutes. *See* 29 U.S.C. § 255(a) (providing statutes of limitations for "[a]ny action commenced on or after May 14, 1947, to

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stated that the *Jiffy June* test is no longer the law of this circuit.") (citation and quotation marks omitted); *Hanger v. Lake Cty.*, 390 F.3d 579, 583-584 (8th Cir. 2004) (discussing tests rejected by *McLaughlin* and finding no willfulness under correct test).

enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act") (alteration in original); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614-617 (1993) (interpreting ADEA in light of *McLaughlin*).

There can be no question that the Ninth Circuit's view of *McLaughlin*'s willfulness standard resulted in the expansion of the statute-of-limitations period in this case from two to three years. In the absence of Ninth Circuit precedent lowering the bar for demonstrating willfulness, Judge Owens and Judge Trott would have held the City's violation to be *non*willful and applied the two-year statute of limitations. App., *infra*, 39a-40a ("Absent *Alvarez*, I would affirm the district court on the statute of limitations question."). That the panel, unencumbered by Ninth Circuit precedent, would have arrived at that commonsense result is unsurprising—especially when the Ninth Circuit deemed the case on the merits to be "close" and to lack controlling "case authority on the proper treatment of cash-in-lieu of benefits payments under the FLSA in [the Ninth Circuit]." *Id.* at 13a, 36a.

Beyond the circumstances of this case, certiorari review is needed to restore the careful balance Congress struck in imposing a two-tiered statute of limitations. Before licensing a 50% increase in liability—an amount that can then be doubled under the liquidated damages provision, 29 U.S.C. § 216(b)—courts must give meaning to Congress's "obvious" effort to draw a "significant distinction

between ordinary violations and willful violations." *McLaughlin*, 486 U.S. at 132.

This Court has broached the willfulness question numerous times over the last decades in order to safeguard Congress's intent. *See, e.g.*, *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007); *Bryan v. United States*, 524 U.S. 184 (1998); *Thurston*, 469 U.S. 111; *McLaughlin*, 486 U.S. 128. Even after *McLaughlin*, this Court expressed "[s]urpris[e]" that "the Courts of Appeals continue to be confused about the meaning of the term 'willful.'" App., *infra*, 39a (Owens, J., concurring, joined by Trott, J.) (first alteration in original) (quoting *Hazen Paper*, 507 U.S. at 615). The Ninth Circuit's erroneous decision, which only perpetuates confusion for employers of all types and their employees, justifies this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 19, 2017

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANNY FLORES; ROBERT BARADA; KEVIN WATSON; VY VAN; RAY LARA; DANE WOOLWINE; RIKIMARU NAKAMURA; CHRISTOPHER WENZEL; SHANNON CASILLAS; JAMES JUST; STEVE RODRIGUES; and ENRIQUE DEANDA, *Plaintiffs-Appellees/ Cross-Appellants,* and CRUZ HERNANDEZ, *Plaintiff-Appellee*, and GILBERT LEE; RENE LOPEZ, *Plaintiffs,* v. CITY OF SAN GABRIEL, *Defendant-Appellant/ Cross-Appellee.*	Nos. 14-56421, 14-56514 D.C. No. 2:12-cv-04884-JGB-JCG OPINION

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted February 10, 2016
Pasadena, California

Filed June 2, 2016

Before: Stephen S. Trott, Andre M. Davis,[*]
and John B. Owens, Circuit Judges.

Opinion by Judge Davis;
Concurrence by Judge Owens

SUMMARY[**]

Labor Law

On an appeal and a cross-appeal, the panel affirmed in part and reversed in part the district court's summary judgment partially in favor of the plaintiffs in an action under the Fair Labor

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[*] The Honorable Andre M. Davis, Senior Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Standards Act, alleging that the City of San Gabriel failed to include payments of unused portions of police officers' benefits allowances when calculating their regular rate of pay, resulting in a lower overtime rate and a consequent underpayment of overtime compensation.

The district court agreed with the plaintiffs that the City's cash-in-lieu of benefits payments were not properly excluded from its calculation of the regular rate of pay, except to the extent that the City made payments to trustees or third parties. The district court held that the plaintiffs were restricted to a two-year statute of limitations because the City's violation was not willful. The district court also found that the City qualified for a partial overtime exemption, limiting its liability for overtime to hours worked in excess of 86 in a 14-day work period.

The panel held that the City's payment of unused benefits must be included in the regular rate of pay and thus in the calculation of the overtime rate for its police officers. The panel held that the City's violation of the Act was willful because it took no affirmative steps to ensure that its initial designation of its benefits payments complied with the Act and failed to establish that it acted in good faith. Accordingly, the plaintiffs were entitled to a three-year statute of limitations and liquidated damages for the City's violations. The panel also concluded, however, that the City had demonstrated that it

qualified for the partial overtime exemption under § 207(k) of the Act, limiting its damages for the overtime violations.

Judge Owens, joined by Judge Trott, wrote that he concurred fully in the majority's opinion but believes that the court's willfulness caselaw is off track.

COUNSEL

Brian P. Walter (argued) and Alex Y. Wong, Liebert Cassidy Whitmore, Los Angeles, California, for Defendant-Appellant/Cross-Appellee.

Joseph N. Bolander (argued), Brandi L. Harper, and Christopher L. Gaspard, Gaspard Castillo Harper, APC, Ontario, California, for Plaintiffs-Appellees/Cross-Appellants.

OPINION

DAVIS, Circuit Judge:

Plaintiffs-Appellees and Cross-Appellants Danny Flores, Robert Barada, Kevin Watson, Vy Van, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Shannon Casillas, James Just, Steve Rodrigues, and Enrique Deanda and Plaintiff-Appellee Cruz Hernandez (collectively, "Plaintiffs") are current or former police officers

employed by the City of San Gabriel, California ("City"). The Plaintiffs brought suit against the City for violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–19, alleging that the City failed to include payments of unused portions of the Plaintiffs' benefits allowances when calculating their regular rate of pay, resulting in a lower overtime rate and a consequent underpayment of overtime compensation. The Plaintiffs asserted that the City's violation of the FLSA was "willful," entitling them to a three-year statute of limitations for violations of the Act, and sought to recover their unpaid overtime compensation and liquidated damages.

The City claimed that its cash-in-lieu of benefits payments were properly excluded from the Plaintiffs' regular rate of pay pursuant to two of the Act's statutory exclusions and argued that it qualified for a partial overtime exemption under § 207(k), which allows public agencies employing firefighters or law enforcement officers to designate an alternative work period for purposes of determining overtime. The City denied that any violation of the FLSA was willful and that the Plaintiffs were entitled to liquidated damages.

For the reasons that follow, we conclude that the City's payment of unused benefits must be included in the regular rate of pay and thus in the calculation of the overtime rate for its police officers as well. And because the City took no affirmative

steps to ensure that its initial designation of its benefits payments complied with the FLSA and failed to establish that it acted in good faith in excluding those payments from its regular rate of pay, the Plaintiffs are entitled to a three-year statute of limitations and liquidated damages for the City's violations. We also conclude, however, that the City has demonstrated that it qualifies for the partial overtime exemption under § 207(k) of the Act, limiting its damages for the overtime violations alleged here.

I. BACKGROUND

A. Statutory background

Under the FLSA, an employer must pay its employees premium overtime compensation of one and one-half times the regular rate of payment for any hours worked in excess of forty in a seven-day work week. *Cleveland v. City of Los Angeles*, 420 F.3d 981, 984–85 (9th Cir. 2005) (citing § 207(a)). The "regular rate" is defined as "all remuneration for employment paid to, or on behalf of, the employee," subject to a number of exclusions set forth in the Act. § 207(e). The FLSA also provides "a limited exemption from the overtime limit to public employers of law enforcement personnel or firefighters." *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (citing § 207(k)). The partial overtime exemption in § 207(k) "increases the

overtime limit slightly and it gives the employer greater flexibility to select the work period over which the overtime limit will be calculated." *Id.* at 1060 (citation omitted).

The FLSA provides a private cause of action for employees to seek unpaid wages owed to them under its provisions. § 216(b). The Act has a two-year statute of limitations for claims unless the employer's violation was "willful," in which case the statute of limitations is extended to three years. § 255(a). An employer who violates the FLSA's overtime provisions is liable in the amount of the employee's unpaid overtime compensation, in addition to an equal amount in liquidated damages. § 216(b). The Act provides a defense to liquidated damages for an employer who establishes that it acted in good faith and had reasonable grounds to believe that its actions did not violate the FLSA. § 260.

B. Factual and procedural background

1. Flexible Benefits Plan

The City provides a Flexible Benefits Plan to its employees under which the City furnishes a designated monetary amount to each employee for the purchase of medical, vision, and dental benefits. All employees are required to use a portion of these funds to purchase vision and dental benefits. An

employee may decline to use the remainder of these funds to purchase medical benefits only upon proof that the employee has alternate medical coverage, such as through a spouse. If an employee elects to forgo medical benefits because she has alternate coverage, she may receive the unused portion of her benefits allotment as a cash payment added to her regular paycheck.

In 2009, an employee who declined medical coverage received a payment of $1,036.75 in lieu of benefits each month. This amount has increased each year, so that employees who declined medical coverage received $1,112.28 in 2010, $1,186.28 in 2011, and $1,304.95 in 2012. This payment appears as a designated line item on an employee's paycheck and is subject to federal and state withholding taxes, Medicare taxes, and garnishment.

In 2009, the City paid $2,389,468.73 to or on behalf of its employees pursuant to its Flexible Benefits Plan, and it paid $1,116,485.77 of that amount, or 46.725% of total plan contributions, to employees for unused benefits. While the exact figures vary each year, the percentage of the total plan contributions that the City pays to employees for unused benefits has remained somewhat consistent. In 2010, the City paid $1,086,202.56 to employees for unused benefits, reflecting 42.842% of total plan contributions; in 2011, $1,138,074.13, or

43.934% of total plan contributions; and in 2012, $1,213,880.70, or 45.179% of total plan contributions.

At some time prior to 2003, the City designated its cash-in-lieu of benefits payments as "benefits" that were excluded from its calculation of a recipient's regular rate of pay, and, accordingly, has not included the value of the payments in its calculation of employees' regular rate of pay. The City has not revisited its designation since that time.

2. Calculation of overtime

Since at least 1994, the City's police officers have been paid overtime when they have worked more than eighty hours in a fourteen-day work period. Since at least 2003, the City's eighty-hour/fourteen-day work period has been memorialized in several documents. A 2003 City resolution concerning the "work week" states that police officers work eighty hours in a bi-weekly period. This same eighty-hour/fourteen-day work period was restated in the City's Salary, Compensation and Benefit Policy Manual, dated July 3, 2010, and in the 2005–2007 Memorandum of Understanding between the City and the police officers' collective bargaining unit. Because the City's cash-in-lieu of benefits payments are excluded from its calculation of an officer's regular rate of pay, the benefits payments are not incorporated into the City's calculation of the officer's overtime rate.

3. Litigation between the parties

The Plaintiffs instituted this suit against the City in 2012. Following discovery, both parties moved for partial summary judgment on the Plaintiffs' claims. The district court agreed with the Plaintiffs that the City's cash-in-lieu of benefits payments were not properly excluded from its calculation of the regular rate of pay, except to the extent that the City makes payments to trustees or third parties. *Flores v. City of San Gabriel*, 969 F. Supp. 2d 1158, 1169–77 (C.D. Cal. 2013) ("*Flores I*"). Finding that the City's violation of the Act was not willful, however, it held that the Plaintiffs were restricted to the two-year statute of limitations for their claims. *Id.* at 1177. The district court also found that the City qualified for the § 207(k) partial overtime exemption and thus limited the City's liability for overtime to hours worked in excess of eighty-six in a fourteen-day work period. *Id.* at 1177–79. After receiving supplemental briefing, the district court denied the Plaintiffs' motion for partial summary judgment on the issue of liquidated damages and sua sponte entered summary judgment in favor of the City on that issue. *Flores v. City of San Gabriel*, No. CV 12-04884-JDB (JCGx), 2013 WL 5817507, at *1 (C.D. Cal. Oct. 29, 2013) ("*Flores II*").

The City timely appealed the district court's rulings concerning the exclusion of the cash-in-lieu of benefits payments from the regular rate of pay. The

Plaintiffs cross-appealed, challenging the district court's rulings that the payments qualified for exclusion under the Act if made to a trustee or a third party, that the City qualified for a § 207(k) partial overtime exemption, that the applicable statute of limitations was two years, and that the Plaintiffs were not entitled to liquidated damages.

II. STANDARD OF REVIEW

We review a grant of summary judgment or partial summary judgment de novo, applying the same standard of review as the district court under Federal Rule of Civil Procedure 56. *Adair*, 185 F.3d at 1059; *Local 246 Utility Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 294 n.1 (9th Cir. 1996). Under Rule 56, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the parties file cross-motions for summary judgment, we review each separately, giving the non-movant for each motion the benefit of all reasonable inferences. *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008) (citation omitted).

III. ANALYSIS

"The FLSA is construed liberally in favor of employees; exemptions 'are to be narrowly construed

against the employers seeking to assert them . . . .'" *Cleveland*, 420 F.3d at 988 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). The employer bears the burden of establishing that it qualifies for an exemption under the Act. *Id.* We will not find a FLSA exemption applicable "except [in contexts] plainly and unmistakably within [the given exemption's] terms and spirit." *Id.* (alterations in original) (quoting *Klem v. Cty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000)).

A. Calculation of regular rate of pay

1. Section 207(e)(2)

The City's primary contention on appeal is that its cash-in-lieu of benefits payments are properly excluded from the regular rate of pay pursuant to § 207(e)(2) because they are not compensation for hours worked by the Plaintiffs. Section 207(e)(2) excludes from the regular rate of pay

> payments made 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; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's

> interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.

The City argues that this final phrase—"other similar payments to an employee which are not made as compensation for his hours of employment"—permits exclusion of any payments that do not depend on when or how much work the employee performs. The City does not contend that its cash-in-lieu of benefits payments are not compensation. Rather, because its payments of the Plaintiffs' unused benefits are not tied to hours worked or amount of services provided by the Plaintiffs, the City reasons, the payments are properly excluded under § 207(e)(2). This is a question of first impression in this and other circuits. While a close question, we conclude that the City's cash-in-lieu of benefits payments may not be excluded under § 207(e)(2) and therefore must be included in the calculation of the Plaintiffs' regular rate of pay.

