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2017]

WERE THEY ON A BREAK? THE THIRD CIRCUIT TRIES TO
PROVIDE CLARITY IN MEALTIME COMPENSATION
CASES IN *BABCOCK v. BUTLER COUNTY*

ARIANNA K. McLAUGHLIN*

“Time is money.”¹

I. WHOSE TIME IS IT ANYWAY? AN INTRODUCTION TO MEAL PERIODS AND
THE FAIR LABOR STANDARDS ACT

Lunch breaks are important.² For many, a lunch break is the opportunity to get a breath of fresh air, sneak in some exercise, run a few errands, or even take a quick nap.³ In these situations the Fair Labor Standards Act (FLSA) requires employers to compensate employees for time they are working, but not for the time they are not.⁴ As it applies to a meal period, the FLSA requires compensation if an employee is on a bona-

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1. See Benjamin Franklin, *Advice to a Young Tradesman* (1748), reprinted in THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN 51, 51 (Ralph L. Ketcham ed., 2003) (1965) (“Remember that TIME is Money.”).

2. See Karen Pallarito, *Why Taking a Break at Work Makes You a Better Employee*, HEALTH.COM (Sept. 18, 2015), <http://www.health.com/home/workday-breaks-help-employees-reboot-researchers-say> [<https://perma.cc/QYK5-EHPH>] (reporting workers who take breaks “have more stamina and fewer aches and pain when they return to work”); Ruchika Tulshyan, *Why Your Lunch Break Is Sacred*, FORBES (Aug. 22, 2014, 10:25 AM), <http://www.forbes.com/sites/ruchikatulshyan/2014/08/22/why-your-lunch-break-is-sacred/#6be95ad56f51> [<https://perma.cc/4CBK-SSRL>] (noting breaks increase worker productivity and health); *We’re Not Taking Enough Lunch Breaks. Why That’s Bad for Business*, NPR: THE SALT (Mar. 5, 2015, 10:47 AM), <http://www.npr.org/sections/thesalt/2015/03/05/390726886/were-not-taking-enough-lunch-breaks-why-thats-bad-for-business> [<https://perma.cc/LV44-TMLW>] (noting changes in environment taken during breaks boosts creativity and innovation in workplace).

3. See *Babcock v. Butler Cty.*, 806 F.3d 153, 155 (3d Cir. 2015) (listing activities Butler County Prison employees would have utilized during lunch period absent restrictions).

4. See 29 U.S.C.A. §§ 201–19 (West 2012); see also *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 5 (1st Cir. 2003) (“The FLSA requires an employer to record, credit, and compensate employees for all of the time which the employer requires or permits employees to work.”), *aff’d on reh’g*, 360 F.3d 274 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

fide lunch break and is working, but if the employee is idle during the break, they will not be compensated.⁵

However, if there is one thing the television show *Friends* has taught us, it is that it is not always clear whether people are, or are not, on a break.⁶ The line between work and play begins to blur when employees have meal breaks, but face employer-imposed restrictions during that time.⁷ In these situations, it becomes unclear whether an employer's failure to compensate an employee constitutes an FLSA violation.⁸ In *Babcock v. Butler County*,⁹ the Third Circuit aimed to resolve some of the complexity over determining compensation for mealtime breaks.¹⁰

In *Babcock*, corrections officers were permitted a lunch period.¹¹ Nevertheless, during that time, the officers were required to remain in uniform, sit near emergency equipment, respond to any on-going emergencies, and were unable to leave the prison absent special permission by the warden.¹² The Third Circuit held that whether an employee must be compensated for a meal period is determined by the predominant benefit test (PBT) that requires compensation only if the employer receives the predominant benefit of the time.¹³ Considering the freedoms the officers maintained during their break and the existence of a collective bargaining agreement (CBA) between the parties, the court held the break period predominantly benefited the employees.¹⁴

5. See 29 C.F.R. § 785.19 (2017) (describing activities considered work and thus not bona fide meal period); see also 29 U.S.C.A. § 204 (delegating authority to Department of Labor to administer FLSA).

