

2-1-2019

## Lean Weeks and Fat Weeks: A Commissioned Employee's Regular Rate of Overtime Pay

Colt Burnett

*Georgia State University College of Law*, [cburnett4@student.gsu.edu](mailto:cburnett4@student.gsu.edu)

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Labor and Employment Law Commons](#), and the [Law and Economics Commons](#)

---

### Recommended Citation

Colt Burnett, *Lean Weeks and Fat Weeks: A Commissioned Employee's Regular Rate of Overtime Pay*, 35 GA. ST. U. L. REV. (2019).  
Available at: <https://readingroom.law.gsu.edu/gsulr/vol35/iss2/6>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

## LEAN WEEKS AND FAT WEEKS: A COMMISSIONED EMPLOYEE'S REGULAR RATE OF OVERTIME PAY

Colt Burnett\*

### INTRODUCTION

For an entire year, Sean Freixa worked between sixty and seventy hours per week selling cruise packages.<sup>1</sup> His employer, Prestige Cruise Lines, paid him \$500 per week plus commission.<sup>2</sup> During that year, Freixa earned over \$73,000.<sup>3</sup> Commissions made up 63% of his annual earnings.<sup>4</sup> Some months, Freixa sold many cruises.<sup>5</sup> Prestige paid out those commissions in the following month.<sup>6</sup> Other months, he did not earn a penny in commissions.<sup>7</sup> During those months, Prestige Cruise Lines, believing their employee was exempt, did not pay Freixa overtime.<sup>8</sup> In 2016, he sued Prestige, alleging that during the months where he earned no commission he should have earned overtime pay.<sup>9</sup>

Wage and hour litigation is skyrocketing.<sup>10</sup> Every year tens of thousands of companies pay penalties for failing to comply with the

---

\* J.D. Candidate 2019, Georgia State University College of Law. Thank you to my family and friends for your unwavering support, and thank you to my colleagues, professors, and my Law Review peers for your invaluable help and guidance in completing and publishing this Note.

1. *Freixa v. Prestige Cruise Serv., LLC*, 853 F.3d 1344, 1345 (11th Cir. 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Freixa*, 853 F.3d at 1345.

8. *Id.*

9. *Id.*

10. Lydia DePillis, *Why Wage and Hour Litigation Is Skyrocketing*, WASH. POST, (Nov. 25, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/> [<https://perma.cc/Y2DW-2VEE>]. In 2015:

The number of wage and hour cases filed in federal court rose to 8,871 for the year ending Sept. 30, up from 1,935 in 2000. That's an increase of 358 percent, compared to the federal judiciary's overall intake volume, which rose only a total of about 7 percent over the same period.

*Id.*

Fair Labor Standards Act (FLSA).<sup>11</sup> Ambiguities abound between the words of the FLSA and its real-life application, creating uncertainty for employers and employees.<sup>12</sup> Such uncertainty can be costly.<sup>13</sup> It is ubiquitously known that employers must pay employees overtime for hours worked in excess of forty hours per week.<sup>14</sup> Passed in 1938, the FLSA established overtime provisions “to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce.”<sup>15</sup> However, overtime calculation can be much more involved than merely multiplying the minimum wage by time-and-a-half.

---

11. Over the last five years, the Department of Labor concluded FLSA compliance actions for more than 1.3 million employees, who received a total of \$1.2 billion in minimum wage and overtime back wages. WAGE & HOUR DIV., Data, U.S. DEP’T. OF LABOR, <https://www.dol.gov/whd/data/index.htm> [<https://perma.cc/AHL7-GRYM>] (last visited Nov. 8, 2018). In just fiscal year 2016, the Wage and Hour Division found more than \$260 million in back wages for more than 280,000 workers. *Id.*

12. See ANDREW SHERRILL, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-629T, FAIR LABOR STANDARDS ACT: DEPARTMENT OF LABOR NEEDS A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE (2014); Scott Flaherty, *FLSA Ambiguities Driving More Lawsuits, Congress Told*, LAW360, (July 23, 2014, 2:15 PM), <https://www.law360.com/articles/558092/flsa-ambiguities-driving-more-lawsuits-congress-told> [<https://perma.cc/N8TR-FAE2>].

13. See *supra* text accompanying note 11.

14. As originally codified in the Fair Labor Standards Act:

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.

29 U.S.C. § 207(a)(1) (2012), *invalidated by* Texas v. United States, Civil Action No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019).

15. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945). The FLSA served as:

[A] recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided.

*Id.* at 706–07. Debates in the Congressional Record indicate the principal ambition of the FLSA was “to aid the unprotected, unorganized[,] and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.” *Id.* at 707 n.18.

Some modern-day employers operate complicated pay schemes, and many employees work inconsistent hours.<sup>16</sup> Most commission plans yield different earnings for the employee from pay period to pay period; sometimes this is strictly due to the employee's efforts, but sometimes employees structure the commission plan itself to change across periods.<sup>17</sup> Additionally, many employers "defer" commissions, in which the employee only earns the commission after the employer is paid by the customer for that employee's sale.<sup>18</sup> The commission payments are processed and then disbursed after they are earned.<sup>19</sup> As the pay structure deviates from traditional norms, determining whether an employee is entitled to overtime becomes more complex.

This Note focuses on the uncertainty inherent in overtime calculations for certain categories of employees who earn commission in addition to hourly wages.<sup>20</sup> Part I of this Note gives the relevant history behind overtime and "regular rate" calculation.<sup>21</sup> Part II analyzes the different methods of determining an employee's regular rate of pay in the Seventh and Eleventh United States Circuit Courts of Appeals.<sup>22</sup> Part III proposes for a uniform approach to deferred commission allocation in overtime calculation, advocating the Eleventh Circuit's method because it more closely follows the

---

16. See generally Doug J. Chung, *How to Really Motivate Salespeople*, HARV. BUS. REV., Apr. 2015, at 54 (highlighting the advantages and disadvantages of complicated compensation systems). "Irregular shift work is associated with working longer weekly hours." LONNIE GOLDEN, IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES, BRIEFING PAPER NO. 394, ECON. POL'Y INST. 2 (Apr. 9, 2015), <https://www.epi.org/files/pdf/82524.pdf> [<https://perma.cc/AGQ6-5CUX>].

17. Jordan Nottrodt, *How Commission Works and How to Choose the Right Payroll Structure*, WAGEPOINT, <https://blog.wagepoint.com/h/i/239268037-how-commission-works-and-how-to-choose-the-right-payroll-structure> [<https://perma.cc/UX5P-CK6R>] (last visited Nov. 7, 2018).