The Department of Labor's interpretation of § 207(e)(2)'s final phrase is set forth at 29 C.F.R. § 778.224,[1] which provides, in part:

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[1] Section 778.224 is an interpretative bulletin containing an "official interpretation[] . . . issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the

> Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

29 C.F.R. § 778.224(a). Section 778.224 also provides three examples of payments that constitute "other

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Secretary." 29 C.F.R. § 778.1. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (citations omitted). Such interpretations are instead "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only to the extent that the agency's interpretation has the "power to persuade." *Id.* (quoting *Skidmore*, 323 U.S. at 140). Because the City does not challenge § 778.224 as unpersuasive, we consider it here without expressing an opinion on its persuasiveness.

similar payments" under § 207(e)(2) and are thus properly excluded under that subsection—amounts paid to an employee for the rental of her vehicle; loans or advances made to the employee; and "[t]he cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities." § 778.224(b). The Department of Labor's interpretation of § 207(e)(2) is thus directly contrary to the interpretation of the "other similar payments" clause that the City urges here. Under § 778.224(a), a payment may not be excluded from the regular rate of pay pursuant to § 207(e)(2) if it is generally understood as compensation for work, even though the payment is not directly tied to specific hours worked by an employee. And indeed, the examples given in § 778.224(a) of payments that were not intended to be excluded under the "other similar payments" clause, such as bonuses or room and board, are commonly considered to be compensation even though such payments do not fluctuate in accordance with particular hours worked by an employee.

We have similarly interpreted the "other similar payments" clause to focus on whether the character of the payment was compensation for work. In *Local 246 Utility Workers Union of America v. Southern California Edison Co.*, the employer argued that payments made to supplement the wages of

disabled workers performing lower-wage work than they had performed prior to their disability were not "made as compensation for [the employee's] hours of employment" because the workers were paid a weekly, not hourly, wage. *Local 246*, 83 F.3d at 295 (alteration in original). We rejected this argument, explaining that "[t]he key point is that the pay or salary is *compensation for work*" and "[t]hus it makes no difference whether the supplemental payments are tied to a regular *weekly* wage or regular *hourly* wage." *Id.* (emphasis added). In other words, the question of whether a particular payment falls within the "other similar payments" clause does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work. Indeed, we opined that, "[e]ven if payments to employees are not measured by the number of hours spent at work, that fact alone does not qualify them for exclusion under section 207(e)(2)." *Id.* at 295 n.2 (citing *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577 (7th Cir. 1995)).

The City contends that *Local 246* must not be read so broadly because the distinction at issue there was between weekly and hourly wages, not between compensation that was tied to hours worked and compensation that was not. That is true. However, the City fails to grapple fully with our reasoning for rejecting the employer's distinction between weekly

and hourly wages—that the "key point" is whether the payment is "compensation for work"—and makes no mention of our observation that payments that "are not measured by the number of hours spent at work" are not automatically excludable under § 207(e)(2). This reasoning forecloses the City's interpretation of § 207(e)(2).

Neither *Reich v. Interstate Brands Corp.* nor *Minizza v. Stone Container Corp. Corrugated Container Division East Plant*, 842 F.2d 1456 (3d Cir. 1988), persuades us that our reading of § 207(e)(2) is incorrect. *Reich* concerned the classification of payments made to bakers for working a schedule without two consecutive days off. 57 F.3d at 575-76. While the Seventh Circuit concluded that the "other similar payments" clause "refers to other payments that do not depend at all on when or how much work is performed," it rejected the employers' interpretation that the clause excluded any payment "not measured by the number of hours spent at work," the same reading of the statute that the City espouses here. *Id.* at 577–78. The *Reich* court determined that a payment for working an inconvenient schedule is unlike vacation pay and the reimbursement of expenses—the other two kinds of payment enumerated in § 207(e)(2)—and is instead similar to "a higher base rate compensating the employee for smelly or risky tasks, foul-tempered supervisors, or inability to take consecutive days off."

Id. at 578–79. Accordingly, the court held that the schedule payments could not be excluded under § 207(e)(2). *Id.* At bottom, the Seventh Circuit's reading of the statute is not so different from our own—both look to whether the payment at issue is generally understood as compensation to the employee, not whether the payment is tied to specific hours worked by the employee.

In *Minizza*, the Third Circuit considered the treatment of lump sum payments made to employees pursuant to a collective bargaining agreement. 842 F.2d at 1458. The payments were made in lieu of a wage increase and as an inducement to ratify the agreement. *Id.* The Third Circuit determined that these lump sum payments were properly excluded under § 207(e)(2), rejecting the district court's conclusion that the payments could not be excluded because they were not sufficiently similar to vacation time and reimbursements. *Id.* at 1461–62. The Third Circuit interpreted § 207(e)(2)'s "other similar payments" clause to encompass "payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples." *Id.* at 1461. This reading, too, ultimately focuses on whether a given payment is a form of compensation for an employee's service or, like vacation time and reimbursements, is instead a payment that would not generally be considered compensation for an employee's work. Admittedly, the Third Circuit's

greater focus on a direct tie to hours worked or services provided hews more closely to the interpretation that the City urges here. We decline to adopt a similar requirement. We observe, however, because the purpose of the payments in *Minizza* was to secure the employees' ratification of a collective bargaining agreement, such payments are not compensation for work performed, and would similarly be excludable under our interpretation of § 207(e)(2).

Accordingly, consistent with our precedent and the Department of Labor's interpretation, we focus our inquiry on whether a given payment is properly characterized as compensation, regardless of whether the payment is specifically tied to the hours an employee works, when determining whether that payment falls under § 207(e)(2)'s "other similar payments" clause.

As noted previously, the City does not contend that its cash-in-lieu of benefits payments are excluded from the regular rate of pay because they are not compensation, but rather because they are not compensation for hours of work performed or an amount of services provided. Even if the City had not made this concession, however, we would conclude that the payments at issue here are properly considered compensation for work. The other payments we have found to be excluded under § 207(e)(2)'s "other similar payments" clause are

payments for non-working time, similar to vacation or sick time, which are expressly excluded under § 207(e)(2). *See Balestrieri v. Menlo Park Fire Prot. Dist.*, 800 F.3d 1094, 1103–04 (9th Cir. 2015) (leave buyback payments); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004) (lunch periods). The payments at issue here are not similar to payments for non-working time or reimbursement for expenses.

Moreover, the FLSA's inclusion of a separate exemption specifically addressing benefits, § 207(e)(4), suggests that payments related to benefits would otherwise be considered compensation. Inclusion of a separate exemption also indicates that Congress did not understand § 207(e)(2)'s "other similar payments" clause to already exempt payments related to benefits. *See Reich*, 57 F.3d at 578. To be sure, "the subsections of § 7(e) are not mutually exclusive; that a payment cannot be excluded under one subsection does not imply that every other subsection is inapplicable." *Id.* While the inclusion of a separate exemption addressing benefits is by no means dispositive, it provides insight into the intended scope of § 207(e)(2). As the Seventh Circuit reasoned, "we hesitate to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the 'regular rate,' for

then most of the remaining subsections become superfluous." *Id.*

For these reasons, and in light of the command that we interpret the FLSA's exemptions narrowly in favor of the employee, we conclude that the City has failed to carry its burden to demonstrate that its cash-in-lieu of benefits payments "plainly and unmistakably" constitute excludable payments under § 207(e)(2). *Cleveland*, 420 F.3d at 988. The City warns us that a ruling in favor of the Plaintiffs in this case will encourage municipalities to discontinue cash-in-lieu of benefits payment programs due to the consequent increase in overtime costs to the detriment of municipal employees. As we have observed before, such arguments are "more appropriately . . . made to Congress or to the Department of Labor, rather than to the courts." *Bratt v. Cty. of Los Angeles*, 912 F.2d 1066, 1071 (9th Cir. 1990). The potential effect of our ruling on municipal decision-making does not give us license to alter the terms of the FLSA. Accordingly, we affirm the district court's ruling that the City's cash-in-lieu of benefits payments are not properly excluded under § 207(e)(2).

2. Section 207(e)(4)

The City also argues that its cash-in-lieu of benefits payments are properly excluded pursuant to § 207(e)(4). Section 207(e)(4) excludes from the

regular rate of pay "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."

Because the City pays the unused benefits directly to its employees and not "to a trustee or third person," its cash-in-lieu of benefits payments cannot be excluded under § 207(e)(4). We rejected a similar argument in *Local 246* when the employer had proffered no evidence that any of the payments at issue were made to a trust rather than directly to the employees because "[s]ection 207(e)(4) deals with contributions by the employer, not payments to the employee." *Local 246*, 83 F.3d at 296. That reasoning applies equally here.

The City urges us to find that its cash-in-lieu of benefits payments fall within the ambit of § 207(e)(4) even though the payments are not made to a trustee or third party because the payments "generally" meet the requirements of that subsection, arguing that it should not be penalized for administering its own flexible benefits plan. But "[w]here '[a] statute's language is plain, the sole function of the courts is to enforce it according to its terms,' because 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Cleveland*, 420 F.3d at 989 (quoting *United States v. Ron Pair*

Enters., Inc., 489 U.S. 235, 241 (1989); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The City's cash-in-lieu of benefits payments are not made to a trustee or third party, and therefore those payments do not meet the requirements of § 207(e)(4). We are not at liberty to add exceptions to the clear requirements set forth in the statute for payments that "generally" satisfy the requirements of that provision. This is particularly true here, where exemptions to the FLSA's requirements are to be narrowly construed in favor of the employee. *Cleveland*, 420 F.3d at 988 (citing *Arnold*, 361 U.S. at 392). We thus have no trouble concluding that the City's cash-in-lieu of benefits payments are not properly excluded from the regular rate of pay pursuant to § 207(e)(4).

Whether benefit payments made directly to a trustee or third party pursuant to the City's Flexible Benefits Plan are properly excluded from the regular rate of pay under § 207(e)(4) is a closer question. The district court answered the question in the affirmative, a holding that the Plaintiffs challenge in their cross-appeal. The Plaintiffs argue that the Flexible Benefits Plan is not a "bona fide plan" under § 207(e)(4), and thus even payments made to a trustee or third party pursuant to the Plan are not properly excluded under that subsection. We agree.

Under § 207(e)(4), payments made to a trustee or third party "pursuant to a bona fide plan for

providing old-age, retirement, life, accident, or health insurance or similar benefits for employees" may be excluded from the regular rate of pay. The statute does not define the term "bona fide plan." The Department of Labor's interpretation of that term is set forth at 29 C.F.R. § 778.215.[2] The parties' dispute concerns only one provision of that section:

> The plan must not give an employee . . . the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided*, *however*, That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still

[2] Like § 778.224, § 778.215 is an interpretative bulletin accorded respect under *Skidmore* to the extent that the interpretation has the "power to persuade." *Christensen,* 529 U.S. at 587 (quoting *Skidmore,* 323 U.S. at 140). Because neither party challenges the district court's reliance on § 778.215 to determine whether the City's payments to a third party may be excluded under § 207(e)(4), we apply § 778.215 here without expressing an opinion as to its persuasiveness. To the extent that the City later suggests that we need not consider the Department's interpretation because the term "bona fide" in § 207(e)(4) is unambiguous, we disagree. The City cites Black's Law Dictionary, which defines "bona fide" as "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine," as evidence that the term has an ordinary, unambiguous meaning. The very definition that the City quotes, however, illustrates that the term "bona fide" has multiple reasonable interpretations. The term is thus ambiguous and resort to the Department of Labor's interpretation for guidance is appropriate.

> be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit . . . during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

§ 778.215(a)(5).

The Department of Labor interpreted this provision in a 2003 Opinion Letter, which states that cash-in-lieu of benefits payments are "incidental" under § 778.215(a)(5) if they account for no more than 20% of the employer's total contribution amount. July 2, 2003 Dep't of Labor Op. Letter, 2003 WL 23374600, at *2. The Opinion Letter explains that the Department has historically used a 20% limitation on cash payments per employee to determine if such payments are more than "incidental" under § 778.215(a)(5). *Id.* However, the 2003 Opinion Letter modifies the application of the 20% cap:

> We continue to believe that this 20% cap is an appropriate method for assessing whether any cash

> payments are an incidental part of a bona fide benefits plan under 778.215(a)(5)(iii). However, because section 7(e) of the FLSA provides for the exclusion of employer contributions for benefits that are made pursuant to a bona fide *plan*, on further review we believe that the focus of the question should be whether the plan as a whole is a bona fide benefits plan. Therefore, we believe that the 20% test should be applied on a plan-wide basis. Moreover, such a plan-wide 20% test is more consistent with the regulatory language which allows "*all* or a part of the amount" standing to an employee's credit to be paid in cash, so long as it occurs under circumstances which are consistent with such a plan's primary purpose of providing benefits.

Id. The City urges us to disregard the 2003 Opinion Letter as insufficiently reasoned and inconsistent with § 778.215(a)(5). Like the Department's interpretative bulletins, opinion letters are "entitled to respect" under *Skidmore* only to the extent that the agency's interpretation has the "power to

persuade." *Christensen*, 529 U.S. at 587 (quoting Skidmore, 323 U.S. at 140). Under *Skidmore*, whether an agency's interpretation is accorded deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

We agree with the City that the 2003 Opinion Letter is unpersuasive. The Department of Labor wholly fails to explain its reasoning for the adoption of the 20% ceiling. Rather, the agency explains that it previously used a 20% cap on cash payments per employee and then discusses its reasoning for transitioning to a 20% cap on cash payments plan-wide. Nowhere does it provide any rationale for why 20% was chosen as the percentage at which cash payments are no longer an "incidental" part of a plan.

Even setting aside the 20% threshold in the 2003 Opinion Letter, however, we cannot find that the City's Flexible Benefits Plan qualifies as a "bona fide" plan under § 778.215(a)(5). Forty percent or more of the City's total contributions are paid directly to employees rather than received as benefits. While the City correctly points out that its cash-in-lieu of benefits payments are less than half of its total contributions, benefits payments constitute only a bare majority of its total contributions. The City's

cash payments are simply not an "incidental" part of its Flexible Benefits Plan under any fair reading of that term. Because the City's Flexible Benefits Plan is not a "bona fide plan" under § 207(e)(4) pursuant to the requirements of § 778.215(a)(5), even the City's payments to trustees or third parties under its Flexible Benefits Plan are not properly excluded under § 207(e)(4).

B. Section 207(k) partial overtime exemption

In response to the Plaintiffs' FLSA claims, the City had argued before the district court that it was entitled to a partial overtime exemption under § 207(k). The court agreed and granted summary judgment to the City on this issue. The Plaintiffs do not contest the City's eligibility for the exemption; the only question before us is whether the City has actually established a § 207(k) work period.