6. See *Friends: The One Where Ross and Rachel Take a Break* (NBC television broadcast Feb. 13, 1997).

7. See Johnathan A. Segal, *Legal Trends: Give Me a Break*, SOC'Y FOR HUM. RES. MGMT. (Dec. 1, 2013), <https://www.shrm.org/hr-today/news/hr-magazine/pages/1213-flsa-breaks.aspx> [<https://perma.cc/ELB2-PBDW>] (detailing various lunch-break scenarios and potential FLSA violations).

8. See *id.* (discussing ambiguity over when compensation for lunch breaks is required under FLSA). See generally *Babcock*, 806 F.3d at 155 (describing scenario where three-fourths of lunch break is compensated and one-fourth is not).

9. 806 F.3d 153 (3d Cir. 2015).

10. See generally *id.* at 155 (“This appeal raises the issue of whether a portion of time for the Butler County Prison corrections officers’ meal periods is compensable under the FLSA.”).

11. See *id.* (explaining that each corrections officer received one lunch break per one eight and one-quarter hours shift).

12. See *id.* (listing restrictions imposed upon employees).

13. See *id.* at 157–58 (affirming district court’s adoption of PBT and granting defendant’s motion to dismiss because court could not “find that the officers were ‘primarily engaged in work-related duties’ during . . . mealtime”).

14. See *id.* at 158 (holding collectively-bargained lunch period predominantly benefited employees). A collective bargaining agreement is a contract on employment derived from negotiations between the employer and its organized employees. See *Collective Bargaining*, CORNELL UNIV. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/collective_bargaining [<https://perma.cc/8CQ4-5WF9>] (last visited Jan. 15, 2016) (defining CBA).

Thus, the court found that compensation was not required under the FLSA.¹⁵

This Casebrief will discuss the Third Circuit's holding, arguing that despite the court's attempt to clarify when meal time is compensable, the decision still provides little guidance to attorneys and parties in future cases.¹⁶ Part II of this Casebrief will review the FLSA and the regulatory and judicial approaches to defining "work" under the FLSA.¹⁷ Part III will focus on the facts, procedural history, and holding in *Babcock*, including a discussion of the dissenting opinion.¹⁸ Part IV of this Casebrief will argue the adoption of the PBT has not adequately clarified when meal time compensation is required because *Babcock's* unique facts do not easily extend to other cases and because it is unknown how much weight the court afforded the CBA in evaluating the PBT.¹⁹ Part IV will also discuss the implications of *Babcock* on both sides of the employer-employee relationship, offering advice to practitioners.²⁰ Lastly, Part V concludes by emphasizing that although *Babcock* provides Third Circuit courts with some direction in adopting the PBT, the legal landscape of mealtime compensability remains relatively uncertain.²¹

II. LET'S "WORK" IT OUT: A BACKGROUND OF THE FLSA AND THE WORD IT FAILED TO DEFINE

While the FLSA requires compensation for time employees are working, the statute never elaborates on what is considered "work."²² As a re-

15. See *Babcock*, 806 F.3d at 158 (finding time predominantly benefited employees).

16. For a discussion of why it is difficult to determine how courts will rule in future cases based on the holding in *Babcock*, see *infra* notes 106–34 and accompanying text.

17. For a discussion of the existing statutory guidelines pertaining to employee compensation, and the judicial and regulatory guidance of the application of the existing statutory requirements, see *infra* notes 22–55 and accompanying text.

18. For a discussion of the facts, procedural history, and opinions in *Babcock*, see *infra* notes 56–102 and accompanying text.

19. For a discussion of the ambiguity that persists in the aftermath of *Babcock* see *infra* notes 106–34 and accompanying text.

20. For a discussion of the implications of *Babcock* on mealtime breaks from both an employer and an employee perspective, see *infra* notes 135–60 and accompanying text.