18. *Id.*

19. See 29 C.F.R. § 778.119 (2018); see also *Freixa v. Prestige Cruise Serv., LLC*, 853 F.3d 1344, 1345 (11th Cir. 2017).

20. Aubrie K. Kiel, *Uncertainty on Overtime Salary Threshold—Certainly Plenty of Ways to Mess Up*, NAT'L L. REV. (Aug. 17, 2017), <https://www.natlawreview.com/article/uncertainty-overtime-salary-threshold-certainly-plenty-ways-to-mess> [<https://perma.cc/XX42-735H>]; Christine Pulfrey & Michael Trimarchi, *Employer Uncertainty May Accompany Actions by Labor Department on Overtime, Guidance*, BLOOMBERG BNA (July 12, 2017), <https://www.bna.com/employer-uncertainty-may-n73014461585/> [<https://perma.cc/Z7VY-6UVC>].

21. See discussion *infra* Part I.

22. See discussion *infra* Part II.

aims of the FLSA and because the Department of Labor favors the interpretation.<sup>23</sup>

### I. Background

The Fair Labor Standards Act of 1938 creates “a ceiling over hours” and “a floor under wages” by establishing a forty-hour work week, with overtime pay for hours worked beyond forty and a minimum wage.<sup>24</sup> The Act aimed to rehabilitate and reform labor laws in the wake of the Great Depression.<sup>25</sup> Congress included the FLSA’s overtime provision to increase employment.<sup>26</sup> The provision requires employers to pay an employee one-and-a-half times her regular rate for any work in excess of forty hours per week.<sup>27</sup>

---

23. See discussion *infra* Part III.

24. Franklin D. Roosevelt, President, 81–Fireside Chat (June 24, 1938) (transcript available at <https://www.presidency.ucsb.edu/documents/fireside-chat-14> [<https://perma.cc/KNJ4-TF86>]). In the Fireside Chat, President Roosevelt said:

After many requests on my part the Congress passed a Fair Labor Standards Act, commonly called the Wages and Hours Bill. That Act—applying to products in interstate commerce—ends child labor, sets a floor below wages and a ceiling over hours of labor. Except perhaps for the Social Security Act, it is the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country.

*Id.*

25. See *id.*

26. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942), *superseded by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 115-281, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Missel*, the Court noted:

“[O]ne of the fundamental purposes of the Act was to induce worksharing and relieve unemployment by reducing hours of work.” We agree that the purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.

*Id.* (quoting *Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 103 (5th Cir. 1942)).

27. 29 U.S.C. § 207(a) (2012), *invalidated by* *Texas v. United States*, Civil Action No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019).

Overtime requirements incentivize employers to hire more workers, rather than paying overtime to their existing workers.<sup>28</sup> This increases the employment rate while ensuring workers have time to spend their hard-earned money.<sup>29</sup>

The FLSA's overtime provision has expanded to cover many kinds of employees.<sup>30</sup> However, many others are exempt depending on certain conditions.<sup>31</sup> The "retail or service" exemption of § 207(i) of the FLSA is meant to protect employers from commissioned employees hoping to game the system.<sup>32</sup> The Southern District of New York aptly rationalizes the exemption in *English v. Ecolab, Inc.*:

Service specialists, who are paid on a commission basis and are able to set their own schedules, can work fewer hours in one week and more in the next. If they received overtime, employees could compress their hours into one week (*e.g.*, work 60 hours) to obtain overtime pay, and then coast during the next week (*e.g.*, work 10 hours). By doing so, employees would end up working fewer hours than a regular employee working two forty hour work weeks, but yet earn more.<sup>33</sup>

---

28. *See Missel*, 316 U.S. at 577–78 (“In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.”).

29. *See id.* This policy also strengthens the economy by ensuring paid employees will spend their money during their time off, rather than work all the time and not spend their money. *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1061 (1st Cir. 1995).

30. *See* 29 C.F.R. § 778.0 (2018). That regulation provides:

All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act.

*Id.*

31. *See generally* 29 U.S.C. § 213 (2012).

32. *English v. Ecolab, Inc.*, No. 06 Civ. 5672(PAC), 2008 WL 878456, at \*2–3 (S.D.N.Y. Mar. 28, 2008).

33. *Id.* at \*16. The rationale behind the exemption was not merely to protect employers, but to benefit employees as well:

[S]ervice specialists, who work independently and without significant oversight, are given both time and financial incentives to perform their assignments quickly

When an employee's regular rate is more than one-and-a-half times the minimum wage, he is exempt from receiving overtime because he already earns more than overtime necessitates.<sup>34</sup> Although the words "regular rate" were not defined in the FLSA of 1938, they were given meaning by the Supreme Court in 1942, in *Overnight Motor Transport Co. v. Missel*, as the rate computed by dividing wages by hours worked.<sup>35</sup>

---

and efficiently. If the overtime requirement applied, however, this incentive would be lost. In the absence of direct supervision, service specialists could work as slowly as possible to generate hours in excess of forty per week. While "[t]he Act's overtime provisions apply to work performed off premises, outside of the employer's view and sometimes at odd hours, where an employer's concurrent knowledge of an employee's labor is not the norm," this edict applies with significantly less force when the unsupervised employee has an incentive to work as short a workweek as possible[—]the fewer hours it takes a specialist to reach a commission plateau, the higher his rate of compensation. This ensures that time is not wasted simply to increase hours worked.

*Id.* (quoting *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008)).

34. 29 U.S.C. § 207(i) (2012), *invalidated by* *Texas v. United States*, Civil Action No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019). The statute states:

No employer shall be deemed to have violated subsection (a) 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 . . . .

*Id.*

35. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579–80 (1942), *supereded by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 115-281, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

We now come to the determination of the meaning of the words 'the regular rate at which he is employed.' . . . Neither the wage, the hour[,] nor the overtime provisions of sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. It is likewise abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week.

. . . .