The City bears the burden of establishing that it qualifies for the exemption. *Adair*, 185 F.3d at 1060 (citations omitted). "Generally, the employer must show that it established a [§ 207(k)] work period and that the [§ 207(k)] work period was 'regularly recurring.'" *Id.* (citing *McGrath v. City of Philadelphia*, 864 F. Supp. 466, 474 (E.D. Pa. 1994); 29 C.F.R. § 553.224). "Whether an employer meets this burden is normally a question of fact." *Id.* (citing *Spradling v. City of Tulsa*, 95 F.3d 1492, 1505 (10th

Cir. 1996); *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996)).

It is undisputed that the City adopted an eighty-hour/fourteen-day work period for its police officers at least as early as 2003 and that the City has paid overtime in accordance with this work period since at least 1994. Nor do the Plaintiffs dispute that the City memorialized its adoption of the eighty-hour/fourteen-day work period in a 2003 City resolution and restated it in the City's Salary, Compensation and Benefit Policy Manual, dated July 3, 2010, and in a 2005–2007 Memorandum of Understanding between the City and the Plaintiffs' collective bargaining unit. The Plaintiffs nonetheless argue that the City does not qualify for a § 207(k) exemption because the City does not reference § 207(k) in any of these documents. They contrast the City's references to its work period for police officers with language in the City's Salary, Compensation and Benefit Policy Manual expressly stating that the City and the firefighters' collective bargaining unit "agree to use the 7k partial overtime exemption."

An employer need not expressly identify § 207(k) when establishing a § 207(k) work period in order to qualify for the exemption. In *Adair*, we held that the employer carried its burden to show that it had established a § 207(k) exemption "when it specified the work period in the [Collective

Bargaining Agreement] and when it actually followed this period in practice." 185 F.3d at 1061. The Collective Bargaining Agreement read, "[f]or purposes of complying with the Fair Labor Standards Act, the Patrol Division work period shall be eight days and the Detective Division seven days." *Id.* at 1060 (alteration in original) (citations omitted). While the Plaintiffs attempt to distinguish *Adair* by pointing to that provision's specific reference to the FLSA, we placed no weight on this language when discussing whether the employer established the § 207(k) exemption. All we required then—and all we require now—is that the employer show that it established a § 207(k) work period and that the § 207(k) work period was regularly recurring. *Id.* (citations omitted). Specific reference to § 207(k) is not necessary to satisfy this standard. Consistent with our sister circuits, we decline to require more of employers to qualify for the § 207(k) exemption. *See Rosano v. Twp. of Teaneck*, 754 F.3d 177, 187–88 (3d Cir. 2014); *Calvao v. Town of Framingham*, 599 F.3d 10, 16–17 (1st Cir. 2010); *Brock v. City of Cincinnati*, 236 F.3d 793, 810 (6th Cir. 2001); *Freeman v. City of Mobile*, 146 F.3d 1292, 1297 n.3 (11th Cir. 1998); *Spradling*, 95 F.3d at 1505; *Barefield*, 81 F.3d at 710; *see also Milner v. Hazelwood*, 165 F.3d 1222, 1223 (8th Cir. 1999) (per curiam) (holding that employer need not establish the exemption through public declaration).

The City has satisfied the criteria for application of the § 207(k) exemption by adopting an eighty-hour/fourteen-day work period for its law enforcement officers and by paying overtime in accordance with that period since 1994—facts that are not disputed by the Plaintiffs. Accordingly, we affirm the district court's grant of summary judgment to the City on this issue.

C. Liquidated damages

The Plaintiffs also challenge the district court's finding that they are not entitled to liquidated damages. An employer who violates the FLSA "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." § 216(b). However, if the employer shows that it acted in "good faith" and that it had "reasonable grounds" to believe that its actions did not violate the Act, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216." § 260. To avail itself of this defense, the employer must "establish that it had 'an honest intention to ascertain and follow the dictates of the Act' and that it had 'reasonable grounds for believing that [its] conduct complie[d] with the Act.'" *Local 246*, 83 F.3d at 298 (alterations in original) (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d

Cir. 1982)). If an employer fails to satisfy its burden under § 260, an award of liquidated damages is mandatory. *Id.* at 297 (citing *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985)). Whether the employer acted in good faith and whether it had objectively reasonable grounds for its action are mixed questions of fact and law. *Bratt*, 912 F.2d at 1071 (citing 29 C.F.R. § 790.22(c)). Questions involving the application of legal principles to established facts are reviewed de novo. *Id.*

To establish its good faith, the City relies exclusively on the deposition testimony of Linda Tang, an employee in its payroll department, who testified about the City's process for determining whether a particular payment must be included in the regular rate of pay. Ms. Tang testified that the City's payroll and human resources departments work together to determine whether a particular type of payment should be included in the calculation of the regular rate of pay when the payment is first provided. After a payment's initial classification, the City conducts no further review of a payment's designation, although Ms. Tang testified that the human resources department notifies the payroll department if it learns of new authority concerning the classification of a payment. Because the cash-in-lieu of benefits payments were classified as a "benefit" in the payroll system during this initial

review, they have never been included in the calculation of the regular rate of pay.

Such paltry evidence is not sufficient to carry the City's burden to demonstrate that it acted in good faith. The City has presented no evidence of what steps the human resources department took to determine that the cash-in-lieu of benefits payments were appropriately classified as a "benefit" under the FLSA and excluded from the calculation of the regular rate of pay. That the payroll department consulted the human resources department to find out how a given payment should be categorized in the City's payroll system sheds no light on *how* either department determined that the payment's designation as a "benefit" complied with the FLSA. An employer who "'failed to take the steps necessary to ensure [its] [] practices complied with [FLSA]'" and who "offers no evidence to show that it *actively endeavored* to ensure such compliance" has not satisfied § 260's heavy burden. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) (alterations in original) (emphasis added) (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999)); *see also Chao v. A-OneMed. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003) (upholding an award of liquidated damages where the employer believed that it was not required to pay overtime because employees divided their hours between two legal entities that were operated together, but had failed to consult an

objective authority or seek advice on the legality of its position).

Grasping at straws, the City argues that its good faith is also demonstrated by its inclusion of other types of payments in the regular rate of pay and its payment of overtime more generously than the FLSA requires. These arguments miss the mark. Evidence that the City complied with its other obligations under the Act or that it agreed to pay overtime more generously than required by law do not demonstrate what the City has done to ascertain whether its classification of the payments at issue here complied with the FLSA.

Because the City has failed to demonstrate that it attempted to comply with the Act in good faith, we conclude that the Plaintiffs are entitled to liquidated damages and remand this case to the district court to enter judgment for the Plaintiffs accordingly.

D. Statute of limitations

Pursuant to § 255(a), the two-year statute of limitations for actions under the FLSA may be extended to three years if an employer's violation is deemed "willful." *Alvarez*, 339 F.3d at 908 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988); § 255(a)). A violation is willful if the employer "knew or showed reckless disregard for the matter of

whether its conduct was prohibited by the [FLSA]." *Chao*, 346 F.3d at 918 (alteration in original) (quoting *McLaughlin*, 486 U.S. at 133). An employer need not violate the statute knowingly for its violation to be considered "willful" under § 255(a), *Alvarez*, 339 F.3d at 908, although "merely negligent" conduct will not suffice, *McLaughlin*, 486 U.S. at 133. The three-year statute of limitations may be applied "where an employer disregarded the very 'possibility' that it was violating the statute," *Alvarez*, 339 F.3d at 908–09 (citing *Herman*, 172 F.3d at 141), "although [a court] will not presume that conduct was willful in the absence of evidence," *id.* at 909 (citing *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir. 1990)). Like its determination regarding liquidated damages, a district court's determination of willfulness under § 255(a) is a mixed question of fact and law, with de novo review of the district court's application of the law to established facts. *See id.* at 908 (citations omitted).

An employer's violation of the FLSA is "willful" when it is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them." *Id.* at 909; *see also Haro v. City of Los Angeles*, 745 F.3d 1249, 1258 (9th Cir. 2014) (citing *Alvarez*, 339 F.3d at 909). Such is the case here. Ms. Tang's testimony regarding the City's process for designating payments as either a "premium" or a "benefit" to distinguish between payments included

in the City's calculation of an officer's regular rate of pay shows that the City was aware of its obligations under the FLSA. And despite notice of the Act's requirements, the record yields no evidence of affirmative actions taken by the City to ensure that its classification of its cash-in-lieu of benefits payments complied with the FLSA. Indeed, it is undisputed that the City failed to investigate whether its exclusion of cash-in-lieu of benefits payments from the regular rate of pay complied with the FLSA at any time following its initial determination that the payments constituted a benefit.

To be sure, as the district court correctly noted, there was no case authority on the proper treatment of cash-in-lieu of benefits payments under the FLSA in this circuit. But the absence of binding authority directly on point is not dispositive here. It is likely to be the exception, rather than the rule, that controlling case law addresses the precise question faced by an employer trying to determine its obligations under the FLSA, and thus only a small subset of FLSA violations would be considered willful if the existence of binding authority on the subject were our only consideration. More to the point here, the absence of controlling case authority cannot be dispositive when the City has put forth no evidence that it ever looked to see whether such authority existed. *Cf. Serv. Emps. Int'l Union, Local 102 v. Cty.*

of San Diego, 60 F.3d 1346, 1355–56 (9th Cir. 1994) (finding that evidence that employer relied on substantial legal authority and consulted with experts and the Department of Labor on its obligations under the FLSA established that the employer's violation was not willful).

The City has put forth no evidence of any actions it took to determine whether its treatment of cash-in-lieu of benefits payments complied with the FLSA, despite full awareness of its obligation to do so under the Act. We therefore conclude that its violation of the FLSA was willful and that the Act's three-year statute of limitations applies. We accordingly reverse the district court's ruling concerning the statute of limitations, and remand the matter for further proceedings.

IV. CONCLUSION

For the reasons set forth above, we hold that the City's cash-in-lieu of benefits payments are not properly excluded from the calculation of the regular rate of pay under either § 207(e)(2) or (e)(4). And because the City's Flexible Benefits Plan is not a "bona fide plan" under § 207(e)(4), even the City's payments to trustees or third parties may not be excluded from the regular rate of pay under that subsection. The City does, however, qualify for the partial overtime exemption in § 207(k). We further hold that the City has not shown that it attempted to

comply with the FLSA in good faith and that the Plaintiffs are therefore entitled to liquidated damages under the Act. Finally, because the City's violation of the FLSA was willful, we hold that the Act's three-year statute of limitations applies. We therefore affirm in part, reverse in part, and remand this matter to the district court for further proceedings and entry of a judgment consistent with this opinion. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

OWENS, Circuit Judge, with whom TROTT, Circuit Judge, joins, concurring:

I concur fully in the majority's opinion. I write separately because I believe that our willfulness caselaw in the context of the FLSA statute of limitations is off track.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the Supreme Court stressed that willfulness was more than mere negligence, and that "[i]f an employer acts unreasonably, but not recklessly, in determining its legal obligation," the two-year FLSA statute of limitations would apply. *Id.* at 132–35 & n.13. In formulating this definition, the Court emphatically rejected the so-called "*Jiffy June*" standard that expanded the statute of

limitations anytime "an employer knew that the FLSA 'was in the picture.'" *Id.* at 132 (*quoting Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1972)); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993) (noting that "[s]urprisingly, the Courts of Appeals continue to be confused about the meaning of the term 'willful' in" the Age Discrimination in Employment Act, even though *McLaughlin* "[o]nce again . . . rejected the 'in the picture standard'").

In *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908–09 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005), a panel of this court correctly cited *McLaughlin* when analyzing an FLSA willfulness question. But then the panel concluded that the employer acted willfully because it "was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them," and that it "'could easily have inquired into' the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith." *Id.* at 909 (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999)).

This gloss on *McLaughlin* comes very close to a qyburnian resurrection of the *Jiffy June* standard. And it is this gloss – and not the tougher standard that the Supreme Court set out – which compels me to join Part III.D of the majority opinion. Absent

Alvarez, I would affirm the district court on the statute of limitations question.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANNY FLORES, ROBERT BARADA, KEVIN WATSON, VY VAN, RAY LARA, DANE WOOLWINE, RIKIMARU NAKAMURA, CHRISTOPHER WENZEL, CRUZ HERNANDEZ, SHANNON CASILLAS, JAMES JUST, RENE LOPEZ, GILBERT LEE, STEVE RODRIGUES, and ENRIQUE DEANDA, Plaintiffs, v. CITY OF SAN GABRIEL, and DOES 1 THROUGH 10, inclusive, Defendants.	)	Case No. CV 12-04884 JGB (JCGx) **ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Before the Court is the Motion for Summary Judgment, or in the alternative, Partial Summary

Judgment filed by Defendant City of San Gabriel on May 13, 2013. (Doc. No. 20.) Also before the Court is Plaintiffs' Motion for Partial Summary Judgment filed on May 13, 2013. (Doc. No. 23.) After considering the papers timely filed and the arguments presented at the August 19, 2013 hearing, the Court GRANTS Defendant's Motion for Partial Summary Judgment and GRANTS IN PART Plaintiffs' Motion for Partial Summary Judgment. The Court directs the parties to submit further briefing addressing the issue of liquidated damages.

I. BACKGROUND

A. Procedural Background

Plaintiffs Danny Flores, Robert Barada, Kevin Watson, Vy Van, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Cruz Hernandez, Shannon Casillas, James Just, Rene Lopez, Gilbert Lee, Steve Rodrigues, and Enrique Deanda (collectively, "Plaintiffs") filed their Complaint on June 4, 2012. (Doc. No. 1.) Defendant City of San Gabriel ("Defendant") filed its Answer on June 26, 2012. (Doc. No. 5.)

Defendant filed its Motion for Summary Judgment, or in the alternative, Partial Summary Judgment, on May 13, 2013. ("Def. Mot.," Doc. No. 20.) In support of its Motion, Defendant filed:

- Separate Statement of Uncontroverted Facts and Conclusions of Law ("Def. SUF," Doc. No. 22-1);

- Declaration of Rayna Ospino ("Ospino Mot. Decl.," Exh. 1 to Defendant's Appendix of Evidentiary Support ("Def. Mot. Appendix"), Doc. No. 21);

- Declaration of Linda Tang ("Tang Mot. Decl.," Exh. 2 to Def. Mot. Appendix);

- Excerpts from City of San Gabriel Resolution No. 02-12, adopted January 7, 2013 ("Resolution No. 02-12," Exh. A to Def. Mot. Appendix);

- Excerpts from the City of San Gabriel Salary, Compensation and Benefit Policy Manual, dated July 3, 2010 ("Policy Manual," Exh. B to Def. Mot. Appendix); and

- Excerpts from the Memorandum of Understanding between the City of San Gabriel and the San Gabriel Police Officers' Association for 2005–2007, signed August 2, 2005 ("Mot. MOU," Exh. C to Def. Mot. Appendix).