21. For a further discussion of the impact of the Court's holding, see *infra* notes 161–64 and accompanying text.

22. See 29 U.S.C.A. § 204 (West 2012) (delegating authority to Department of Labor to interpret FLSA); 29 C.F.R. § 785.6 (2017) ("The [FLSA], however, contains no definition of 'work.'"); *Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."); see also Adam R. Long, *When Must Meal Breaks Be Paid? Third Circuit Clarifies FLSA Test*, PA. LAB. & EMP. BLOG (Dec. 1, 2015), <http://www.palaborandemploymentblog.com/2015/12/articles/wage-hour/mealbreaks/> [https://perma.cc/XQZ2-WS5S]

sult, two separate methods for ascertaining “work” in mealtime compensation cases have emerged.²³ The Department of Labor (DOL) offers one suggestion, stating that employees are “working” unless they are relieved of all duties; this is referred to as the relieved of all duties (ROAD) test.²⁴ In contrast, several courts have held that employees are “working” during a break when the time predominantly benefits the employer rather than the employee; this is known as the PBT.²⁵

A. *All Work and No Play Under the FLSA: The Requirements of the Fair Labor Standards Act*

In 1938, Congress passed the FLSA for the purpose of offering federal protection to employees.²⁶ The FLSA does not require employers to pro-

(noting the interpretation of what is work is a “murky issue.”). For a further discussion of the Fair Labor Standards Act, see *infra* notes 26–33 and accompanying text.

23. See *Babcock v. Butler Cty.*, 806 F.3d 153, 155, 158 (3d Cir. 2015) (discussing two approaches to mealtime compensability and applying PBT approach); see also Laura Lawless Robertson, *There Really Is Such a Thing as a Free Lunch (for Employers)*, Says Third Circuit Court of Appeals, EMP. L. WORLDVIEW (Nov. 25, 2015), <http://www.employmentlawworldview.com/there-really-is-such-a-thing-as-a-free-lunch-for-employers-says-third-circuit-court-of-appeals/> [https://perma.cc/XH4Z-NM9W] (noting divergence of approaches may require the United States Supreme Court to “conclusively resolve the dispute”).

24. See 29 C.F.R. § 785.19 (2017) (“Bona fide meal periods are not work-time. . . . The employee must be completely relieved from duty for the purposes of eating regular meals.”). For a further discussion of the Department of Labor’s relieved of all duties approach to meal period compensation, see *infra* notes 34–41 and accompanying text.

25. See, e.g., *Alexander v. City of Chi.*, 994 F.2d 333, 337 (7th Cir. 1993) (adopting predominant benefit test that considers “when the employee’s time is not spent predominantly for the benefit of the employer.” (quoting *Lamon v. City of Shawnee*, 972 F.2d 1145, 1155, 1157 (10th Cir. 1992))). For a further discussion of the judicially created predominant benefits test, see *infra* notes 42–55 and accompanying text.

26. See *Brooklyn Savs. Bank v. O’Neil*, 324 U.S. 697, 706 (1945) (holding legislative history of FLSA indicates Congressional intent to protect certain employee groups from working conditions that “endangered the national health and well-being”). *Brooklyn Savings Bank* further elaborated that Congress recognized that the need to protect employees stemmed from “unequal bargaining power . . . between employer and employee” and thus “certain segments of the population required federal compulsory legislation to prevent private contracts . . . which endangered” both the employees and the national economy. See *id.*; see also Jason K. Roberts, *Be Thankful for Meal Breaks: Third Circuit Panel Adopts “Predominant Benefit” Test For Meal Breaks Under the FLSA*, RUBIN FORTUNATO & HARBISON P.C. (Nov. 25, 2015), <http://www.rubinfortunato.com/article/thankful-meal-breaksthird-circuit-panel-adopts-predominant-benefit-test/> [https://perma.cc/42SB-GPGX] (noting FLSA is “integral part of this country’s employment laws.”); Sammy Sugira Jr., *Third Circuit Addresses Whether Meal Period Restrictions Are Violations Under the FLSA in Babcock v. Butler County*, EMP. L. BLOTTER (Dec. 16, 2015), <http://employmentlawblotter.com/wordpress/2015/12/16/third-circuit-addresses-whether-meal-period-restrictions-are-violations-under-the-flsa-in-babcock-vs-butler-county/> [https://perma.cc/XR5V-E4XQ] (noting employee class action FLSA actions are “on the rise.”).