No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked, to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an

Issues arise when the employee's commissions vary greatly between pay periods and the employer does not—or cannot—keep track of the period in which the commissions are earned.<sup>36</sup> In the event an employee files a claim for unpaid wages against her employer, the jurisdiction in which she states her claim could apply a rule that would grant her compensation. However, if she filed her claim in a different state, that jurisdiction could decide, like the trial court in *Freixa*, that she is exempt from overtime requirements and dismiss her case entirely.<sup>37</sup> To establish a prima facie case for unpaid overtime wages, a plaintiff must establish that: (1) the defendant employed her; (2) the defendant is an enterprise engaged in interstate commerce covered by the FLSA; (3) she worked more than forty hours per week; and (4) the defendant did not pay her overtime wages.<sup>38</sup> Section 207(i) of the FLSA exempts retail or service establishments from paying overtime wages where: “(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 . . . and (2) more than half of his compensation for a representative period (not less than one month) represents commissions on goods and services.”<sup>39</sup> This represents an affirmative defense for retail or service employers in wage and hour suits.<sup>40</sup>

Determining whether more than half of an employee's compensation derives from commission is simple. The law requires employers to keep detailed and accurate wage records.<sup>41</sup> Without

---

argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems.

*Id.* (citation omitted).

36. See *Freixa v. Prestige Cruise Serv., LLC*, 853 F.3d 1344, 1345 (11th Cir. 2017).

37. *Freixa v. Prestige Cruise Serv., LLC*, No. 15-22732-Civ-COOKE/TORRES, 2016 WL 5112202, at \*1 (S.D. Fla. May 23, 2016), *rev'd*, 853 F.3d 1344 (11th Cir. 2017).

38. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1277 n.68 (11th Cir. 2008).

39. § 207(i).

40. *Id.*; see also Jesse A. Crips & Catherine V.A. Smith, *7 Steps to Consider in Wage-and-Hour Complaints*, LAW360 (Sept. 21, 2015, 2:00 PM), <https://www.law360.com/articles/703564/7-steps-to-consider-in-wage-and-hour-complaints> [<https://perma.cc/3XYF-9TYS>].

41. 29 C.F.R. § 516.1 (2018). “[E]very employer subject to any provisions of the Fair Labor Standards Act of 1938 . . . is required to maintain records containing the information and data required



records, an employer cannot prove an overtime exemption.<sup>42</sup> Employees are typically either wholly commissioned or earn a base pay rate plus commission on top,<sup>43</sup> but some employers use more complicated commission structures.<sup>44</sup>

Determining the employee's regular rate of pay is less simple. The regular rate of pay is "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed."<sup>45</sup> The regular rate is important for employers to know because it may or may not exempt an employee from earning overtime.<sup>46</sup> If an employer does not know when the employee's commissions are earned, courts may use "other reasonable or equitable method[s]" to

by the specific sections of this part." *Id.*

42. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The employer in a FLSA case bears the burden of establishing that its employees are exempt, and because of the remedial nature of the FLSA, "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Id.*

43. See Ken Sundheim, *7 Different Ways Sales Professionals Are Paid*, BUS. INSIDER (Apr. 18, 2011, 6:36 PM), <http://www.businessinsider.com/7-different-ways-sales-professionals-are-paid-2011-4> [<https://perma.cc/MD52-TDJF>].

44. *Id.* In addition to straight commission—no base salary, and the only way to earn money is as a percentage of each sale—and base, or salary, plus commission, some employers pay (1) variable commission, which fluctuates depending on whether sales goals are exceeded and by how much; (2) draw against commission, where at the start of each pay period an employee is advanced a certain amount of money, called a "pre-determined draw," and the draw is deducted from the employee's commission at the end of each pay period, and; (3) residual commission, where as long as a sales account generates revenue the selling employee consistently receives commission on the account each pay period. *Id.*

45. 29 C.F.R. § 779.419(b) (2018) (quoting *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945)). The regular rate, "by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." *Walling*, 325 U.S. at 424. The regular rate can be both fluid and rigid; employer and employee may:

[A]gree to pay compensation according to any time or work measurement they desire. "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.

*Id.* at 424–25 (citation omitted).

46. 29 U.S.C. § 207(i) (2012), *invalidated by* *Texas v. United States*, Civil Action No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019).

calculate an employee's regular rate of pay.<sup>47</sup> These other methods have been interpreted to include averaging wages and hours over an entire pay period, effectively spreading the employee's high commission earnings over low earning periods.<sup>48</sup> Other courts limit the spread of those earnings, confining earnings to certain time periods based on how often the employer pays the employee.<sup>49</sup>

Before the Eleventh Circuit decided *Freixa* in April 2017, many district courts within the Eleventh Circuit averaged commissions across long terms of an employee's employment period to determine the employee's regular rate of pay.<sup>50</sup> The United States Court of Appeals for the Seventh Circuit continues to decide the regular rate of pay in overtime disputes in this way.<sup>51</sup> The method of averaging the commissions is laid out in 29 C.F.R. § 778.120. Courts employing the method only did so where the commissions were not identifiable as earned in particular workweeks.<sup>52</sup> However, now that *Freixa* has clarified the rule that commissions may only be averaged across the pay period in which they were earned, it will be much more difficult for employers to argue for averaging commissions across an employee's full term of employment while in the Eleventh Circuit. The Eleventh Circuit held that the commissions must be allocated to the weeks within the time period in which they were earned, either the pay period or the "computation period."<sup>53</sup> In

---

47. See 29 C.F.R. § 778.120(a)–(b) (2018).

48. See Triple "AAA" Co. v. Wirtz, 378 F.2d 884, 886–87 (10th Cir. 1967).

49. See *Freixa v. Prestige Cruise Serv., LLC*, 853 F.3d 1344, 1346–47 (11th Cir. 2017).

50. See, e.g., *Forster v. Smartstream, Inc.*, No. 3:13-cv-866-J-PDB, 2016 WL 70605, at \*7 (M.D. Fla. Jan. 6, 2016) (averaging base pay and commissions over a forty-five-week period); *Henriquez v. Total Bike, LLC*, No. 13-20417-CIV., 2013 WL 6834656, at \*3 (S.D. Fla. Dec. 23, 2013) (averaging base pay and commissions over a 128-week period); *Kuntsmann v. Aaron Rents, Inc.*, 903 F. Supp. 2d 1258, 1268 (N.D. Ala. 2012) (averaging base pay and commissions over five months). *But see Rodriguez v. Home Heroes, LLC*, No. 8:13-CV-2711-T-26AEP, 2015 WL 668009, at \*8 (M.D. Fla. Feb. 17, 2015) (focusing on single workweeks to determine the hourly pay of a commissioned employee).