On June 10, 2013, Plaintiffs filed their Opposition to Defendant's Motion. ("Pl. Opp.," Doc. No. 27.) Plaintiffs filed the following documents in support of their Opposition:

- Declaration of Joseph N. Bolander ("Bolander Opp. Decl.," Doc. No. 27-1) attaching Exhibits A-B; and

- Statement of Genuine Disputes of Material Fact ("Pl. SGD," Doc. No. 27-2).

Defendant filed its Reply on June 24, 2013. ("Def. Reply," Doc. No. 31.) In support of its Reply, Defendant also filed its Objections to Plaintiffs' Evidence. ("Def. Reply Obj.," Doc. No. 32.)

Plaintiffs filed their Motion for Partial Summary Judgment on May 13, 2013. ("Pl. Mot.," Doc. No. 23.) In support of their Motion, Plaintiffs also filed the following:

- Declaration of Joseph N. Bolander ("Bolander Mot. Decl.," Doc. No. 23-2);

- Statement of Uncontroverted Facts and Conclusions of Law ("Pl. SUF," Doc. No. 23-3); and

- Request for Judicial Notice ("RJN," Doc. No. 23-4).[1]

On June 10, 2013, Defendant filed its Opposition to Plaintiffs' Motion. ("Def. Opp.," Doc.

[1] Since the Court does not rely on the district court's order in Rob Morris v. City of Santa Maria, LA CV 12-04989 JAK (FFMx) to reach its decision, it does not take judicial notice of that document.

No. 26.) Defendant filed the following documents in support of its Opposition:

- Statement of Genuine Disputes of Material Fact ("Def. SGD," Doc. No. 26-2);
- Declaration of Rayna Ospino ("Ospino Opp. Decl.," Exh. 1 to Defendant's Appendix of Evidentiary Support in Opposition to Plaintiffs' Motion ("Def. Opp. Appendix"), Doc. No. 26-1);
- Declaration of Linda Tang ("Tang Opp. Decl.," Exh. 2 to Def. Opp. Appendix);
- Declaration of Marcella Marlowe ("Marlowe Decl.," Exh. 3 to Def. Opp. Appendix);
- Declaration of Alex Y. Wong ("Wong Decl.," Exh. 4 to Def. Opp. Appendix);
- Excerpts from the Memorandum of Understanding Between City of San Gabriel and the San Gabriel Police Officers' Association for 2005-2007, signed August 2, 2005 ("Opp. MOU," Exh. C to Def. Opp. Appendix); and
- Proposed Joint Stipulation of Fact ("Joint Stipulation," Exh. D to Def. Opp. Appendix).

Plaintiffs filed their Reply on June 24, 2013. ("Pl. Reply," Doc. No. 29.) Plaintiffs filed the following documents in support of their Reply:

- Response to Defendant's Statement of Genuine Issues ("Pl. Resp.," Doc. No. 28); and

- Objections to Defendant's Evidence Offered in Support of Defendant's Opposition ("Pl. Reply Obj.," Doc. No. 30.)

B. Complaint

In their Complaint, Plaintiffs allege that they are employed as police officers in the City of San Gabriel Police Department. (Compl., ¶¶ 3-17.) The City of San Gabriel and the San Gabriel Police Officers Association entered into the Memorandum of Understanding ("MOU") that allowed officers to choose a health insurance cash out option. (Compl., ¶ 19.) Pursuant to the MOU, Plaintiffs are entitled to receive cash back payments for any unused portion of their medical benefits. (Compl., ¶ 20.)

Plaintiffs have been exercising their option to receive the cash back payment for the unused portion of their medical benefits. (Compl., ¶ 23.) However, Defendant does not apply the cash back portions of Plaintiffs' unused medical benefits to their regular rate of pay. (Compl., ¶ 24.) Therefore, the rate Plaintiffs received for overtime hours worked did not include the cash back portions of Plaintiffs' unused medical benefits. (Compl., ¶ 25.) As a result, Defendant failed to pay Plaintiffs for overtime

compensation at one and a half times their regular rate of pay. (Compl., ¶ 26.)

Plaintiffs' cause of action arises under the Fair Labor Standards Act "FLSA", 29 U.S.C. § 207, et seq. Plaintiffs request an award of liquidated damages in a sum equal to the amount of the unpaid compensation pursuant to 29 U.S.C. § 216(d) and recovery of reasonable attorney fees and costs pursuant to 29 U.S.C. § 216(b). (Compl., ¶¶ 31-32.)

C. Parties' Requests for Relief

Defendant filed its Motion for Summary Judgment asserting the following:

- Defendant is entitled to summary judgment on the ground that payments made in lieu of benefits to employees are excluded under 29 U.S.C. § 207(e)(2) or, alternatively, under 29 U.S.C. § 207(e)(4).

- Alternatively, Defendant is entitled to partial summary judgment on the ground that it implemented a partial overtime exemption pursuant to 29 U.S.C. § 207(k).

Plaintiffs filed their Motion asserting that they are entitled to partial summary judgment on the following grounds:

- Defendant cannot meet its burden of demonstrating that payments made in lieu of benefits are excluded under

section 207(e)(4) since these payments are not made to a trustee or third person;

- Each Plaintiff's total monthly benefit allowance should be included in the regular rate of pay calculation because Defendant's plan does not qualify as a "bona fide" plan pursuant to section 207(e)(4);

- Plaintiffs are entitled to an award of liquidated damages; and

- Plaintiffs are entitled to a three-year statute of limitation.

D. Summary of Court's Ruling:

For the reasons set forth below, the Court finds the following:

- Defendant's payments to Plaintiffs made in lieu of benefits are not excludable under section 207(e)(2) from the regular rate calculation;

- The payments made in lieu of benefits are also not excludable under section 207(e)(4);

- To the extent that Defendant makes contributions under the Plan to third parties, these contributions are excludable under 29 U.S.C. § 207(e)(4);

- Plaintiffs' claims are governed by a two-year statute of limitations under 29 U.S.C. § 255(a);

- Defendant is liable to Plaintiffs for FLSA overtime only to the extent that Plaintiffs worked in excess of 86 hours in a 14-day work period since Defendant implemented a partial overtime exemption pursuant to section 207(k); and

- Before the Court decides the issue of liquidated damages, the Court directs the parties to submit further briefing addressing the issue.

II. LEGAL STANDARDS[2]

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the

[2] Unless otherwise noted, all references to "Rule" refer to the Federal Rules of Civil Procedure.

case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. This burden may be satisfied by either (1) presenting evidence to negate an essential element of the non-moving party's case; or (2) showing that the non-moving party has failed to sufficiently establish an essential element to the non-moving party's case. Id. at 322-23. Where the party moving for summary judgment does not bear the burden of proof at trial, it may show that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." Id. at 325. The moving party is not required to produce evidence showing the absence of a genuine issue of material fact, nor is it required to offer evidence negating the non-moving party's claim. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); United Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

However, where the moving party bears the burden of proof at trial, the moving party must present compelling evidence in order to obtain summary judgment in its favor. United States v. One Residential Property at 8110 E. Mohave, 229 F. Supp. 2d 1046, 1047 (S.D. Cal. 2002) (citing Torres

Vargas v. Santiago Cummings, 149 F.3d 29, 35 (1st Cir. 1998) ("The party who has the burden of proof on a dispositive issue cannot attain summary judgment unless the evidence that he provides on that issue is conclusive.")). Failure to meet this burden results in denial of the motion and the Court need not consider the non-moving party's evidence. One Residential Property at 8110 E. Mohave, 229 F. Supp. 2d at 1048.

Once the moving party meets the requirements of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. The non-moving party does not meet this burden by showing "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The United States Supreme Court has held that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Anderson, 477 U.S. at 252. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. Celotex, 477 U.S. at 325. The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions

are for the jury. Anderson, 477 U.S. at 255. Without specific facts to support the conclusion, a bald assertion of the "ultimate fact" is insufficient. See Schneider v. TRW, Inc., 938 F.2d 986, 990-91 (9th Cir. 1991).

Cross-motions for summary judgment do not necessarily permit the judge to render judgment in favor of one side or the other. Starsky v. Williams, 512 F.2d 109, 112 (9th Cir. 1975). The Court must consider each motion separately "on its own merits" to determine whether any genuine issue of material fact exists. Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). When evaluating cross-motions for summary judgment, the court must analyze whether the record demonstrates the existence of genuine issues of material fact, both in cases where both parties assert that no material factual issues exist, as well as where the parties dispute the facts. See Fair Hous. Council of Riverside Cnty., 249 F.3d at 1136 (citation omitted).

III. DISCUSSION

A. Evidentiary Objections

All of Defendant's objections to Plaintiffs' evidence filed in support of Plaintiffs' Opposition to Defendant's Motion are on grounds of relevance under Federal Rule of Evidence 402. (See "Def. Reply

Obj.," Doc. No. 32.) Plaintiffs also object to Defendant's evidence offered to show that Defendant did not have actual knowledge that its actions constituted violations of the FLSA, in part, on the ground that it constituted an improper legal conclusion. (See "Pl. Reply Obj.," Doc. No. 30.) "Objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself" and are thus "redundant" and unnecessary to consider here. Burch v. Regents of Univ. of California, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006); see Anderson, 477 U.S. at 248 ("Factual disputes that are irrelevant or unnecessary will not be counted."). Thus, the Court does not rule on any of the parties' relevance objections or objections as to improper legal conclusions.

Plaintiffs also object to Defendant's evidence regarding Defendant's lack of actual knowledge on the ground that such evidence constituted improper lay opinion in violation of Federal Rule of Evidence 701. (See "Pl. Reply Obj.," Doc. No. 30.) "The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." U.S. v. Corona, 359 Fed. Appx. 848, 851 (9th Cir. 2009)

(internal citations and quotations omitted). "If the opinion rests in any way upon scientific, technical, or other specialized knowledge, its admissibility must be determined by reference to Rule 702, not Rule 701." U.S. v. Garcia, 413 F.3d 201, 215 (2nd Cir. 2005) (internal citations and quotations omitted); see also, S.E.C. v. Sabhlok, 495 Fed. Appx. 786, 787 (9th Cir. 2012) (citing Fed. R. Evid. 701(c)) ("Rule 701(c) of the Federal Rules of Evidence forbids only lay opinion testimony that is 'based on scientific, technical, or other specialized knowledge within the scope of Rule 702.'"). Marcella Marlowe's statements in her declaration are rationally based on her perception and knowledge of the absence of any prior complaints as to the regular rate calculation. ("Marlowe Decl.," Exh. 3 to Def. Opp. Appendix, ¶¶ 5-8.) Given her position as the Human Resources Director and the top manager in the Human Resources Office, Ms. Marlowe would have known of any issues or complaints regarding the regular rate calculation. (Id., ¶ 7.) Therefore, Ms. Marlowe's opinion qualifies as a lay opinion. Accordingly, the Court OVERRULES Plaintiffs' objections as Ms. Marlowe's statement to the extent that they object to her statement as an improper lay opinion.

B. Uncontroverted Facts

Both sides cite facts that are not relevant to resolution of the motions. To the extent certain facts are not mentioned in this Order, the Court has not

relied on them in reaching its decision. The Court finds the following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of this Motion. L.R. 56-3; see generally Fed. R. Civ. P. 56.

1. The Work Period and Overtime

Plaintiffs are employed as full-time police officers by Defendant and are members of the San Gabriel Police Officers' Association ("POA"), a collective bargaining unit. (Pl. SUF, ¶¶ 1-2; Def. SGD, ¶¶ 1-2; Def. SUF, ¶ 5; Pl. SGD, ¶ 5.) At all times during their employment, Plaintiffs have been "non-exempt" hourly employees. (Pl. SUF, ¶ 3; Def. SGD, ¶ 3.)

Since 1994, Defendant has utilized a 14-day work period for calculation of overtime for sworn law enforcement personnel. (Def. SUF, ¶ 1; Pl. SGD, ¶ 1.) Since 2003, Defendant's adoption of the 14-day law enforcement work period has been memorialized in various City resolutions and documents. (Def. SUF, ¶ 2; Pl. SGD, ¶ 2.) The number of hours worked by fulltime Police Department personnel in a "bi-weekly" period is 80 hours. (Def. SUF, ¶ 3-4; Pl. SGD, ¶ 3-4.) Article 10 of the 2005-2007 Memorandum of understanding ("MOU") between Defendant and POA defines overtime as "all hours worked over (80) in the two (2) week pay period of

employees." (Def. SUF, ¶ 6; Pl. SGD, ¶ 6.) Accordingly, Defendant calculated and paid overtime based upon hours worked over 80 in the 14-day period. (Def. SUF, ¶ 7; Pl. SGD, ¶ 7.) Defendant restated the 2005-2007 MOU's definition of overtime in its Salary, Compensation and Benefits Policy Manual. (Def. SUF, ¶ 9; Pl. SGD, ¶ 9.) Although the overtime language in the 2005-2007 MOU has not been incorporated into subsequent MOUs, Defendant's practice of calculating and paying overtime based upon the 80 hour/14-day period has not changed. (Def. SUF, ¶¶ 8, 10; Pl. SGD, ¶¶ 8, 10.) The 14-day payroll period in use by Defendant coincides with the 14-day work period for sworn law enforcement personnel. (Def. SUF, ¶ 11; Pl. SGD, ¶ 11.)

Defendant requires Plaintiffs to record their hours worked, including any overtime hours, on bi-weekly, 14-day "Time and Attendance Reports" which indicate they cover a two-week, 14-day work period. (Def. SUF, ¶ 12; Pl. SGD, ¶ 12.) Defendant assigns certain police officers to a 3/12 schedule under which each employee was assigned three 12-hour shifts one week and four 12-hour shifts in the other, resulting in a total of 84 hours worked. (Def. SUF, ¶ 13; Pl. SGD, ¶ 13.) When the 3/12 schedule was first implemented, Defendant credited each employee with 4 hours of compensatory time off in each payroll

period to compensate for the 84 hours worked in the two-week period. (Def. SUF, ¶ 14; Pl. SGD, ¶ 14.)

Subsequently, pursuant to the 2005-2007 MOU, the City and the POA agreed that employees assigned to a 3/12 schedule would be credited with four hours of compensatory time at time and a half for the four regularly scheduled hours worked over 80 during each work period. (Def. SUF, ¶ 15; Pl. SGD, ¶ 15.) According to Defendant's current practice, for officers assigned a 3/12 schedule, hours worked in excess of 84 regularly scheduled hours may either be paid out or credited as compensatory time at time and one half at the discretion of the employee. (Def. SUF, ¶ 16; Pl. SGD, ¶ 16.) For employees working other schedules, hours worked over 80 are paid out, or compensatory time is credited, at time and one half. (Def. SUF, ¶ 17; Pl. SGD, ¶ 17.)

