

Third Circuit Rejects “Overtime Gap Time” Claims Under the FLSA, Deepening Circuit Split

WRITTEN BY

Brian R. Ellixson | Tracey E. Diamond

KEY POINTS

- The Third Circuit held in *Secretary of Labor v. Comprehensive Healthcare Management Services, LLC* that the Fair Labor Standards Act (FLSA) does not provide a cause of action for “overtime gap time” — compensation for non-overtime hours worked in a pay period when the employee has also worked overtime.
- The decision deepens an existing circuit split, with the Second and Third Circuits rejecting overtime gap time claims under the FLSA and the Fourth Circuit holding such claims are viable.
- Employers with nationwide operations must navigate conflicting FLSA precedent across circuits, as well as overlapping state wage and hour laws that may independently provide recovery for unpaid gap time.
- Employers should ensure accurate recordkeeping, payment for all hours worked, and proper inclusion of all forms of compensation in the regular rate of pay when calculating overtime.

On June 3, 2026, in *Secretary of Labor v. Comprehensive Healthcare Management Services, LLC*, the U.S. Court of Appeals for the Third Circuit held that the Fair Labor Standards Act (FLSA) does not provide a cause of action for “overtime gap time” — compensation for non-overtime hours worked in a pay period when the employee has worked overtime. This decision extends prior Third Circuit law rejecting pure gap time claims under the FLSA and deepens a circuit split about the viability of overtime gap time claims under the FLSA. Employers with nationwide operations now have additional guidance on gap time claims under the FLSA but need to be aware of conflicting FLSA precedent and overlapping state law requirements to ensure wage and hour compliance.

BACKGROUND

In *Comprehensive Healthcare*, the Secretary of Labor sued Comprehensive Healthcare Management Services, an operator of multiple skilled nursing and assisted-living facilities in Pennsylvania, alleging widespread FLSA violations, including recordkeeping failures, “pay-by-schedule” practices (*i.e.*, paying employees based on scheduled hours rather than actual hours worked), automatic meal-break deductions, failure to pay overtime, and miscalculation of the regular rate.

After a bench trial, the district court awarded almost \$36 million in damages. A portion of that award compensated employees for unpaid straight-time hours worked in weeks when they also worked overtime, which the court labeled “overtime gap time.”

Comprehensive Healthcare appealed, arguing among other things that the district court erred in finding that claims for overtime gap time are cognizable under the FLSA.

WHAT IS “GAP TIME”?

The FLSA requires employers to pay nonexempt employees: (1) a minimum wage, 29 U.S.C. § 206; and (2) overtime pay for hours worked in excess of 40 hours per workweek at a rate not less than one-and-one-half times employees’ regular rate of pay. *Id.* at § 207.

“Gap time” refers to uncompensated time worked that is not covered by the FLSA overtime provisions because it does not exceed the overtime limit and is not covered by the FLSA’s minimum wage provisions because, even though it is uncompensated, the employees are still paid at least minimum wage when their wages are averaged across their actual time worked.

There are two forms of gap time — “pure” gap time and “overtime” gap time:

- Pure gap time refers to straight-time hours in a week where the employee does not work for more than 40 hours. For example, where an employee works 38 hours in a week but is paid only for 35 of those hours, the three unpaid straight-time hours are considered to be pure gap time.
- Overtime gap time refers to the straight-time hours worked when the employee works 40 or more hours in a workweek. For example, if an employee works 43 hours but is only paid for 38 hours of non-overtime work plus three hours of overtime, the two unpaid straight-time hours are considered to be overtime gap time.

Courts, including the Third Circuit, have consistently held that pure gap time claims, *i.e.*, straight time wages for unpaid work during pay periods where the employee did not work overtime, are not cognizable under the FLSA. *See, e.g., Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1284 (4th Cir. 1996); *Banks v. First Student Management LLC*, 237 F.Supp.3d 397, 403 (E.D. La. 2017); *Valcho v. Dallas Cnty. Hosp. Dist.*, 658 F.Supp.2d 802, 811 (N.D. Tex. 2009); *Davis v. Abington Memorial Hospital*, 765 F.3d 236, 244 (3d Cir. 2014) (“Courts widely agree that there is no cause of action under the FLSA for ‘pure’ gap time wages — that is, wages for unpaid work during pay periods without overtime.”). However, the viability of overtime gap time claims remained an open question of law in the Third Circuit prior to the *Comprehensive Healthcare* decision.