51. *Smith v. Family Video Movie Club, Inc.*, No. 11 C 1773, 2015 WL 1542649, at \*4 (N.D. Ill. Mar. 31, 2015); *Morse v. Equity Lifestyle Props. Inc.*, No. 2:13-cv-00408-JMS-MJD, 2014 WL 1764927, at \*5–6 (S.D. Ind. Apr. 30, 2014) (finding "reasonable or equitable method" of allocating commissions during overtime commission not applicable where the employer has records indicating the specific weeks where the employee earned such commission).

52. *Forster*, 2016 WL 70605, at \*7; *Henriquez*, 2013 WL 6834656, at \*3; *Kuntsmann*, 903 F. Supp. 2d at 1268. *But see Rodriguez*, 2015 WL 668009, at \*8.

53. *Freixa*, 853 F.3d at 1347.

contrast, the Seventh Circuit allows any “other reasonable and equitable method,” often resorting to allocation across the full term of employment.<sup>54</sup>

## II. Analysis

### A. Averaging Commissions Across All Hours Worked to Determine the Regular Rate

In 1967, the Tenth Circuit affirmed an Oklahoma district court’s method of computing overtime compensation by taking an employee’s monthly salary, multiplying it by twelve months, then dividing the product by fifty-two weeks, and finally dividing the quotient by the number of hours worked in the week.<sup>55</sup> The formula to find this number looked like this:

$$\begin{aligned} &\text{Monthly salary} \times 12 \text{ months} \div 52 \text{ weeks} = \text{weekly} \\ &\text{compensation} \\ &\text{Weekly compensation} \div \text{average number of hours worked} \\ &\text{per week} = \text{regular rate for each hour worked}^{56} \end{aligned}$$

In *Triple AAA Co. v. Wirtz*, the Tenth Circuit determined this number to be an employee’s regular rate.<sup>57</sup> In *Triple AAA*, four employees were compensated \$2,557.69 in overtime compensation.<sup>58</sup> The court found the employees had worked an average of forty-four hours per week and had not been fairly compensated for the four extra hours worked.<sup>59</sup> The employer claimed overtime was factored into their salary; however, the employees’ monthly salary remained consistent despite fluctuating hours beyond forty per week.<sup>60</sup> Thus, the court concluded the employees had never been paid overtime.<sup>61</sup>

---

54. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986).

55. *Triple “AAA” Co. v. Wirtz*, 378 F.2d 884, 887 (10th Cir. 1967).

56. *Id.*

57. *Id.*

58. *Id.* at 886.

59. *Id.*

60. *Id.*

61. *Triple “AAA” Co.*, 378 F.2d at 886.

For each of the four overtime hours the employees worked, the court added half of the regular rate to it.<sup>62</sup> This last number would be the overtime rate.<sup>63</sup> The employees were paid the overtime rate for four hours of every week they had worked over the entire year.<sup>64</sup>

This formula is the standard method of calculating any hourly employee's regular rate for determining overtime compensation.<sup>65</sup> When the facts are so straightforward, without other complicating factors such as commission, calculating overtime is relatively painless. When future questions of calculating the regular rate for employees working purely on commission arose, one court repurposed this simple formula, focusing specifically on the fact that the court had averaged the employees' earnings over an entire year.<sup>66</sup>

The Seventh Circuit cited to the overtime calculation method laid out in *Triple AAA* in deciding *Walton v. United Consumers Club, Inc.* in 1986.<sup>67</sup> The United Consumers Club sold memberships and merchandise.<sup>68</sup> The club maintained a staff of salesmen who were paid on commission and worked "until 11:00 pm, five or six days per week, plus occasional Sundays."<sup>69</sup> The employees were not paid extra for their time.<sup>70</sup> In fact, their earnings depended entirely on their sales.<sup>71</sup> Six of them sued for back wages.<sup>72</sup> United Consumers

---

62. *Id.* at 887.

63. *Id.*

64. *Id.*

65. 29 C.F.R. § 778.110(a) (2018). The regulation states:

If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of [forty] in the week. Thus, a \$12 hourly rate will bring, for an employee who works [forty-six] hours, a total weekly wage of \$588 ([forty-six] hours at \$12 plus [six] at \$6). In other words, the employee is entitled to be paid an amount equal to \$12 an hour for [forty] hours and \$18 an hour for the [six] hours of overtime, or a total of \$588.

*Id.*

66. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986).

67. *Id.* (citing *Triple "AAA" Co.*, 378 F.2d at 887).

68. *Id.* at 304.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Walton*, 786 F.2d at 304. The court notes the employees were initially treated as independent contractors, which would have exempted them from the FLSA overtime requirements, but they were no

Club argued that one of the six employees had earned a regular rate more than one-and-a-half times the minimum wage.<sup>73</sup> Under section 207(i), the employee was exempt from overtime compensation.<sup>74</sup> In calculating the employee's regular rate, United Consumers Club divided the total compensation she had been paid by the hours she claimed to have worked.<sup>75</sup> Her calculated regular rate came to \$5.61 per hour.<sup>76</sup>

$$\text{Total compensation (all commissions)} \div \text{total hours (all hours worked)} = \text{regular rate}$$

The Seventh Circuit then created a new rule for this formula, adding on to the Tenth Circuit's method of calculating a commissioned employee's regular rate.<sup>77</sup> Judge Easterbrook, writing for the Seventh Circuit, posited:

[T]here was no need to break both [compensation and hours] down week by week. Commission salesman have fluctuating hours and income, and it is unlikely that Congress meant to require employers to pay overtime in the lean weeks when the fat weeks more than make up. Other cases have used periods as long as a year to establish average wages.<sup>78</sup>

Judge Easterbrook also pointed to the text of the retail or service overtime exemption statute, § 7(i), which suggests a month is the minimum reasonable accounting period, and therefore a year is acceptable.<sup>79</sup> As a result, the court found the single salesperson was

---

longer treated as such at the time of the appeal. *Id.*

73. *Id.* at 307.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Walton*, 786 F.2d at 307.

