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## Second Circuit Clarifies Required Degree of Specificity To State An Overtime Claim Under FLSA, Rejects “Gap-Time” Claims

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On March 1, 2013, the Second Circuit in *Lundy v. Catholic Health Sys. of Long Island Inc.*, No. 12-1453, 2013 U.S. App. LEXIS 4316 (2d Cir. Mar. 1, 2013) affirmed the dismissal of a wage and hour complaint in which plaintiffs (a group of three health care employees) alleged that they had worked uncompensated meal periods and time before and after scheduled shifts and were owed overtime compensation for hours worked in excess of forty (40) hours a week pursuant to the Fair Labor Standards Act (“FLSA”). Importantly, the Court, for the first time, considered the degree of specificity required to state an overtime claim under the FLSA and held that the FLSA does not provide for gap-time claims, even when an employee has worked overtime.

### Pleading Requirements Under the FLSA

The Court rejected as insufficient the following allegations: “typically” missing meal breaks or interruptions of meal breaks; “typically” working an additional 15 minutes before or after each break without additional compensation; and not being paid for training time that “typically” lasted 30 minutes and other training that consisted of, “on average,” 10 training hours per year. Ultimately, the Second Circuit held that, although plaintiffs’ allegation “could theoretically put [plaintiffs] over the 40 hour mark in one or another unspecified week (or weeks) ... [plaintiffs’] allegations supply nothing but low octane fuel for speculation, not the plausible claim that is required.” *Lundy*, 2013 U.S. App. LEXIS 4316 at \*18. Accordingly, in order to sufficiently plead a FLSA overtime

claim, a plaintiff must adequately allege: (1) forty (40) hours of work in a given workweek; and (2) some uncompensated time in excess of forty (40) hours.

### Gap-Time Claims Under the FLSA

The Second Circuit also affirmed, as a matter of law, that the FLSA does not recognize a separate claim for “gap time” or straight time pay for unpaid hours worked. A “gap” claim is one in which an employee has not worked forty (40) hours in a given week but seeks recovery of unpaid time worked, or in which an employee has worked over forty (40) hours in a given week but seeks recovery for unpaid work under forty (40) hours. Rather, the FLSA only recognizes claims for failure to pay minimum wage – where the total wages for the week, divided by the total hours worked, fail to meet the minimum wage – and failure to pay overtime.

### Exercise of Supplemental Jurisdiction

This holding, while affecting state law claims for overtime, does not affect state law claims for unpaid compensation. As the Second Circuit explained, the exercise of supplemental jurisdiction is always within the sound discretion of the courts. The Court went on to instruct the lower courts to “consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise” supplemental jurisdiction. The fact that the Second Circuit approves of exercising

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supplemental jurisdiction over state law claims, even upon the dismissal of all federal claims, is quite favorable to employers who are more apt to keep state wage and hour claims in federal court.

Ultimately, the Second Circuit reversed the District Court's dismissal of the New York Labor Law ("NYLL") claims holding, in contrast to the FLSA, that the NYLL does provide a remedy for "gap time" claims and, thus, the plaintiffs were entitled to bring such claims. Employers should take note of this part of the opinion and be sure to consider the potential distinction between the FLSA and state law.

**The Bottom Line.** This decision provides a powerful instrument in an employer's tool box to dismiss vague and conclusory FLSA claims early on. As always, however, employers and in-house counsel should always be on the look-out for ways to reduce the risk of FLSA claims. ■

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