vide employees with meal periods; nevertheless, some states require mandatory meal breaks and some employers voluntarily choose to provide their employees with breaks.²⁷ The FLSA requires that employers compensate employees for time worked.²⁸ As a result, once an employer offers its employees a meal break, the employer may become liable under the FLSA.²⁹

To illustrate, imagine an employer provides an uncompensated lunch break to an employee.³⁰ If the employer requires the employee to remain at their workstation and continue working during their uncompensated break, the FLSA requires the employer to compensate the employee for

27. See *Minimum Length of Meal Period Required Under State Law for Adult Employees in Private Sector*, WAGE & HOUR DIV., U.S. DEP'T LAB. (Jan. 1, 2017), <https://www.dol.gov/whd/state/meal.htm#foot1> [<https://perma.cc/7WGB-GUJH>] (noting states that have meal period regulations include: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, and Rhode Island). Despite the lack of formalized findings on the amount of employers offering lunch and meal breaks, it is believed that many employers in fact provide some type of meal break for their employees. See Allison Doyle, *What Meals and Rest Breaks Do Employees Get?*, THE BALANCE: JOB SEARCHING (Oct. 19, 2016), <https://www.thebalance.com/what-meal-and-rest-breaks-do-employees-get-2060466> [<https://perma.cc/H4AX-TN3K>] (“many companies do provide breaks.”); Lisa Guerin, *When Must Employers Provide Meal and Rest Breaks*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/when-must-employers-provide-meal-rest-breaks.html> [<https://perma.cc/ZD4A-HHPV>] (last visited Jan. 12, 2017) (noting “[m]ost employers allow employees to take a lunch break”). Required meal times, including stipulations for whether or not the time is compensated, may also be created through collective bargaining agreements. For definition of a collective bargaining agreement, see *supra* note 14 and accompanying text.

28. See 29 C.F.R. § 785.19 (requiring compensation for employees who “work” during meal period); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 63–64 (2d Cir. 1997) (explaining that employer could be liable for not compensating employees for a meal period in which “work” was performed); Guerin, *supra* note 27 (noting FLSA requires employers to pay for time worked, even if time is designated as meal period).

29. See *Lamon v. City of Shawnee*, 972 F.2d 1145, 1155–56 (10th Cir. 1992) (“[The] FLSA requires remuneration for meal periods during which a police officer is unable [sic] comfortably and adequately pass the mealtime because the officer’s time or attention is devoted primarily to official responsibilities.”); Guerin, *supra* note 27 (warning employers that failure to compensate employees for time worked during uncompensated meal period could result in FLSA liability).

30. See Hilery Simpson, *Paid Lunch and Paid Rest Time Benefits from the Employee Benefits Survey, 1979–93*, COMPENSATION & WORKING CONDITIONS, Dec. 1996, at 19 (displaying results of survey of employees who do and who do not receive paid lunch breaks).

Based on the results of the 1979–93 Employee Benefits Survey, it appears employers are more likely to offer uncompensated lunch breaks than compensated ones. See *id.* (reporting that in 1993, only 9% of medium and large private establishing employees had paid lunch time, in 1992 only 10% of state and local government employees received paid lunch time, and in 1992 only 9% of small private establishment employees received paid lunch breaks).

their time worked.³¹ Nevertheless, when employees have lunch breaks but face certain restrictions during that period, the line between “work” and “break” blurs.³² In these situations, whether the employer must compensate the employee is unclear.³³

B. *The 9 to 5: The Department of Labor’s Relieved of All Duties Approach*

In an attempt to clarify the ambiguity of when an employee’s lunch break is compensable, the Department of Labor promulgated regulations to aid in the interpretation and enforcement of the FLSA.³⁴ One such regulation defines a “bona fide meal period.”³⁵ The DOL explains that a meal period is not compensable if the employee is not “completely relieved from duty” for that period.³⁶ If an employee is “required to perform any duties, whether active or inactive,” the employee is not relieved of their duties and their time must be compensated.³⁷