78. *Id.*

79. *Id.*

paid an average of \$5.61 an hour.<sup>80</sup> In 1986, the minimum wage was \$3.35 per hour, and one-and-a-half times the minimum wage was \$5.03 per hour.<sup>81</sup> The employee was dismissed from the lawsuit for earning more than half of her compensation from commissions and for earning a regular rate more than one-and-a-half times the minimum wage.<sup>82</sup> She was awarded nothing.<sup>83</sup>

This equation oversimplifies the process of determining an employee's regular rate of pay. The regular rate is the "hourly rate actually paid for the normal, non-overtime workweek."<sup>84</sup> The Seventh Circuit's equation ignores the FLSA's requirement that pay earned in a particular workweek, that is, seven consecutive twenty-four hour periods, must be paid on the regular payday for the pay period when it is earned.<sup>85</sup> When compensations and hours are averaged over a year's time, the workweek requirement ceases to hold meaning.<sup>86</sup> In the eyes of the law, each workweek is meant to stand alone.<sup>87</sup> As Judge Easterbrook said: "commissions fluctuate."<sup>88</sup>

The Labor Code provides for times when the workweek is unworkable.<sup>89</sup> This Note focuses on the meaning of 29 C.F.R. §

80. *Id.*

81. *Id.*

82. *Id.*

83. *Walton*, 786 F.2d at 308.

84. 29 C.F.R. § 779.419(b) (2018). "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945).

85. *See Walton*, 786 F.2d at 307. Compare the Seventh Circuit's equation with the Code of Federal Regulations, which says:

The workweek is the unit of time to be taken as the standard in determining the applicability of an exemption. An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive [twenty-four]-hour periods. It need not coincide with the calendar week. If in any workweek an employee does only exempt work, he is exempt from the wage and hour provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in [one] workweek and not in the next.

29 C.F.R. § 780.10 (2018).

86. *See* 29 C.F.R. § 778.104 (2018). "The [FLSA] takes a single workweek as its standard and does not permit averaging of hours over [two] or more weeks." *Id.*

87. *See id.*

88. *Walton*, 786 F.2d at 307.

89. 29 C.F.R. § 778.120 (2018). "If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be

778.120, which creates an exception to the workweek rule when “it is not possible or practicable to allocate . . . [an employee’s] commission actually earned or reasonably presumed to be earned each week.”<sup>90</sup> At this point, “some other reasonable or equitable method must be adopted.”<sup>91</sup> The regulation provides two methods to use in the alternative: (1) allocation of equal amounts to each week; or (2) allocation of equal amounts to each hour worked.<sup>92</sup> The Seventh Circuit uses the second of these methods.<sup>93</sup> This regulation allows averaging compensation and wages across hours worked only when it is impossible or impractical to allocate commission.<sup>94</sup>

*B. No Commissions Allocated Outside of the Period Earned*

In April 2017, the Eleventh Circuit held that when calculating an employee’s regular rate of pay, commissions cannot be allocated outside of the period in which they are earned.<sup>95</sup> In *Freixa*, the Eleventh Circuit reversed summary judgment for the cruise company, finding a salesman not exempt from the FLSA and remanding the wage and hour case to determine whether the employee was eligible for overtime pay for months when he earned no commission.<sup>96</sup> Prestige Cruise Lines had a drawn-out method of calculating commissions.<sup>97</sup> First, it totaled up all the cruises the employee had

---

adopted.” *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Subsection (a) states: “Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount.” *Id.* Subsection (b) states:

Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period.

§ 778.120.

93. *Walton*, 786 F.2d at 307.

94. § 778.120.

95. *Freixa v. Prestige Cruise Servs., LLC*, 853 F.3d 1344, 1346, 1348 (11th Cir. 2017).

96. *Id.* at 1345.

97. Appellees’ Answer Brief at 11–12, *Freixa v. Prestige Cruise Svcs., LLC*, 853 F.3d 1344 (2017) (No. 16-13745), 2016 WL 7336874, at \*11–12.

booked.<sup>98</sup> Next, it subtracted all the employee's booked cruises that had been canceled that month.<sup>99</sup> Finally, Prestige applied a progressive commission rate that would increase as more cruise packages were sold.<sup>100</sup> During the months of July and November, Freixa earned no commission.<sup>101</sup> However, in March he earned nearly \$9,000 for his February sales.<sup>102</sup> Because Prestige deferred commission payments to subsequent months—when cruises were canceled the sales agent did not earn commission, even if the cancellation occurred months later—it became impossible, according to Prestige, to ascertain exactly which weeks Freixa earned his commissions.<sup>103</sup>

The district court followed the Seventh Circuit method and divided Freixa's entire annual pay across every hour in every week he worked:

$$\begin{aligned} & \$73,164 \text{ (total annual wages)} \div 52 \text{ weeks} = \\ & \$1,403.85, \text{ Freixa's weekly compensation} \\ & \$1,407 \div 60 \text{ (average hours worked each week)} = \end{aligned}$$

---

98. *Freixa*, 853 F.3d at 1345. The Eleventh Circuit recounted:

To calculate the commissions due for each month, the cruise service assessed the sum of all bookings an employee completed in the month and subtracted bookings the employee completed in previous months that were cancelled in the current month. The cruise service then multiplied the gross number of bookings by a percentage that changed progressively.

*Id.*

99. *Id.*

100. *Id.* The rate would pay no commission for up to three bookings and then a commission of 1.25% for four to six bookings. *Id.* The rate would grow with the employee's sales. *Id.*

101. *Freixa*, 853 F.3d at 1345.

102. *Id.*

103. *Id.* at 1347. Because commission percentage multipliers increased as the number of sales increased, and because of the effect of cancellations on the multiplier, it was not possible for Prestige to determine the monetary amount of commissions generated by the sale of a particular cruise sale on the same day that cruise was sold. *Id.* For example, if Mr. Freixa sold his first cruise of the month on June 2, 2014, there would have been no way of knowing on June 2 whether Mr. Freixa would sell no more cruises that month, and thus earn no commission for the June 2 sale; Mr. Freixa would sell four more cruises that month, and thus earn a 1.25% commission for the June 2 sale; Mr. Freixa would sell 30 more cruises that month, and thus earn a 3.45% commission for the June 2 sale; Mr. Freixa would sell some other number of cruises that month and have a different commission percentage multiplier allocated to the June 2 sale; or whether Mr. Freixa's sales from previous months would be cancelled, thus decreasing the multiplier allocated to the June 2 sale. *Id.* Therefore, there was no feasible way to trace a proportion of each commission payment to a specific workweek retrospectively in this case. *Id.* at 1345, 1347.