2. Flexible Benefit Plan

In August of 1993, Defendant adopted a Flexible Benefit Plan ("Plan") for purposes of providing benefits to employees. (Def. SUF, ¶¶ 18, 24; Pl. SGD, ¶¶ 18, 24.) Pursuant to the Plan, Defendant makes a set and fixed Employer Contribution on behalf of employees on an annual basis pursuant to City Council resolution. (Def. SUF, ¶ 19; Pl. SGD, ¶ 19.) The Employer Contribution is converted into Cafeteria Plan Benefit Dollars which are then made available to employees for purchase of

select benefits. (Def. SUF, ¶ 20; Pl. SGD, ¶ 20.) A portion of the Cafeteria Plan Benefit Dollars is applied toward dental and vision insurance for the employee. (Def. SUF, ¶ 21; Pl. SGD, ¶ 21.) The employee may then elect one or more additional benefits. (Def. SUF, ¶ 22; Pl. SGD, ¶ 22.)

Upon providing proof of alternative medical coverage, the employee may opt out of enrollment in medical coverage under the Plan. (Def. SUF, ¶ 23; Pl. SGD, ¶ 23.) The Plan gives employees who have alternate medical coverage the option to waive medical coverage offered by Defendant and receive any unused portion of their monthly benefit allowance as taxable income on their paycheck. (Pl. SUF, ¶ 7; Def. SGD, ¶ 7.) Likewise, if any of the Employer Contributions have not been applied toward the purchase of available benefits, any excess amounts are paid to the employee as taxable income in lieu of benefits. (Def. SUF, ¶ 25; Pl. SGD, ¶ 25.)

Employees who elect to receive some or all of their monthly benefit allowance in cash[3] receive two direct payments per month that appear as a designated line item on their paychecks. (Pl.

[3] The term "cash payments," as used by the parties, refers to the unused portion of the monthly benefit allowance that employees receive as taxable income on their paychecks. Employees do not receive these payments in the form of cash. Rather, the payments appear as a designated line item on the employees' paychecks every pay period. (Pl. SUF, ¶ 13; Def. SGD, ¶ 13.)

SUF, 13; Def. SGD, ¶ 13.) Cash payments made to employees pursuant to the Plan are not made to a trustee or third person on behalf of the employee. (Pl. SUF, ¶ 14; Def. SGD, ¶ 14.) The cash value received is subject to federal and state withholding taxes, Medicare taxes, and garnishment. (Pl. SUF, ¶ 16; Def. SGD, ¶ 16.)

The Employer Contribution to the Plan in a given pay period is fixed and does not vary based upon the number of hours an employee works. (Def. SUF, ¶ 26; Pl. SGD, ¶ 26.) The excess amount an employee may receive back as cash from the Plan each month is also fixed, and is based upon the extent of the employee's utilization of available benefits. (Def. SUF, ¶ 28; Pl. SGD, ¶ 28.) Therefore, the amount an employee may receive as cash in lieu of benefits is not contingent upon the number of hours worked or the employee's productivity. (Def. SUF, ¶¶ 29-30; Pl. SGD, ¶¶ 29-30.)

In 2009, direct cash payments to employees as cash in lieu of benefits amounted to 46.725% of total Plan contributions. (Pl. SUF, ¶ 20; Def. SGD, ¶ 20.) In 2010, direct cash payments to employees made in lieu of benefits totaled 42.842% of total Plan contributions. (Pl. SUF, ¶ 22; Def. SGD, ¶ 22.) In 2011, direct cash payments to employees made in lieu of benefits made up 43.934% of total Plan contributions. (Pl. SUF, ¶ 24; Def. SGD, ¶ 24.) In 2012, direct cash payments to employees made in lieu

of benefits made up 45.179% of total Plan contributions. (Pl. SUF, ¶ 26; Def. SGD, ¶ 26.)

Since at least 2003, Defendant has not included the value of cash payments made in lieu of benefits in the calculation of the recipient's FLSA regular rate of pay. (Pl. SUF, ¶ 27; Def. SGD, ¶ 27.) Neither does Defendant include the entire monthly benefit allowance amount in the calculation of each individual employee's FLSA regular rate of pay. (Pl. SUF, ¶ 29; Def. SGD, ¶ 29.) Defendant has not conducted an inquiry into whether or not these payments are properly excludable from the FLSA regular rate calculation. (Pl. SUF, ¶ 28; Def. SGD, ¶ 28.) Defendant did not conduct a review of its Plan to ascertain what percentage of total Plan contributions are paid out in cash to employees prior to the filing of this lawsuit. (Pl. SUF, ¶ 30; Def. SGD, ¶ 30.)

Over the years, Defendant regularly met with the POA to discuss issues of concern regarding wages and compensation of employees, including overtime pay.[4] (Def. SGD, ¶ 17; Pl. Resp., ¶ 17.) Despite these

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[4] Defendant claims that by meeting with the POA, Defendant, by extension, met with each of the Plaintiffs. (Def. SGD, ¶ 17.) Defendant's cited evidence does not provide support to Defendant's statement. (See Marlowe Decl., Exh. 3 to Def. Opp. Appendix, ¶ 5.) Plaintiffs oppose Defendant's statement but do not cite to any supporting evidence to the contrary. (Pl. Resp., ¶ 17.) The dispute as to whether meeting with the POA

meetings and discussions between Defendant and the POA, at no time prior to the filing of this action did either the POA or employees ever raise Defendant's failure to include in the FLSA regular rate the amounts contributed into the Plan, including cash payments to employees in lieu of benefits. (Def. SGD, ¶ 19; Pl. Resp., ¶ 19.)

Plaintiffs are paid overtime compensation pursuant to their labor agreement with Defendant for all hours worked in excess of eighty hours in a two-week work period. (Pl. SUF, ¶ 31; Def. SGD, ¶ 31.) Plaintiffs each received cash payments in lieu of benefits at some point in time between June 1, 2009 and June 1, 2012. (Pl. SUF, ¶ 32; Def. SGD, ¶ 32.)

3. Section 207(k) Exemption

Defendant's Salary, Compensation and Benefits Policy ("Policy") expressly states that firefighters employed by Defendant are subject to the 207(k) exemption, but it makes no reference to the 207(k) exemption as it pertains to police officers.[5] (Pl. SGD, ¶ 46; Exh. B to Bolander Opp. Decl., Exh. 3 to Deposition of Linda Tang ("Tang Depo.") at 10-13,

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is by extension meeting with each of the Plaintiffs is immaterial as it has no bearing on the issues now before the Court.

[5] Defendant does not dispute the facts relating to the absence of reference to the 207(k) exemption as it pertains to police officers. Rather, Defendant objects to the evidence as irrelevant. (Def. Reply Obj.)

2931.) While the Policy explicitly provides that firefighters are subject to 7(k) partial overtime exemption, the Policy does not mention 7(k) exemption or the FLSA in describing overtime threshold for police officers. (Pl. SGD, ¶ 47; Exh. B to Bolander Decl., Exh. 3 to Tang Depo. at 30-31.) None of the other documents cited by Defendant as evidencing the election of 207(k) exemption state that police officers are subject to the 207(k) exemption. (Pl. SGD, ¶ 48; Resolution No. 02-12, Exh. A to Def. Mot. Appendix at 7-8; Mot. MOU, Exh. C to Def. Mot. Appendix at 3.)

C. Exclusion of Payments under 29 U.S.C. § 207(e)(2)

Under the FLSA, employees working overtime must be compensated "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The main issue before the Court is whether Defendant's exclusion of payments made pursuant to the Flexible Benefit Plan ("Plan") from the regular rate calculation, which results in a lower calculation of overtime pay, violates the FLSA. Defendant first argues that its exclusion of these payments is proper under section 207(e)(2) since the payments are not made as compensation for hours worked, but rather represent fixed payments to employees for opting out of certain benefits provided by Defendant. (Def. Mot. at 10-13.)

The employer bears the burden of establishing that a payment is exempt under the FLSA. Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 209 (1966). "FLSA exemptions are to be narrowly construed against . . . employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit." Klem v. Cnty. Of Santa Clara, Cal., 208 F.3d 1085, 1089 (9th Cir. 2000) (internal citations and quotations omitted).

1. Ninth Circuit Case Law

Defendant argues that payments to employees made in lieu of benefits under the Plan are not made as compensation for the hours of employment under the final clause of section 207(e)(2). (Def. Mot. at 10-13.) Title 29 U.S.C. § 207(e)(2) excludes from the "regular rate"

> [P]ayments made 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; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are*

> *not made as compensation for his hours of employment . . .*

29 U.S.C. § 207(e)(2) (emphasis added). The Ninth Circuit has not addressed whether payments made to employees out of flexible benefit plans must be included in an employee's regular rate for purposes of the FLSA. While other district courts in California have addressed whether other payments and benefits are excluded from the regular rate calculation, none has addressed the application of section 207(e)(2) to payments made under flexible benefit plans.

The Ninth Circuit addressed the issue of whether "supplemental payments, designed to bring the wage of a partially disabled worker up to his or her predisability wage level," should be included in the regular rate of pay used to calculate overtime in Local 246 Util. Workers Union of Am. v. S. Cal. Edison Co., 83 F.3d 292, 294 (9th Cir. 1996) ("Local 246"). The court held that the employer "must include these supplemental payments in the regular rate used to calculate overtime." Id. at 296. Like Defendant here, the employer in Local 246 argued that the supplemental payments were not compensation for hours worked since they were not tied to specific working hours. Id. at 295.

The Ninth Circuit held that "[t]he key point is that the pay or salary is compensation for work, and the regular rate therefore must be calculated by

dividing all compensation paid for a particular week by the number of hours worked in that week." Id. at 295 (citing 29 C.F.R. § 778.109). The Court added that "it makes no difference whether the supplemental payments are tied to a regular weekly wage or regular hourly wage."[6] Id.

Following the reasoning in Local 246, the Court finds Defendant's payments made in lieu of benefits under the Plan constitute compensation for service even if they are not tied to a regular weekly or hourly wage. Local 246 noted that "pay or salary that is paid by the week or longer period is still counted in calculating the regular hourly rate." Local 246, 83 F.3d at 295 (citing 29 C.F.R. § 778.109). Here, employees electing to receive some or the entire monthly benefit allowance in cash receive two cash payments per month which appear on their paychecks and are subject to federal and state taxes. (Pl. SUF, ¶¶ 13, 16; Def. SGD, ¶¶ 13, 16.) Since the employees receive these payments periodically and the payments are subject to taxes, they are remuneration for work performed and therefore must be included in the regular rate of pay used in

[6] The Seventh Circuit in Reich v. Interstate Brands Corp., 57 F.3d 574, 577 (7th Cir. 1995) reiterated that section 207(e)(2) "cannot possibly exclude every payment that is not measured by the number of hours spent at work." Id. at 577.

calculating overtime.[7] See Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 193 (4th Cir. 2007) ("Healthcare benefits are a part of the total package of employee compensation an employer gives in consideration for an employee's services."). As the Local 246 Court noted, the fact that these payments are not tied to specific hours worked has no bearing on the characterization of the payment as compensation for work. Local 246, 83 F.3d at 295 n.2 (citing Reich v. Interstate Brands Corp., 57 F.3d 574, 577 (7th Cir. 1995), cert. denied, 516 U.S. 1042 (1996) ("Even if payments to employees are not measured by the number of hours spent at work, that fact alone does not qualify them for exclusion under section 207(e)(2).")).

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[7] In Minizza v. Stone Container Corp. Corrugated Container Div. East Plant, 842 F.2d 1456 (3rd Cir. 1988), The Third Circuit concluded that two lump sum payments made pursuant to the terms of a collective bargaining agreement were excluded from regular rate calculations under section 207(e)(2) because they "were nothing more or less than an inducement by the employers to the employees to ratify the agreement on the terms proposed by the employers." Id. at 1457, 1462. The Court finds the Third Circuit decision in Minizza inapposite to the instant case. Here, Defendant adopted the Plan for the purpose of providing benefits to its employees. (Def. SUF, ¶¶ 18, 24; Pl. SGD, ¶¶ 18, 24.) The cash payments here are taxed as wages. (Pl. SUF, ¶ 16; Def. SGD, ¶ 16.) Unlike the lump sum payments in Minizza payable once a year for two consecutive years, the cash payments made in lieu of benefits here are made on a bi-weekly basis and appear on the employees' paychecks. (Pl. SUF, ¶ 13; Def. SGD, ¶ 13.)

Defendant argues that payments made in lieu of benefits are analogous to compensation for lunch periods that are excludable under section 207(e)(2). (Def. Mot. at 11-12.) In *Ballaris v. Wacher Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004), the Ninth Circuit held that payments for lunch periods were excluded from calculation of the regular rate under section 207(e)(2). The court recognized that the parties treated the lunch period as non-working time. Ballaris, 370 F.3d at 909. Therefore, the court held that these payments "constituted an additional benefit for employees and not compensation for hours worked." Id. at 909.

The facts in Ballaris are distinguishable from those before the Court. While the parties in Ballaris agreed that the lunch period constituted non-working time, there is no evidence here that employees receive the benefit payments or cash in lieu of benefits for time spent not working. An examination of the statutory language of section 207(e)(2) highlights the distinction. Section 207(e)(2) excludes from the regular rate payments that are similar to "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work . . ." 29 U.S.C. § 207(e)(2). Just like vacation periods, holidays, and time off due to illness, lunch periods constitute time when no work is performed. On the other hand, payments made in lieu of benefits under

the Plan are not analogous to non-working periods enumerated in section 207(e)(2) since they are not payments made for a period where no work is performed.[8]

Rather, payments made in lieu of benefits are more analogous to the reimbursements at issue in Adoma v. Univ. of Phoenix, Inc., 779 F. Supp. 2d 1126 (E.D. Cal. 2011). At issue in Adoma were tuition benefits paid to employees and their dependents for courses taken at the defendant university and other subsidiary institutions (internal program) and non-subsidiary institutions (external program). Adoma, 779 F. Supp. 2d at 1128-29. The court held that since "the tuition benefit is not a payment made for a period where no work is performed," it had to analyze whether the payment is similar to "reasonable payments for traveling expenses, or other expenses,

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[8] Defendant argues that the payments here are analogous to buy backs of unused benefits. (Def. Mot. at 13.) Defendant relies in part on Chavez v. City of Albuquerque, 630 F.3d 1300 (10th Cir. 2011), where the Tenth Circuit distinguished between buy backs of vacation days and sick days and held that while sick leave buy-backs must be included in the regular rate, vacation leave buy-backs were excludable under section 207(e)(2). Id. at 1309-1310. In Chavez, the court focused on the burden or benefit to the employer resulting from use of sick days and vacation days. Id. at 1309-1310. Here, by contrast, the burden on Defendant does not vary depending on employee's use of benefits under the Plan since Defendant's contribution on behalf of employees is set and fixed on an annual basis. (Def. SUF, ¶ 19; Pl. SGD, ¶ 19.) Therefore, the Chavez Court's reasoning is not instructive on the issue before the Court.

incurred by the employee in the furtherance of his employer's interests and properly reimbursable to the employer" under section 207(e)(2). Id. After discussing the Department of Labor's regulations and 1994 Opinion Letter, the court reasoned that "[o]ne determines whether a payment is compensation for work by considering whether the benefit primarily benefits the employee or the employer." Id. at 1137. The court held that the internal benefit was not excludable from the regular rate of pay since the benefit to the employee outweighed that to the employer.[9] Id. at 1138.