CIRCUIT SPLIT ON THE VIABILITY OF OVERTIME GAP TIME CLAIMS

Other Courts of Appeal considering the viability of overtime gap time claims under the FLSA have reached opposite conclusions. For example, in *Lundy v. Cath. Health Sys. Of Long Island, Inc.*, 711 F.3d 106, 115-116 (2d Cir. 2013), the Second Circuit held that overtime gap time claims are not cognizable under the FLSA. In *Lundy*, the Second Circuit looked to the text of the FLSA and concluded that the FLSA only requires employers to pay minimum wage and overtime, not gap time, and noted that the statute “simply does not consider or afford a recovery for gap-time hours.” *Id.* at 116.

In contrast, in *Conner v. Cleveland County*, 22 F.4th 412, 426 (4th Cir. 2022), the Fourth Circuit held that overtime gap time claims *are* viable under the FLSA. In that case, the Fourth Circuit concluded that the FLSA’s silence on overtime gap time created ambiguity and therefore deferred to the Department of Labor’s interpretation of the FLSA that overtime gap time claims are cognizable under the FLSA. *See id.* at 424-26 (adopting the DOL’s view that an employer cannot be said to have been properly paid overtime unless it has first paid all straight-time wages owed under the employment agreement for the non-overtime hours worked in the same week); *see also* 29 C.F.R. § 778.315 (DOL guidance interpreting FLSA gap time issue).

THE THIRD CIRCUIT'S DECISION

The Third Circuit reversed the district court's award of overtime gap time pay and held that the FLSA provides no remedy for overtime gap time, so long as the employee's regular rate of pay is sufficiently above minimum wage such that the employer's failure to pay for a certain number of hours does not run afoul of the FLSA's minimum wage requirement. Like the Second Circuit in *Lundy*, the Third Circuit concluded that "the FLSA ... requires payment of minimum wages and overtime wages only" and "simply does not consider or afford a recovery for gap time hours."

In reaching that conclusion, the court rejected the Secretary of Labor's argument that overtime is not truly paid unless the employee is also paid for all straight-time hours worked. The Third Circuit found that the FLSA's silence regarding overtime gap time did not create ambiguity, and therefore, the court would not defer to the DOL's interpretation of the statute. Further, even if the Third Circuit were to consider the DOL's guidance on overtime gap time claims, it would decline to afford it deference because the guidance lacked a reasoned explanation grounded in the statutory text.

The majority opinion noted that its decision did not leave aggrieved employees without recourse; plaintiffs may resort to state wage and hour laws or file a breach of contract claim to recover for unpaid gap time.

TAKEAWAYS

The *Comprehensive Healthcare* decision makes clear that gap time claims of any kind are not viable under the FLSA, at least not in the Second and Third Circuits. While the decision is good news for employers in these circuits, it highlights the existing circuit split on this topic for employers with national operations. Additionally, employers should take note that numerous state laws provide for recovery of unpaid gap time (*i.e.*, the Pennsylvania Wage Payment and Collection Law, the New Jersey Wage Payment Law, the Massachusetts Wage Act, the Texas Payday Law, the New York Labor Law). Additionally, employers who fail to pay for gap time at the contracted hourly rate risk breach of contract claims from employees. Finally, the decision highlights common pitfalls for employers when it comes to wage and hour compliance, such as inadequate recordkeeping, failure to pay for all hours worked, including when employees work through meal breaks, and failure to include additional compensation paid to employees, such as bonuses, in the regular rate of pay when calculating overtime pay.

Regardless of location, employers should: (1) maintain accurate time and pay records; (2) ensure that all hours worked are captured and paid; (3) ensure that all forms of compensation are included in the regular rate of pay when calculating overtime.

If you have questions about the FLSA or other wage and hour laws, please reach out to your Troutman Pepper Locke employment counsel.

RELATED INDUSTRIES + PRACTICES

- [Labor + Employment](#)