\$23.45, Freixa's regular rate<sup>104</sup>

Determining that Freixa's regular rate was significantly higher than one-and-a-half times the minimum wage, \$10.88, the district court held Freixa was exempt from the FLSA's overtime requirements and dismissed his claim.<sup>105</sup>

In reversing, the Eleventh Circuit pointed to 29 C.F.R. § 778.104, which states that each workweek stands alone.<sup>106</sup> As such, hours may not be averaged over two or more weeks.<sup>107</sup> For example, an employee who works thirty hours one week and fifty hours the next must still receive overtime pay for ten hours worked during the second week.<sup>108</sup> An employer may not average the two weeks together to get forty hours.<sup>109</sup> The circuit court also cites to another provision of § 778.119, which provides that commission should be "apportioned back over the workweeks of the period during which it was earned."<sup>110</sup>

---

104. *Freixa*, 853 F.3d at 1345–46. "The district court then divided Freixa's entire remuneration for the year across every hour in every week he worked—assuming sixty hours per week—and arrived at an average hourly rate of \$23.45." *Id.* at 1347.

105. *Id.* at 1346. The district court invoked, but misapplied, a regulatory exception to the general rule about calculating overtime pay because the court failed to see that the commission payments could be allocated within the month in which they were earned. *Id.* at 1347.

106. 29 C.F.R. § 778.104 (2018). The workweek stands alone: [R]egardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

*Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Freixa*, 853 F.3d at 1347; 29 C.F.R. § 778.119 (2018).

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned.

The court here takes the word “period” to mean “computation period,” which it says refers to “each month of [Freixa’s] employment, not the whole year he worked.”<sup>111</sup> The court bases this distinction off of § 778.120, wherein the phrase “computation period” is used eight times, interchangeably with the term “period.”<sup>112</sup> Confusingly, the Eleventh Circuit defined “period” to mean “computation period” and “computation period” to mean “period” despite the different wording in the regulation.<sup>113</sup> Both terms are construed to mean “month” because that is how often Freixa was paid and how long it took his commissions to be calculated.<sup>114</sup> Furthermore, § 778.120 appears to imply that “period” does not necessarily mean “month” when “there are facts which make it inappropriate to assume equal commission earnings for each workweek.”<sup>115</sup> The regulation even specifies how to calculate overtime “[f]or a commission computation period of one month,” then refers to a “semimonthly computation period,” and a

---

§ 778.119.

111. *Freixa*, 853 F.3d at 1347. Here, the court is relying on the contextual facts of Prestige Cruise’s pay structure, which pays out commissions in the months subsequent to when they are earned. *Id.* “Although these regulations use the term ‘period,’ the context makes clear that ‘period’ means ‘computation period,’ which, for Freixa, refers to each month of his employment, not the whole year he worked.” *Id.*

112. *Id.*; 29 C.F.R. § 778.120 (2018). Referring to the terms “computation period” and the “period,” Judge Pryor writes, “[W]e construe the terms to carry the same meaning.” *Freixa*, 853 F.3d at 1347 (citing ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012)) (“A word or phrase is presumed to bear the same meaning throughout a text . . .”).

113. *Freixa*, 853 F.3d at 1347. Judge Pryor writes, “Section 778.120 uses the phrase ‘computation period’ eight times, and uses the term interchangeably with ‘period,’ so we construe the terms to carry the same meaning.” *Id.* (citation omitted). Judge Pryor reads the words to have the same meaning based on the context of their use within the regulation. *Id.*

114. *Id.* Section 778.120 limits the district court to allocating monthly commissions only among the “workweeks of the [computation] period”—that is, each particular month. *Id.*

115. § 778.120(b). The number of hours an employee works each week may vary significantly. *Id.* When this is the case, § 778.120(b) says:

[I]t is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

*Id.*

“commission computation period of a specific number of workweeks,” and finally, “a commission computation period of 96 hours.” Thus, the court’s explanation that “computation period” here means month is based on the fact that the commission payments were typically disbursed one month after they were earned.<sup>116</sup>

Ultimately, the Eleventh Circuit concluded that Freixa earned each commission within a single month.<sup>117</sup> Therefore, the commissions earned in January could be allocated only across the weeks of January.<sup>118</sup> The remaining question was how many hours Freixa worked during the month-long computation period.<sup>119</sup> That question of fact precluded summary judgment.<sup>120</sup> The case was remanded to decide how many hours Freixa worked in any individual workweek.<sup>121</sup> The Eleventh Circuit overcame the exception granted in § 778.120, permitting wage allocation across hours worked to determine an employee’s regular rate by interpreting the regulation to mean the commission payments “can be allocated only across the weeks that comprise the computation period for that particular payment.”<sup>122</sup> The court ruled that the computation period in this case was not a year.<sup>123</sup>

The tension between these two methods of determining the regular rate arises from the uncertainty of determining a payment’s computation period.<sup>124</sup> The FLSA requires a workweek standard, but—in special situations—provides for pay periods longer than one week. The question of whether a computation period can be as long as a year was left unresolved.<sup>125</sup> After all, a “representative period” for testing an employee’s compensation under § 207(i) may be as long as one year.<sup>126</sup> How can the workweek standard and the

---

116. *Freixa*, 853 F.3d at 1347; § 778.120(a)(1).

117. *Freixa*, 853 F.3d at 1347.

118. *Id.* at 1347–48.

119. *Id.* at 1348.

120. *Id.*

121. *Id.*

122. *Id.* at 1347; 29 C.F.R. § 778.120(b) (2018).

123. *Freixa*, 853 F.3d at 1348.

124. *See id.* at 1347; § 778.120.

125. *See Freixa*, 853 F.3d at 1347.

126. 29 C.F.R. § 779.417(c) (2018). The regulation states:

requirement that commission payments only be allocated across the periods in which they are earned be balanced with the exception allowing reasonable and equitable allocation of the commission to each week or hour worked in situations where deferred commissions are not identifiable as earned in particular workweeks? The Eleventh Circuit's rejection of § 778.120 effectively overrules the application of this regulation because employers will be hard-pressed to find a situation where deferred commission payments are *less* identifiable than in *Freixa*.

### III. Proposal

At the first available opportunity, the Department of Labor should publish an opinion resolving the ambiguity regarding the proper method of allocating deferred commissions in overtime calculation by confirming the Eleventh Circuit's interpretation of the law in *Freixa* for all United States jurisdictions. Additionally, the language of § 778.120 should be modified to better explain the references to the computation period, or the time an employer takes to calculate commission. The Eleventh Circuit's description of the rule for allocating deferred commission payments more closely carries out the intent of the FLSA's workweek provision.<sup>127</sup> Furthermore, the

---

The representative period for determining whether more than half of an employee's compensation represents commissions cannot, under the express terms of [§] 7(i), be less than [one] month. The period chosen should be long enough to stabilize the measure of the balance between the portions of the employee's compensation which respectively represent commissions and other earnings, against purely seasonal or plainly temporary changes. Although the Act sets no upper limit on the length of the period, the statutory intent would not appear to be served by any recognition of a period in excess of [one] year as representative for purposes of this exemption. There would seem to be no employment situation in a retail or service establishment in which a period longer than a year would be needed to represent the seasonal and other fluctuations in commission compensation.