31. See 29 U.S.C.A. § 216(b) (West 2012) (subjecting employers to liability for failing to compensate employees for lunch break where sufficient work was preformed); see also Samantha Kemp, *Do Companies Have to Pay Employees for a Lunch Break?*, AZ CENTRAL, <http://yourbusiness.azcentral.com/companies-pay-employees-lunch-break-6802.html> [https://perma.cc/9QSK-3D5R] (last visited Feb. 13, 2017) (providing examples of times when employee is working during break, such as when employee “eats lunch in his office and has to take work phone calls” or if an employee must “be on duty at his work station”). In interpreting the definition of work under the FLSA, the Supreme Court has held that work means the “physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.” See *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining work). The Supreme Court has further elaborated that what constitutes work is a highly fact-specific inquiry, and even employees on inactive duty could be subject to protection under the FLSA if their time predominantly benefited the employer, for instance, by remaining on call. See also *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (“[A]n employer . . . may hire a man to do nothing, or to do nothing but wait for something to happen . . . [r]eadiness to serve may be hired . . . and time spent lying in wait for threats to the safety of the employer’s property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (analyzing whether waiting is considered work).

32. For an example of a situation where an employer’s restrictions on an employee’s lunch break may make it unclear whether the employee is working, see *infra* notes 60–67 and accompanying text.

33. See, e.g., *Alexander v. City of Chi.*, 944 F.2d 333, 334–35 (7th Cir. 1993) (weighing difficulty of whether police officers who had substantial restrictions on what they could do during meals breaks were actually “working” or on “break”).

34. See 29 C.F.R. § 785.19(a) (2017) (differentiating work periods from rest periods with examples).

35. See *id.* (defining “bona fide meal period” as break that is not “worktime” and must at least be thirty minutes or more).

36. See *id.* (announcing relieved of all duties approach).

37. See *id.* (explaining relieved of all duties approach). As an example of the latter circumstance, in the regulation, the DOL explains, “an office employee who is required to eat at his desk . . . is working while eating.” See *id.* (citations omitted); see also *supra* note 31 and accompanying text explaining that the FLSA ren-

Whether an employee's mealtime break is considered "work" hinges on whether the employer has been "completely relieved of duty."³⁸ The ROAD test requires a narrow application, such that if an employee has to perform any work-related functions during their meal period, they must be compensated.³⁹ While the ROAD approach is specifically derived from the DOL's regulation, courts are not required to use it because it does not carry the force of law; rather, the regulation exists solely as persuasive authority.⁴⁰ As such, most courts have not adopted the ROAD approach.⁴¹

ders employers liable for failing to compensate employees that are required to work through lunch.

38. See Howard S. Lavin & Elizabeth E. DiMichele, *Split Circuit: When Are Meals Compensable Under the Fair Labor Standards Act?*, 42 EMPLOYEE RELS. L.J., Summer 2016, at 4 (referring to this analysis as "relieved from all duties test"). In *Kohlheim v. Glynn County*, the Eleventh Circuit utilized a variation of this test, asserting that "the essential consideration in determining whether a meal period . . . is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal." 915 F.2d 1473, 1477 (11th Cir. 1990).

39. See Powders, Kinder & Keeney, *Courts Disagree About When Employers Must Pay Workers for Meal Breaks*, 3 No. 12. R.I. EMP. L. LETTER 7 (1999) (describing ROAD test); Maureen Minehan, *Third Circuit Sides with Employers on Unpaid Meal Breaks*, 32 No. 26 EMP. ALERT NL 1 (Dec. 24, 2015) (explaining employee who has to eat lunch at their desk is entitled to compensation even if they are not actively engaged in assignments); see also *Kohlheim*, 915 F.2d at 1481 (holding firefighters were not completely relieved of duty during mealtime when they were required to remain on site and respond to emergency calls). The 11th Circuit stated:

During meal times the firefighters were required to remain at the station and were subject to emergency calls. The record makes clear that the firefighters were subject to significant affirmative responsibilities during these periods. The mealtime restrictions benefit the county by ensuring maintenance of an available pool of competent firefighters for immediate response to emergency situations. The firefighters are subject to real limitations on their freedom during mealtime which inure to the benefit of the county; accordingly, the three mealtime periods are compensable under FLSA regulations for overtime purposes.