As in Adoma, there is no evidence here that Defendant made cash payments in lieu of benefits for periods where no work is performed. Rather, the excess amount an employee may receive back as cash from the Plan is based on the extent of the employee's utilization of available benefits. (Def. SUF, ¶ 28; Pl. SGD, ¶ 28.) Therefore, the payments are excludable under section 207(e)(2) only if they are similar to payments made for "traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests . . ." 29 U.S.C. § 207(e)(2). It is uncontroverted that Defendant adopted the Plan to provide benefits to its employees. (Def. SUF, ¶ 18,

[9] The court in Adoma held that there was insufficient evidence concerning the external tuition benefit, and it declined to determine whether the external benefit primarily benefits the employer or the employee. Adoma, 779 F. Supp. 2d at 1139.

24; Pl. SGD, ¶ 18, 24.) Even though one can argue that Defendant also derives a benefit from the Plan by having healthier employees that are more productive, cash payments to employees clearly benefit them more than their employer. Accordingly the Court finds, based on the uncontroverted facts, that payments made in lieu of benefits under the Plan are not excludable from the regular rate of pay since they are not similar to the examples enumerated in section 207(e)(2) relating to non-working hours or expenses incurred for the benefit of the employer.

2. Policy Considerations

Defendant argues that public policy favors exclusion of the cash-in-lieu of benefits payments from calculation of the regular rate. (Def. Mot. at 13.) Defendant contends that if these cash payments are not excluded, "employers will be less likely to allow employees to receive the surplus as cash in order to avoid an increase in overtime liability and paying more in benefits than intended." (Id.) Thus, Defendant contends that the interpretation deeming the cash payments exempt from inclusion in the regular rate under section 207(e)(2) is the interpretation that most favors the employees. (Id.)

"FLSA exemptions are to be narrowly construed against . . . employers and are to be withheld except as to persons plainly and

unmistakably within their terms and spirit." Klem v. Cnty. Of Santa Clara, Cal., 208 F.3d 1085, 1089 (9th Cir. 2000) (internal citations and quotations omitted). Thus, the FLSA is construed liberally in favor of employees. Cleveland v. City of Los Angeles, 420 F.3d 981, 988 (9th Cir. 2005). Interpreting section 207(e)(2) to exclude cash payments made in lieu of benefits would favor the employer rather than the employee since it results in a lower calculation of overtime pay. On the other hand, excluding the cash payments from the regular rate calculation benefits the employer who does not have to pay the increased overtime rate. While Defendant makes a compelling argument, a narrow construction of the FLSA exemptions compels a finding that cash payments are not excludable under section 207(e)(2). Even though this interpretation of section 207(e)(2) results in an increase in overtime liability, an increase in costs cannot be the basis for exclusion of cash payments from regular rate calculation.

Narrowly construing the FLSA exemptions and in light of Ninth Circuit precedent, the Court holds that cash payments made in lieu of benefits under the Plan are not excludable under section 207(e)(2) from calculation of the regular rate.

D. Exclusion under § 207(e)(4)

Plaintiffs contend that they are entitled to partial summary judgment on the basis that

Defendant's direct cash payments made in lieu of benefits cannot be excluded from the regular rate under 29 U.S.C. § 207(e)(4). (Pl. Mot. at 11-15.) Plaintiffs also contend that the value of all individual Plan contributions must be included in the regular rate since the Plan is not a "bona fide" plan under section 207(e)(4). (Pl. Mot. at 18-20.) Defendant counters that even if the direct payments are not excludable under section 207(e)(2), the payments are excludable under section 207(e)(4) as interpreted in 29 C.F.R. § 778.215. (Def. Mot. at 17-20.)

1. Exclusion of Direct Cash-in-lieu of Benefits Payments

Title 29 U.S.C. § 207(e)(4) excludes from the regular rate of pay "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." 29 U.S.C. § 207(e)(4). In construing statutory provisions, courts "first look to the language of the statute to determine whether it has a plain meaning." Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009) (citation omitted). Courts should presume that the "legislature says in a statute what it means and means in a statute what it says there." Id. (internal citations and quotations omitted). "Thus, [a court's] inquiry begins with the statutory text, and ends there

as well if the text is unambiguous." Id. (internal citations and quotations omitted).

In Local 246, the court found that "there is no indication that any of the supplemental payments *to the employees* consisted of contributions made by [the employer] irrevocably to a trust." Local 246, 83 F.3d at 296. The court emphasized that section 207(e)(4) "deals with contributions by the employer, not payments to the employee." Id. The Court held that since the employer failed to show that any part of its supplemental payments to the employees was made irrevocably to a trust, section 207(e)(4) did not deem the supplemental payments excludable from the regular rate calculation. Id.

Based on the plain language of section 207(e)(4), an employer's contribution may be excluded from calculation of the regular rate if the employer irrevocably makes the contribution to a trustee or third person. 29 U.S.C. § 207(e)(4). Here, as in Local 246, it is undisputed that Defendant made all the cash-in-lieu of benefits payments directly to Plaintiffs rather than a trustee or third party.[10] (Pl.

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[10] Defendant argues that Local 246 is distinguishable from the present case since the court found that the contributions in Local 246 were not excludable under section 207(e)(2). (Def. Opp. at 9-10.) However, as discussed above, the Court finds that Defendant's cash payments are also not excludable under section 207(e)(2). More importantly, the court's discussion of section 207(e)(4) in Local 246 is independent of its holding regarding the applicability of

SUF, ¶¶ 13-14; Def. SGD, ¶¶ 13-14.) Defendant does not argue that any part of the payment to Plaintiffs consisted of payments Defendant made irrevocably to a trust or third party. Since the language of section 207(e)(4) is unambiguous as to the requirement that the contribution be made to a third party or trustee, the Court finds it unnecessary to resort to the Department of Labor's interpretation as to that requirement.[11] Therefore, Defendant's cash payments to Plaintiffs made in lieu of benefits are not excluded under the plain language of section 207(e)(4) and must be included in the calculation of the regular rate.

2. Exclusion of the Entire Value of the Monthly Benefits Allowance

Plaintiffs next argue that the entire value of the monthly benefit allowance should be included in

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section 207(e)(2). See Local 246, 83 F.3d at 295-96. Since sections 207(e)(2) and (e)(4) offer alternative grounds for the exclusion of certain payments from calculation of the regular rate, and the court held that the supplemental payments did not qualify for exclusion under section 207(e)(2), the Court had to analyze whether the payments can be excluded pursuant to section 207(e)(4). Contrary to what Defendant argues, Local 246's discussion of section 207(e)(4) is not dicta.

[11] Even though the Court does not rely on the Department of Labor's interpretation of section 207(e)(4), the Court notes that 29 C.F.R. § 778.215 reiterates the requirement that payments can only be excluded under section 207(e)(4) if they are made to a trustee or third person. See 29 C.F.R. § 778.215(a)(4).

the regular rate of pay because Defendant's Plan does not qualify as a bona fide plan under section 207(e)(4). (Pl. Mot. at 18-21.) Defendant responds that, under the plain meaning of the term, Defendant's Plan is a bona fide plan, and Defendant's contributions are exempt under section 207(e)(4). (Def. Opp. at 8-10.) Defendant urges the Court to disregard the language of the Department of Labor's ("DOL") interpretive bulletin, 29 C.F.R. § 778.215, and a subsequent DOL opinion letter, dated July 2, 2003 ("2003 Opinion Letter") because the language of section 207(e) is unambiguous, and these two interpretive documents are inconsistent with one another.[12] (Def. Opp. at 10-14.) The Court will first address whether the DOL's interpretations in section 778.215 and the 2003 Opinion Letter conflict with each other or conflict with the language of section 207(e)(4). The Court will then address whether Defendant's contribution into the Plan is excludable under section 207(e)(4).

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[12] Defendant advances conflicting arguments with regards to the applicability of 29 C.F.R. § 778.215. In its Opposition to Plaintiffs' Motion, Defendant argues that the Court should not consider section 778.215 since it is not persuasive and conflicts with the 2003 Opinion Letter. (Def. Opp. at 10-14.) On the other hand, Defendant relies on section 778.215 in its Motion for Summary Judgment to argue that its cash payments made in lieu of benefits are exempt under section 207(e)(4). (Def. Mot. at 17-20.)

a. Department of Labor's Interpretations

As stated above, section 207(e)(4) excludes from "regular rate" any "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." 29 U.S.C. § 207(e)(4). Therefore, under the statutory language, a payment can only be excluded under subsection (e)(4) if (1) it is made to a trustee or third person, and (2) it is made pursuant to a bona fide plan. See Id. Defendant urges the Court to adopt a dictionary definition of the term "bona fide" as one that is "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine." (Def. Opp. at 8.) However, it is unclear from the statutory language whether Congress used the term "bona fide" in its ordinary meaning or as a term of art. In light of the statutory ambiguity, the Court examines 29 C.F.R. § 778.215(a)(5) for guidance. See Madison v. Resources for Human Development, Inc., 233 F.3d 175, 185 (3rd Cir. 2000).

Title 29 C.F.R. § 778.215(a) enumerates certain conditions for the exclusion of an employer's contribution from the regular rate of pay under section 207(e)(4). Section 778.215(a)(5) provides:

> [I]f a plan otherwise qualified as a bona fide benefit plan under section

> 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or part of the amount standing to his credit . . . (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

29 C.F.R. 778.215(a)(5). The 2003 Opinion Letter provides that a cafeteria plan may qualify as a bona fide benefits plan for purposes of section 7(e)(4) if: "(1) no more than 20% of the employer's contribution is paid out in cash; and (2) the cash is paid under circumstances that are consistent with the plan's overall primary purpose of providing benefits." Dep't of Labor Op. Letter, 2003 WL 23374600, at *3 (July 2, 2003).

Section 778.215(a)(5) is not a formal administrative regulation; rather, it is "an interpretive guideline, issued on the advice of the Solicitor of Labor and authorized by the Secretary, not an official regulation promulgated after notice-and-comment rule making." Madison, 233 F.3d at

185-86 (citing 29 C.F.R. § 778.1).[13] Likewise, the 2003 Opinion Letter is an informal agency interpretation. Madison, 233 F.3d at 186. As such, these documents are not entitled to deference under Chevron U.S.A., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).[14] Rather, the agency interpretations are "entitled to respect" under Skidmore v. Swift, 323 U.S. 134 (1944), "but only to the extent they have the 'power to persuade.'" Christensen, 529 U.S. at 587.

> In Skidmore, the Court explained: [R]ulings, interpretations and

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[13] 29 C.F.R. § 778.1 provides:

> This part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Act. It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary.

[14] In Chevron, the Supreme Court held that a court "must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." Christensen v. Harris Cnty., 529 U.S. 576, 586 (2000) (citing Chevron, 467 U.S. at 842-44).

> opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140. "To be persuasive, an agency interpretation cannot run contrary to Congress's intent as reflected in a statute's plain language and purpose." Madison, 233 F.3d at 187.

In its Motion for Summary Judgment, Defendant contends that its cash-in-lieu of benefits payments "generally satisfy the criteria for exclusion" under section 207(e)(4) and 29 C.F.R. § 778.215. (Def. Mot. at 18.) Defendant argues that the fact that it "self-administers its own Flexible Benefit Plan should not operate to the City's detriment." (Def. Mot. at 19.)

The Court finds 29 C.F.R. § 778.215(a)(5) persuasive. Section 778.215(a)(5) clarifies that an otherwise bona fide benefit plan under section 207(e)(4) remains bona fide even if an employee receives as payment all or a portion of the amount standing to his credit. 29 C.F.R. § 778.215(a)(5). The language of section 778.215(a)(5) does not run contrary to section 207(e)(4). However, the Court does not read section 778.215(a)(5) to eliminate the requirement of section 207(e)(4) that a contribution must be made to a trustee or third person. Section 778.215(a)(5) only states that a plan can still be considered a bona fide plan even if the employer makes direct cash payments to the employee. 29 C.F.R. § 778.215(a)(5). Section 778.215(a)(5) does not stand for the proposition that those direct cash payments—even if made pursuant to a bona fide plan—may be excludable under section 207(e)(4). Therefore section 778.215 does not eliminate the requirements set forth in section 207(e)(4).

On the other hand, the Court finds the 2003 Opinion Letter unpersuasive and does not resort to it for guidance. In the 2003 Opinion Letter, the Administrator stated that a plan may qualify as a bona fide benefits plan under section 207(e)(4) if "(1) no more than 20% of the employer's contribution is paid out in cash; and (2) the cash is paid under circumstances that are consistent with the plan's

overall primary purpose of providing benefits." Dep't of Labor Op. Letter, 2003 WL 23374600, at *3. Defendant argues that the 20% maximum requirement is inconsistent with the language of section 778.215 stating that a plan is still a bona fide benefits plan even if the plan provides for the payment to an employee of "*all or a part of* the amount standing to his credit." (Def. Opp. at 14); 29 C.F.R. § 778.215(a)(5) (emphasis added). The Court disagrees. Under section 778.215(a)(5), a plan allowing an employee to receive up to 100% of the contribution in cash could still be a bona fide plan. 29 C.F.R. § 778.215(a)(5). Under the 2003 Opinion Letter, a plan ceases to be bona fide one when more than 20% of *total plan contributions* constitute payments to employees. Dep't of Labor Op. Letter, 2003 WL 23374600, at *3. Therefore, the 2003 Opinion Letter is not inconsistent with section 778.215. In other words, a plan allowing an employee to receive up to 100% of the contribution can still be a bona fide plan, so long as the total cash payments to the employees do not exceed 20% of *total plan contributions*. Therefore, the Court finds that the 20% ceiling set forth in the 2003 Opinion Letter does not conflict with the language of section 778.215(a)(5).