*Id.*

127. 29 U.S.C. § 207(a)(1) (2012), *invalidated by* Texas v. United States, Civil Action No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019). The Labor Code introduces the "workweek" concept by designating the maximum hours an employee may work in one week. *Id.*

[N]o 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

Department of Labor has also opined that “[t]he hourly rate averaged over the entire representative period may not be used to satisfy the requirements of [§] 7(i)(1),” more conveniently referred to as the retail or service overtime exemption.<sup>128</sup>

#### A. *Clarifying the Ambiguity in Deferred Commission Allocation*

As discussed in Part II, there is an ambiguity between the Seventh and Eleventh Circuits about how deferred commissions may be allocated when the commissions cannot be identified as earned in particular workweeks.<sup>129</sup>

##### 1. *The Importance of the Computation Period*

Section 778.120 points out that sometimes—and in reality, most times—a commissioned employee does not earn equal commission every week.<sup>130</sup> Such is the nature of working on commission; wages often vary depending on an employee’s week-to-week success making sales.<sup>131</sup> In those instances, the regulation says it is appropriate to allocate commission to each hour worked during the commission computation period.<sup>132</sup> This period refers to the time an employer takes to calculate the employee’s commission earnings.<sup>133</sup> A 1978 FLSA opinion letter heavily implies the commission

---

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.

*Id.*

128. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (May 27, 1971), 1971 WL 33072.

129. See discussion *supra* Part II.

130. Sundheim, *supra* note 43.

131. *Id.*

132. 29 C.F.R. § 778.120 (2018).

133. See *id.* § 778.121. Per the regulation:

If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period.

*Id.*

computation period is different from the pay period, but that the two can encompass the same time span.<sup>134</sup> It is not immediately clear, however, which period is referred to in § 778.120, which permits “some other reasonable and equitable method” to “allocate the commission among the workweeks of the *period*.”<sup>135</sup> Judge Pryor wrote in *Freixa* that context informs the reader that this “period” refers to the computation period, not the pay period or term of employment as other courts have inferred.<sup>136</sup> The Department of Labor should clarify this regulation, ensuring that future judges and employers understand how to proceed in wage and hour suits involving deferred commissions with an unknown time of earning.

When read this way, the regulation creates a place for the allocation of deferred, unidentifiable commissions. Rather than attempting to allocate the commissions among the weeks worked, it is much simpler to allocate the commissions among the time periods during which the employer calculated those commissions. For example, if an employee earned, on average, more than one-and-a-half times the minimum wage in January and more than half of that was on commission, and January’s commission was calculated and paid out on February’s paycheck, then for the purposes of overtime calculation—assuming the employee worked more than forty hours on average each week of January—those commissions should only be allocated across the weeks of the computation period for January. In effect, this interpretation would serve to break up the employee’s schedule into sections in which the commission wages could be

---

134. See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (July 28, 1978), 1978 WL 51403. The opinion letter explains:

You state that these employees are paid on a commission basis and that the pay period and commission computation period cover [one] month. You will multiply the commission payment by [twelve] and divide by [fifty-two] to get the amount of commission allocable to a single week. The commission for a single week is divided by the total number of hours worked in that week. If this figure is less than the minimum wage, the difference is made up at this point—thus assuring that the employee receives at least the statutory minimum for each hour worked during each week of the monthly pay period.

*Id.*

135. § 778.120 (emphasis added); see also *Freixa v. Prestige Cruise Servs., LLC*, 853 F.3d 1344, 1347 (11th Cir. 2017).

136. *Freixa*, 853 F.3d at 1347.

placed. This interpretation maintains the FLSA's workweek concept by breaking up these time periods for fair overtime calculation.

## 2. *Maintaining the Workweek Concept*

The retail or service overtime exemption's minimum pay requirement must be determined on a workweek-by-workweek basis.<sup>137</sup> In fact, the Department of Labor specifically requires computing the regular rate of pay by the workweek for employees primarily paid by commissions.<sup>138</sup> By accepting the Eleventh Circuit's interpretation of the commission allocation rule, the spirit of the workweek is preserved, albeit not necessarily in the form of a literal week. The workweek is the "basic unit" of the FLSA's overtime pay requirement.<sup>139</sup> Department of Labor regulations require the workweek be the basis for deciding whether overtime pay is due.<sup>140</sup> Furthermore, as the Code of Federal Regulations explicitly states, "[t]he Act takes a single workweek as its standard and does not permit averaging of hours over [two] or more weeks."<sup>141</sup> The Department of Labor explicitly disfavors averaging commissions across multiple earning periods.<sup>142</sup>

Substituting the workweek with the commission computation period would alleviate the strain that deferred, unidentifiable

---

137. 29 C.F.R. § 779.419(a) (2018). That regulation states:

[O]ne additional condition must be met in order for the employee to be exempt under [§] 7(i) from the overtime pay requirement of [§] 7(a) of the Act in a *workweek* when his hours of work exceed the maximum number specified in section (a). This additional condition is that his 'regular rate' of pay for *such workweek* must be more than one and one-half times the minimum hourly rate applicable to him from the minimum wage provisions of [§] 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee *in that particular workweek*.

*Id.* (emphasis added).

138. *Id.*

139. *O'Brien v. Town of Agawam*, 350 F.3d 279, 298 (1st Cir. 2003).

140. *See* 29 C.F.R. § 778.100–106 (2018). The FLSA allows, in rare circumstances, overtime to be calculated for a period other than a workweek. *See* 29 U.S.C. § 207(j) (2012) (fourteen days for certain hospital employees), *invalidated by* *Texas v. United States*, Civil Action No. 4:18–cv–00167–O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appeal filed 5th Cir. Jan. 7, 2019); *id.* § 207(k) (up to twenty-eight days for certain workers engaged in fire protection or law enforcement activities).

141. 29 C.F.R. § 778.104 (2018).

142. *Id.*

commissions would place on the workweek concept. This solution would be much more palatable to the Department of Labor instead of averaging regular rates over multiple weeks of work. In addition to resolving employer and employee uncertainty, creating uniformity in this way for a federal wage rule will solidify protections for employees and prevent employers from exploiting a loophole to cut down the wages they must pay commissioned employees.