The Court, however, finds the 2003 Opinion Letter unpersuasive for a different reason. There, the Administrator adopted the 20% limitation from

prior opinion letters. Dep't of Labor Op. Letter, 2003 WL 23374600, at *2. According to the Opinion Letter, the 20% cap "historically has been applied on an employee-by-employee basis." Id. Therefore, "if a plan allowed any employee to receive more than 20% of the amount standing to his or her credit in cash, the plan would fail to qualify as bona fide." Id. The Administrator in the 2003 Opinion Letter adopted the 20% test to apply on a plan-wide basis rather than employee-by-employee basis. Id. While the Administrator's interpretation does not run contrary to the language of section 778.215, the historical background on which the interpretation is based proves inconsistent with section 778.215. By applying the 20% cap on an employee-by-employee basis, the prior opinion letters ran contrary to the language of section 778.215(a)(5), which provides that a plan may still qualify as a bona fide plan even if an employee receives a portion or all of the contribution as payment. 29 C.F.R. § 778.215(a)(5). Moreover, the Administrator failed to discuss the rationale for adopting the same 20% figure to apply as a limitation on a plan-wide basis. Rather, the Administrator simply stated, "[w]e continue to believe that this 20% cap is an appropriate method for assessing whether any cash payments are an incidental part of a bona fide benefits plan under 778.215(a)(5)(iii)." Dep't of Labor Op. Letter, 2003 WL 23374600, at *2. Neither did the Administrator discuss the reasoning behind the DOL's historical adoption of the 20% cap in prior

opinion letters. Accordingly, under Skidmore, the Court finds the 2003 Opinion Letter unpersuasive since the Administrator fails to provide any reasoning for adopting the 20% cap on a plan-wide basis.

b. Qualification as a Bona Fide Plan

Plaintiffs argue that since the Plan is not a bona fide plan, the entire value of each Plaintiff's monthly benefit allowance should be included in the regular rate. (Pl. Mot. at 18-21.) The majority of Plaintiffs' argument rests on the premise that Defendant has paid more than 20% of the total Plan Contributions to employees over the last four years. (Id.) However, as stated above, the Court does not adopt the 20% limitation as a test for determining whether the Plan is a bona fide one since it finds the 2003 Opinion Letter unpersuasive. In addition, as discussed above, since Defendant makes cash payments in lieu of benefits directly to employees, rather than a trustee or third party, the cash payment cannot be excluded under section 207(e)(4).

Based on the uncontroverted facts, the Court finds that Defendant's Flexible Benefit Program qualifies as a bona fide plan. Under section 778.215(a)(2), the primary purpose of the Plan is to provide health insurance benefits to the employees. (Def. SUF, ¶¶ 18, 20, 24; Pl. SGD, ¶¶ 18,

20, 24.) Defendant's contribution is converted into Cafeteria Plan Benefit Dollars that can be used by the employees to purchase dental and vision insurance. (Def. SUF, ¶¶ 20-21; Pl. SGD, ¶¶ 20-21.) The employee may then elect one or more additional benefits to purchase under the Plan. (Def. SUF, ¶ 22; Pl. SGD, ¶ 22.) In addition, Defendant's policy that an employee may opt out of enrollment in medical coverage under the Plan only after providing proof of alternative medical coverage demonstrates that the primary purpose of the Plan is to provide health benefits to the employees. (Def. SUF, ¶ 23; Pl. SGD, ¶ 23.) Between 2009 and 2012, the majority of contributions into the Plan are used for the purchase of benefits rather than dispensed as direct cash payments. (See Pl. SUF, ¶¶ 20, 22, 24, 26; Def. SGD, ¶¶ 20, 22, 24, 26.) While the Plan allows for direct cash payment to employees, as discussed above, the Plan may still qualify as a bona fide plan under section 778.215(a)(5). Based on these facts, the Court finds that Defendant's Plan is a bona fide plan, and to the extent that Defendant makes these contributions to third parties, the Court finds these contributions excludable under 29 U.S.C. § 207(e)(4).

E. Statute of Limitations

Plaintiffs content that since Defendant's violation was willful, a three-year statute of limitations, rather than the two-year statute of limitations set forth in title 29 U.S.C. § 255(a),

applies. (Pl. Mot. at 23-24.) Title 29 U.S.C. § 255(a) provides that a three year statute of limitations applies for causes of action "arising out of a willful violation." 29 U.S.C. § 255(a). An employer willfully violates the FLSA if that employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richard Shoe Co., 486 U.S. 128, 133 (1988). A finding of willfulness requires more than negligence, and "a completely good-faith but incorrect assumption that a pay plan complied with the FLSA" does not render a violation willful. Id. at 135.

The Court finds that Defendant's violation of the FLSA was not willful, and therefore, Plaintiffs' FLSA claim is governed by a two-year statute of limitations. As discussed above, section 207 enumerates alternative grounds for exclusion of payments from calculation of regular rate of pay. See 29 U.S.C. § 207(e). While the language of section 207(e)(4) clearly makes excludable payments made pursuant to a bona fide plan only if made to a trustee or third parties, the language of section 207(e)(2) does not afford such a clear interpretation. As discussed above, the Ninth Circuit has not addressed the issue of whether cash payments made in lieu of benefits is excludable under section 207(e)(2). Since the language of section 207(e)(2) is ambiguous and there is no published decision analyzing whether cash payments

made in lieu of benefits must be included in regular rate of pay under that subsection, the Court concludes that Defendant's violation was not willful. See Reich v. Gateway Press, Inc., 13 F.3d 685, 703 (3rd Cir. 1994) (upholding the district court's conclusion that actions were not willful since the case presented "close questions of law and fact" and "a case of first impression with respect to one of the governing exemptions"). Accordingly, the Court holds that Plaintiffs' claims are governed by a two-year statute of limitations under 29 U.S.C. § 255(a).

F. Adoption of Partial Overtime Exemption

Title 29 U.S.C. § 207(a)(1) provides that the overtime limit is forty hours per week; an employee working in excess of forty hours per week must receive compensation at a rate at least one-and-a-half times the regular rate of pay. 29 U.S.C. § 207(a)(1). Section 207(k) "offers a limited exemption from the overtime limit to public employers of law enforcement personnel or firefighters." Adair v. City of Kirkland, 185 F.3d 1055, 1059 (9th Cir. 1999) (citing 29 U.S.C. § 207(k)). "The '7(k) exemption' increases the overtime limit slightly and it gives the employer greater flexibility to select the work period over which the overtime limit will be calculated." Id. (citing 29 C.F.R. § 553.230). "Under the [DOL] regulations, if the employer selects a seven-day work period, overtime begins to accrue after forty-three hours, and if an employer selects an eight-day work

period, overtime begins to accrue after forty-nine hours." Id. (citing 29 C.F.R. § 553.230).

There is no dispute that Defendant is eligible for a section 7(k) exemption. Plaintiffs are employed as full-time police officers by Defendant. (Pl. SUF, ¶¶ 1-2; Def. SGD, ¶¶ 1-2.) The issue is whether Defendant adopted such an exemption. "[Defendant] bears the burden of showing that it qualifies for a section 7(k) exemption." Adair, 185 F.3d at 1060 (internal citations omitted). "Generally, the employer must show that it established a 7(k) work period and that the 7(k) work period was 'regularly recurring.'" Id.; 29 C.F.R. § 553.224 ("As used in section 7(k), the term 'work period' refers to any established and regularly recurring period of work . . ."). "Whether an employer adopted a Section 7(k) exemption is an ultimate fact that may be decided on summary judgment if the underlying specific facts are undisputed." Farris v. Cnty. Of Riverside, 667 F. Supp. 2d 1151, 1157 (C.D. Cal. 2009); Adair, 185 F.3d at 1060 ("Whether an employer meets this burden is normally a question of fact.").

Here, the undisputed underlying facts establish that Defendant adopted a 7(k) work period and that the 7(k) period was regularly recurring. Defendant has utilized a 14-day work period for calculation of overtime for law enforcement personnel since 1994, and the number of hours worked by full-time police department personnel in a bi-weekly

period is 80 hours. (Def. SUF, ¶¶ 1, 3-4; Pl. SGD, ¶¶ 1, 3-4.) In addition, Article 10 of the 2005-2007 MOU between Defendant and POA defines overtime as "all hours worked over (80) in the two (2) week pay period of employees." (Def. SUF, ¶ 6; Pl. SGD, ¶ 6.) The Court finds that the language of the 2005-2007 MOU establishes a 14-day work period under Section 7(k) since it specifically identifies a two week "pay period" with overtime defined as hours worked over 80 hours per period. See Farris, 667 F. Supp. 2d 1151. Defendant also included that definition of overtime in its Salary, Compensation and Benefits Policy Manual. (Def. SUF, ¶ 9; SGD, ¶ 9.) While the overtime language in the 2005-2007 MOU has not been incorporated into subsequent memoranda of understanding, Defendant still maintains the practice of calculating and paying overtime based on the 80-hour/14-day pay period. (Def. SUF, ¶¶ 8, 10; Pl. SGD, ¶¶ 8, 10.) In addition, Defendant's implementation of a more generous overtime policy than the one set forth in section 207(k) does not negate its adoption of the 7(k) exemption. See Lamon v. City of Shawnee, Kan., 972 F.2d 1145, 1154 (10th Cir. 1992) ("There is no basis for concluding that, once an employer has opted for the subsection (k) framework, the employer may only pay overtime for hours worked beyond the legal maximum permitted at the regular wage.").

Defendant's scheduling and recording practices also support the finding that Defendant established a 7(k) work period that is regularly recurring. Defendant assigns certain police officers to a 3/12 schedule under which each employee was assigned three 12-hour shifts one week and four 12-hour shifts in the other, resulting a total of 84 working hours. (Def. SUF, ¶ 13, Pl. SGD, ¶ 13.) When that schedule was first implemented, Defendant credited each employee with 4 hours of compensatory time off in each payroll period to compensate for the 84 hours. (Def. SUF, ¶ 14; Pl. SGD, ¶ 14.) Subsequently, pursuant to the MOU, employees assigned to a 3/12 schedule would be credited with four hours of compensatory time at time and a half for the four hours worked over 80 during each work period. (SUF, ¶ 15; Pl. SGD, ¶ 15.) Therefore, Defendant's adoption of a 3/12 schedule demonstrates that Defendant adopted a regularly recurring 14-day work period that is used to calculate overtime hours worked. In addition, Defendant uses a 14-day payroll period that coincides with the 14-day work period for law enforcement personnel. (Def. SUF, ¶ 11; Pl. SGD, ¶ 11.) Defendant requires Plaintiffs to record their hours worked on a bi-weekly, 14-day "Time and Attendance Reports" which indicate that they cover a two-week, 14-day work period, evidencing a work period that is regularly recurring. (Def. SUF, ¶ 12; Pl. SGD, ¶ 12.) The Court finds that these facts show

that Defendant adopted a 14-day work period that was regularly recurring.

Plaintiffs argue that Defendant has not presented any evidence that it elected and implemented a 7(k) exemption since none of the documents cited by Defendant make any mention of the 7(k) exemption's application to police officers. (Pl. Opp. at 23.) Plaintiffs contend there is evidence to show that Defendant elected not to adopt the 7(k) exemption with respect to police officers since Defendant explicitly adopted a 7(k) exemption for firefighters in other portions of the Compensation Manual. (Id.) The Court disagrees.

In Adair, the Ninth Circuit held that the employer "established a 7(k) exemption when it specified the work period in the [collective bargaining agreement] and when it actually followed this period in practice." Adair, 185 F.3d at 1061. The collective bargaining agreement language stated, "for purposes of complying with the Fair Labor Standards Act, the Patrol Division work period shall be eight days and the Detective Division seven days." Id. at 1060. The court held that the employer met its burden since it "affirmatively adopted a work period . . . and it followed that period in practice." Id. at 1062. Plaintiffs argue that Adair is distinguishable from the facts here since Defendant did not provide any evidence showing that it adopted a work period for purposes of complying with the FLSA. (Pl. Opp. at

23-24.) While it is true that Defendant does not expressly mention the FLSA in its documents relating to wages of law enforcement personnel, that fact alone is not dispositive of the issue.

As the court in Farris noted, "[a] public pronouncement requirement is absent from Adair." Farris, 667 F. Supp. 2d at 1158. In McGrath v. City of Philadelphia, 864 F. Supp. 466, 476 (E.D. Pa. 1994), the court held that while the "'establishment' of a 7(k) work period may be manifested by an appropriate public declaration of intent to adopt a work period of between 7 and 28 days . . . a public employer may establish a 7(k) work period even without making a public declaration, so long as its employees actually work a regularly recurring cycle of between 7 and 28 days." McGrath, 864 F. Supp. at 476. Therefore, section 207(k) focuses on "the establishment of the schedule rather than the exemption." Abbe v. City of San Diego, 2007 WL 4146696, at *12 (S.D. Cal. Nov. 9, 2007). Here, while Defendant did not explicitly state that it was adopting a section 7(k) exemption with respect to law enforcement personnel, the undisputed facts, as discussed above, demonstrate that Defendant has adopted a 7(k) work period that is regularly recurring. The fact that Defendant explicitly mentioned the 7(k) exemption for firefighters and failed to make such a reference for law enforcement personnel does not change the result. See Abbe, 2007

WL 4146696, at *12 ("There is no suggestion in the language of Section 7(k) that an employer must affirmatively invoke the exemption."). As a result, there is no triable issue of fact as to whether Defendant established a 7(k) exemption. Accordingly, Defendant is liable to Plaintiffs for FLSA overtime only to the extent that Plaintiffs worked in excess of 86 hours in a 14-day work period. See 29 C.F.R. § 553.230.

G. Liquidated Damages Award

Before the Court decides the issue of liquidated damages, the Court directs the parties to submit further briefing addressing the issue. Plaintiffs may file a supplemental brief on the issue of liquidated damages, due by September 18, 2013. Defendant may file an opposition by September 25, 2013. The issue of liquidated damages will stand submitted as of September 25, 2013.

IV. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant's Motion for Partial Summary Judgment and GRANTS IN PART Plaintiffs' Motion for Partial Summary Judgment. The Court directs the parties to submit further briefing addressing the issue of liquidated damages. Plaintiffs may file a supplemental brief on the issue, due by September 18, 2013. Defendant may file an opposition by September 25, 2013.

Dated: 8/29/13

/s/ Jesus G. Bernal

Jesus G. Bernal
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANNY FLORES, ROBERT BARADA, KEVIN WATSON, VY VAN, RAY LARA, DANE WOOLWINE, RIKIMARU NAKAMURA, CHRISTOPHER WENZEL, CRUZ HERNANDEZ, SHANNON CASILLAS, JAMES JUST, RENE LOPEZ, GILBERT LEE, STEVE RODRIGUES, and ENRIQUE DEANDA, Plaintiffs, v. CITY OF SAN GABRIEL, and DOES 1 THROUGH 10, inclusive, Defendants.	Case No. CV 12-04884 JGB (JCGx) **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUA SPONTE GRANTING DEFENDANT SUMMARY JUDGMENT AS TO LIQUIDATED DAMAGES**

I. BACKGROUND

On August 29, 2013, the Court issued an order granting Defendant's motion for partial summary

judgment and granting in part Plaintiffs' motion for partial summary judgment (hereinafter "Summary Judgment Order").[1] (Summ. J. Order (Doc. No. 37).) In that Order, the Court directed the parties to submit further briefing addressing the issue of liquidated damages. Before the Court is Plaintiffs' supplemental brief on the issue of liquidated damages filed on September 13, 2013 in support of Plaintiffs' motion for partial summary judgment. (Doc. No. 38.) Defendant filed an opposition on September 25, 2013. (Doc. No. 39.)

The Court incorporates by reference the procedural and factual background and the uncontroverted facts as set forth in the Court's Summary Judgment Order. (Summ. J. Order at 1-23.) For the reasons set forth below, the Court denies Plaintiffs' Motion for Partial Summary Judgment on the issue of liquidated damages. The Court sua sponte enters summary judgment in favor of

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[1] Specifically, the Court found the following: (1) Defendant's payments to Plaintiffs made in lieu of benefits are not excludable from the regular rate calculation under section 207(e)(2); (2) the payments made in lieu of benefits are also not excludable under section 207(e)(4); (3) to the extent that Defendant makes contributions under the Plan to third parties, these contributions are excludable under 29 U.S.C. § 207(e)(4); (4) Plaintiffs' claims are governed by a two-year statute of limitations under 29 U.S.C. § 255(a); and (5) Defendant is liable to Plaintiffs for FLSA overtime only to the extent that Plaintiffs worked in excess of 86 hours in a 14-day work period since Defendant implemented a partial overtime exemption pursuant to section 207(k).

Defendant and holds that Plaintiffs are not entitled to liquidated damages.

II. LEGAL STANDARD[2]

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. This burden may be satisfied by either (1) presenting evidence to negate an essential element of the non-moving party's case; or (2) showing that the non-moving party has failed to sufficiently establish an essential element to the non-

[2] Unless otherwise noted, all references to "Rule" refer to the Federal Rules of Civil Procedure.

moving party's case. Id. at 322-23. Where the party moving for summary judgment does not bear the burden of proof at trial, it may show that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." Id. at 325. The moving party is not required to produce evidence showing the absence of a genuine issue of material fact, nor is it required to offer evidence negating the non-moving party's claim. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); United Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

However, where the moving party bears the burden of proof at trial, the moving party must present compelling evidence in order to obtain summary judgment in its favor. United States v. One Residential Property at 8110 E. Mohave, 229 F. Supp. 2d 1046, 1047 (S.D. Cal. 2002) (citing Torres Vargas v. Santiago Cummings, 149 F.3d 29, 35 (1st Cir. 1998) ("The party who has the burden of proof on a dispositive issue cannot attain summary judgment unless the evidence that he provides on that issue is conclusive.")). Failure to meet this burden results in denial of the motion and the Court need not consider the non-moving party's evidence. One Residential Property at 8110 E. Mohave, 229 F. Supp. 2d at 1048.

Once the moving party meets the requirements of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing

that there is a genuine issue for trial." Anderson, 477 U.S. at 256. The non-moving party does not meet this burden by showing "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The United States Supreme Court has held that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Anderson, 477 U.S. at 252. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. Celotex, 477 U.S. at 325. The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. Anderson, 477 U.S. at 255. Without specific facts to support the conclusion, a bald assertion of the "ultimate fact" is insufficient. See Schneider v. TRW, Inc., 938 F.2d 986, 990-91 (9th Cir. 1991).

III. DISCUSSION

Plaintiffs argue that they are entitled to an award of liquidated damages pursuant to 29 U.S.C. § 216(b) because Defendant failed to meet its burden of establishing that it acted with subjective good faith and had objectively reasonable grounds for believing

that its conduct complied with the FLSA. Defendant responds that it has always made a good faith effort to comply with its obligations under the FLSA. In addition, Defendant contends that its determination that the compensation was excludable under section 207(e)(2) was objectively reasonable based on the plain language of that section.

Under section 216(b), an employer who violates section 206 or section 207 of the FLSA is "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). "These liquidated damages represent compensation, and not a penalty." Local 246 Util. Workers Union of Am. v. S. Cal. Edison Co., 83 F.3d 292, 297 (9th Cir. 1996) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)). "While section 216(b) is mandatory, it is modified by section 260." EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 403 (9th Cir. 1985).

Under 29 U.S.C. § 260, liquidated damages are mandatory unless "the employer shows . . . that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [FLSA]." 29 U.S.C. § 260; see Local 246, 83 F.3d at 297-298. "This test has both objective and subjective components, asking how a reasonably prudent person would have acted under the same or

similar circumstances and requiring that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry." Alvarez v. IBP, Inc., 339 F.3d 894, 907 (9th Cir. 2003) (internal citations and quotations omitted). "The employer bears the burden of proof to establish this exception." Id. at 907.

First, the Court finds that Defendant has met its burden of establishing that it acted in subjective good faith. Defendant provided evidence that the payroll department works with the human resources personnel to determine whether a particular pay qualifies as premium pay, includable in the regular rate, or a benefit that is excluded from the regular rate calculation. (Linda Tang Dep. 43:13-46:12, May 1, 2013 (Exh. A to Declaration of Alex Y. Wong).) If the human resources department notices or hears of any new ruling, they notify the payroll department. (Linda Tang Dep. 46:8-10.) When the payments made in lieu of benefits were first implemented, Defendant determined that it was a benefit, classified it as a benefit in its system, and did not include it in calculating overtime. (Linda Tang Dep. 43:17-44:12.) Therefore, Defendant's evidence shows that it implemented steps to ensure it accurately classified payments to be included in the calculation of the regular rate based on the information available to it at the time of implementation. Thus, the Court finds that

Defendant was not "blindly operat[ing] without making an investigation as to its responsibilities under the law." Dalheim v. KDFW-TV, 712 F. Supp. 533, 539 (N.D. Tex. 1989). Given the absence of legal authority addressing whether cash payments made in lieu of benefits must be included in the calculation of regular rate of pay, Defendant had no reason to alter its initial determination.

Plaintiffs cite the Ninth Circuit decision in Chao v. A-One Med. Services, Inc., 346 F.3d 908 (9th Cir. 2003) to argue that Defendant failed to present facts that it was acting based on some objective authority or that it, at the very least, sought advice on the legality of excluding substantial direct cash-in-lieu of benefits from the regular rate of pay. However, as Defendant argues, these two methods constitute mere examples rather than an exhaustive list of acceptable methods for demonstrating good faith. Additionally, in Chao, the court found that the employer's violation of the FLSA was willful. Chao, 346 F.3d at 920. The court in Chao noted that "a finding of good faith is plainly inconsistent with a finding of willfulness." Id. Accordingly, the court's finding of willfulness precluded a finding of that the employer acted in good faith. This case is distinguishable from Chao since the Court here previously found that Defendant's violation was not willful. (Summ. J. Order at 46-47.) Accordingly, the Court finds that Defendant acted with subjective

good faith in deciding to exclude the payments made in lieu of benefits from the regular rate calculation.

Second, the Court finds that Defendant had objectively reasonable grounds for believing that its conduct complied with the FLSA. Plaintiffs argue that Defendant's determination was not objectively reasonable since courts have clearly established that payments to employees are not excludable from the regular rate under section 207(e)(2) if they constitute "compensation for work . . . if makes no difference whether the . . . payments are tied to a regular weekly wage or regular hourly wage." (Mot. at 7) (quoting Local 246, 83 F.3d at 296). As noted in the Court's Summary Judgment Order, the Ninth Circuit has not addressed whether payments made to employees out of flexible benefit plans constitute "compensation for work" that must be included in an employee's regular rate for purposes of the FLSA. (Summ. J. Order at 24-25.) In addition, while district courts have addressed whether other payments and benefits are excludable from the regular rate calculation, none has addressed the application of section 207(e)(2) to payments made under flexible benefit plans. Therefore, Defendant did not have knowledge of circumstances which put him upon inquiry that his conduct violated the FLSA.

Based on the uncontroverted facts, the amount an employee may receive as cash in lieu of benefits is not contingent upon the number of hours worked or

the employee's productivity. (Def. SUF, ¶¶ 29-30; Pl. SGD, ¶¶ 29-30.) With little guidance on the issue, it was reasonable for Defendant to classify its payments under the Flexible Benefit Plan as "payments . . . which are not made as compensation for . . . hours of employment . . ." 29 U.S.C. § 207(e)(2). Accordingly, the Court finds that Defendant had reasonable grounds for believing that its conduct complied with the FLSA.

Since the Court finds that Defendant acted with subjective good faith and had objectively reasonable grounds for believing that its exclusion of payments made in lieu of benefits under the plan was not a violation of the FLSA, the Court finds that Plaintiffs are not entitled to liquidated damages under 29 U.S.C. § 216(b). See Portsmouth Square Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985) (citation omitted) ("[S]ua sponte summary judgment is appropriate where one party moves for summary judgment and, after the hearing, it appears from all the evidence presented that there is no genuine issue of material fact and the *non-moving* party is entitled to judgment as a matter of law.").

IV. CONCLUSION

For the reasons set forth above, the Court denies Plaintiffs' Motion for Partial Summary Judgment on the issue of liquidated damages. The

Court sua sponte enters summary judgment in favor of Defendant and holds that Plaintiffs are not entitled to liquidated damages.

Dated: 10/29/13

/s/ Jesus G. Bernal

Jesus G. Bernal
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANNY FLORES, ROBERT BARADA, KEVIN WATSON, VY VAN, RAY LARA, DANE WOOLWINE, RIKIMARU NAKAMURA, CHRISTOPHER WENZEL, CRUZ HERNANDEZ, SHANNON CASILLAS, JAMES JUST, RENE LOPEZ, GILBERT LEE, STEVE RODRIGUES, and ENRIQUE DEANDA,	)	Case No. CV 12-04884 JGB (JCGx)
Plaintiffs,	)	JUDGMENT
v.	)	
CITY OF SAN GABRIEL,	)	
Defendants.	)	

On August 29, 2013, the Court issued an Order Granting Defendant's Motion for Partial Summary Judgment and Granting in part Plaintiff's Motion for Partial Summary Judgment (Doc. No. 37). In the Court's Order, the Court requested additional

briefing on the issue of Plaintiff's entitlement to Liquidated Damages.

On October 29, 2013, the Court issued an Order Denying Plaintiff's Motion for Summary Judgment and Sua Sponte Granting Defendant Summary Judgment as to liquidated Damages (Doc. No. 71).

FOR GOOD CAUSE HAVING BEEN SHOWN, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Defendant is entitled to claim the overtime exception found in 29 U.S.C. Section 207(k).

2. Defendant failed to include the value of cash-in-lieu of benefits payments when calculating Plaintiff's regular rates of pay.

3. Defendant was not required to include the total value of all benefits provided as part of its Flexible Benefit Plan in the calculation of Plaintiff's regular rates of pay.

4. Plaintiffs Robert Barada, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Cruz Hernandez and Enrique Deanda (collectively "Prevailing Plaintiffs") established

entitlement to unpaid overtime under the Fair Labor Standards Act. Accordingly, judgment is hereby entered in the Prevailing Plaintiff's favor against Defendant. The Prevailing Plaintiffs are entitled to overtime payments from Defendant in the following amounts:

a.	Robert Barada:	$561.58
b.	Ray Lara:	$141.71
c.	Dane Woolwine:	$354.60
d.	Rikimaru Nakamura:	$294.72
e.	Christopher Wenzel:	$452.97
f.	Cruz Hernandez:	$48.02
g.	Enrique Deanda:	$390.26

5. The Prevailing Plaintiffs shall recover prejudgment interest on the above sums.

6. The Prevailing Plaintiffs shall recover their costs of suit and reasonable attorney's fees from Defendant.

7. The Prevailing Plaintiffs are not entitled to liquidated damages.

8. Plaintiffs Kevin Watson, Shannon Casillas, James Just, Gilbert Lee, Rene Lopez, Steve Rodrigues and Vy Van failed to establish entitlement to any relief from Defendant. Accordingly,

judgment is entered in Defendant's favor against those Plaintiffs, who shall take nothing by way of their complaint.

Dated: July 30, 2014 /s/ Jesus G. Bernal

Jesus G. Bernal
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANNY FLORES; ROBERT BARADA; KEVIN WATSON; VY VAN; RAY LARA; DANE WOOLWINE; RIKIMARU NAKAMURA; CHRISTOPHER WENZEL; SHANNON CASILLAS; JAMES JUST; STEVE RODRIGUES; and ENRIQUE DEANDA, *Plaintiffs-Appellees/ Cross-Appellants,* and CRUZ HERNANDEZ, *Plaintiff-Appellee*, and GILBERT LEE; RENE LOPEZ, *Plaintiffs,* v. CITY OF SAN GABRIEL, *Defendant-Appellant/ Cross-Appellee.*	Nos. 14-56421, 14-56514 D.C. No. 2:12-cv-04884-JGB-JCG ORDER

Before: TROTT, DAVIS,* and OWENS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Owens voted to deny the petition for rehearing en banc, and Judges Trott and Davis have so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

* The Honorable Andre M. Davis, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

United States Code Annotated

Title 29. Labor

Chapter 8. Fair Labor Standards

29 U.S.C. § 207

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments

made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for

overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two

thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any

workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub. L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made 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; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day

or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not

otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit

consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially

equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a

workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

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

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(*l*) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of

employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(*o*) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or

understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for

additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law

enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for

which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r)(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

United States Code Annotated

Title 29. Labor

Chapter 9. Portal-to-Portal Pay

29 U.S.C. § 255

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act—

> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;
>
> (b) if the cause of action accrued prior to May 14, 1947—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and,

except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter B. Statements of General Policy or Interpretation Not Directly Related to Regulations

Part 778. Overtime Compensation

Subpart C. Payments that May be Excluded from the "Regular Rate"

29 C.F.R. § 778.224

§ 778.224 "Other similar payments".

(a) *General.* The preceding sections have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided under section 7(e)(2) because they are not made as compensation for hours of work. Section 7(e)(2) also authorizes exclusion from the regular rate of "other similar payments to an employee which are not made as compensation for his hours of employment." Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not

considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(b) Examples of other excludable payments. A few examples may serve to illustrate some of the types of payments intended to be excluded as "other similar payments":

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.