### *B. Deference to Administrative Agency Opinions*

The Department of Labor issues opinions, a field operations handbook, amicus briefs, and other materials to publicize its views on how to interpret the FLSA. Courts should give some deference to these formal expressions of opinion when deciding wage and hour suits.<sup>143</sup> The Supreme Court has held that an agency's interpretation of a law published in an informal document, such as an opinion letter, is entitled to deference.<sup>144</sup> The letter is not controlling on the courts, but it does denote a body of experience and judgment to which courts can look for guidance.<sup>145</sup> Forty years later in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court created a two-step test to determine if deference should be given to the agency's interpretation: (1) has Congress spoken on the matter; and (2) if not, and if the law does not address the current issue, is the agency's answer based on a permissible construction of the law.<sup>146</sup> The Court

---

143. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See generally *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

144. *Skidmore*, 323 U.S. at 140. Herein, the Court noted several factors that would go to the weight of the administrator's opinion:

We consider that the rulings, interpretations and 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.

*Id.*

145. *Id.*

146. *Chevron*, 467 U.S. at 842–43.

When a court reviews an agency's construction of the statute which it



assumes that where Congress has elected not to address the law, “there is an express delegation of authority to the agency” to clear up the law by regulation.<sup>147</sup>

Under *Auer v. Robbins*, the Supreme Court deferred to the Labor Secretary’s interpretation of an ambiguous regulation.<sup>148</sup> Here, although the regulation is controlling,<sup>149</sup> several Department of Labor opinion letters provide persuasive authority for the Eleventh Circuit’s interpretation.<sup>150</sup> In 1971, 1976, and again in 2005, the Department of Labor’s Wage and Hour Division opined in letters a variation of the following sentiment, contained in the 2005 letter:

[T]he regular rate requirement of [§] 7(i) [the retail and service overtime exemption] applies on a workweek basis. Averages of compensation for two or more weeks do not satisfy the “regular rate” requirement of the [7(i)]

---

administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.*

147. *Id.*

148. *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). The Court reasoned that, “because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’” *Id.*

149. *Chevron*, 467 U.S. at 843–44. In *Chevron*, the Supreme Court concluded:

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

*Id.*

150. See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Oct. 24, 2005) [hereinafter Opinion Letter 2005]; U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Mar. 26, 1976) [hereinafter Opinion Letter 1976]; U.S. Dep’t of Labor, *supra* note 128.

exemption. Therefore, you must assess the applicability of [§] 7(i) on a workweek-by-workweek basis for each employee.<sup>151</sup>

Thus, the agency has explicitly opposed the Seventh Circuit's position on commission allocation for several decades and that opinion should be given deference. That opposition has taken other forms. Department of Labor amicus briefs are also entitled to deference under *Auer*.<sup>152</sup> In fact, the Department filed an amicus brief in *Freixa*, siding with the plaintiff.<sup>153</sup> The Eleventh Circuit adopted the Department of Labor's interpretation—with a twist.<sup>154</sup> The Department of Labor argued for allocating the commissions across the workweeks in which they were earned, without considering how to do so in light of the deferrals.<sup>155</sup> The Eleventh Circuit decided to use the computation period in place of the workweek, as discussed above.

Given the ambiguity within the regulation for allocating deferred commissions, clarity should be brought to § 778.120. The Eleventh Circuit's interpretation of the rule, only permitting allocation of commission across the time period in which it was earned or computed, more closely aligns with the goals of the FLSA and is expressly agreed to by the Department of Labor. For these reasons, the Department of Labor should clarify the ambiguity within

---

151. Opinion Letter 2005, *supra* note 150 (internal citations omitted); *see also* Opinion Letter 1971, *supra* note 150; U.S. Dep't of Labor, *supra* note 128.

152. *Auer*, 519 U.S. at 462. In responding to the petitioner's complaint that the Labor Secretary's interpretation of a regulation came in the form of an amicus brief, the Court said:

[T]hat does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "*post hoc* rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

*Id.* (citation omitted)

153. Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant at 1, *Freixa v. Prestige Cruise Servs., LLC*, 853 F.3d 1344 (2017) (No. 16-13745), 2016 WL 6833773, at \*1 [hereinafter Brief for the Secretary of Labor].

154. *Freixa*, 853 F.3d at 1345.

155. *See* Brief for the Secretary of Labor, *supra* note 153, at 9-10.

§ 778.120 by clearly stating that commissions may not be allocated across multiple pay or computation periods.

#### CONCLUSION

Across the country, employees earning nontraditional commission payments are being compensated differently for overtime work.<sup>156</sup> The Seventh Circuit permits averaging commission earnings across a year for overtime calculation, but the Eleventh Circuit requires allocating commissions to the period in which they were earned or computed. Despite the schism in opinion, both circuit courts rely on the labor regulation § 778.120: “[d]eferred commission payments not identifiable as earned in particular workweeks.”<sup>157</sup> However, under the Seventh Circuit’s reasoning, “an employer could pay an employee less than the minimum weekly pay required by the exemption for weeks upon weeks between commission payments on the grounds that the employee . . . will be paid enough commissions during the entire course of employment such that the employee’s average hourly rate will exceed one and one-half times the minimum wage.”<sup>158</sup> Additionally, under this scheme, an employee could quit work or be fired before her commissions are paid.<sup>159</sup> The Department of Labor should, at its next opportunity, work to remedy the Seventh Circuit’s misunderstanding of the rule by rewriting the regulation or publishing an opinion in regard to the next potential case addressing the issue before the court. Doing so would serve the goals of the FLSA to maintain a workweek-by-workweek approach.<sup>160</sup>

---

156. *See generally Freixa*, 853 F.3d at 1347; *Morse v. Equity Lifestyle Props., Inc.*, No. 2:13-cv-00408-JMS-MJD, 2014 WL 1764927, at \*6 (S.D. Ind. Apr. 30, 2014); *Owopetu v. Nationwide CATV Auditing Servs., Inc.*, No. 5:10-cv-18, 2011 WL 883703, at \*10 (D. Vt. Mar. 11, 2011). *But see Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986); *Schwind v. EW & Assocs., Inc.*, 371 F.Supp.2d 560, 568 (S.D.N.Y. 2005).

157. 29 C.F.R. § 778.120 (2018).

158. Brief for the Secretary of Labor, *supra* note 153, at 2–3.

159. *Id.* at 3.

160. 29 C.F.R. § 778.104 (2018).