Id. (footnote omitted).

40. See *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 65 (2d Cir. 1997) ("Although not controlling on courts, such regulations do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (internal quotations and citations omitted)). The Massachusetts Superior Court has recently chosen to adopt the Relieved of All Duties Test in *DeVito v. Longwood Security Services, Inc.* No. SUCV201301724BLS1, 2016 WL8200495 (Mass. Supp. Dec. 23, 2016); see Barry J. Miller & Anne S. Bider, *Massachusetts Superior Court Adopts Stringent Standard for Unpaid Meal Breaks Under State Law*, SEYFARTH SHAW LLP (Jan. 1, 2017), <http://www.seyfarth.com/publications/MA011317-LE> [<https://perma.cc/3UU2-U29>].

41. See, e.g., *Babcock v. Butler Cty.*, 806 F.3d 153, 156 (3d Cir. 2015) (noting majority of courts of appeals utilize PBT rather than relieved of all duties approach).

C. *All in a Day's Work: The Judicially Conceived Predominant Benefit Test*

Currently, the PBT is used by a majority of circuit courts of appeal.⁴² Unlike the ROAD test, the PBT is a judicially created test based on the Supreme Court's holdings in *Armour & Co. v. Wantock*⁴³ and *Skidmore v. Swift & Co.*⁴⁴ The PBT determines mealtime compensability by analyzing

42. *See id.* at 156 (compiling cases to reveal PBT has been used by Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits); *see also Reich*, 121 F.3d at 65 (noting their use of PBT is consistent with DOL meal regulation because regulation must be interpreted practically and in flexible manner); *Roy v. Cty. of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998) (stating PBT is "the most appropriate standard for compensability [because it] is a flexible and realistic one where we determine, whether, on balance, employees use mealtime for their own, or for their employer's benefit." (citations and internal quotations omitted)); *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 266 (5th Cir. 1998) (utilizing PBT and noting factors that can be considered include "the limitations and restrictions placed upon the employees, the extent to which those restrictions benefit the employer, the duties for which the employee is held responsible during the meal period, and the frequency in which meal periods are interrupted."); *Avery v. City of Talladega*, 24 F.3d 1337, 1347 (11th Cir. 1994) (finding the PBT applies to law enforcement personnel); *Henson v. Pulaski Cty. Sherriff Dep't*, 6 F.3d 531, 534–35 (8th Cir. 1993) (stating PBT comports with Supreme Court's definition of work, and relieved of all duties test "lacks persuasive force" because it is inconsistent with "Supreme Court's direction that courts take a practical approach based on the unique facts of each case"); *Alexander v. City of Chi.*, 994 F.2d 333, 337 (7th Cir. 1993) (noting the predominant benefit test "sensibly integrates developing case law with the regulations' language and purpose"); *Lamon v. City of Shawnee*, 972 F.2d 1145, 1157 (10th Cir. 1992) ("[A] law enforcement officer is considered to be completely relieved from duty . . . when the employee's time is not spent predominately for the benefit of the employer."); *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984) (noting difficulty of relieved of all duties standard is that it could require compensation at all hours in situations where workers were required to bring tools or work materials home with them). In addition to the various circuit courts, the PBT has also been adopted and applied by courts within the Third Circuit. *See Aboud v. City of Wildwood*, No. 12-7195, 2013 WL 2156248, at *6 (D.N.J. May 17, 2013); *Prise v. Alderwoods Grp., Inc.*, 817 F.Supp.2d 651, 666–67 (W.D. Pa. 2011); *Lugo v. Farmer's Pride Inc.*, 802 F. Supp.2d 598, 613 (E.D. Pa. 2011); *Oakes v. Pennsylvania*, 871 F. Supp. 797, 799–800 (M.D. Pa. 1995).

43. 323 U.S. 126 (1944).

44. 323 U.S. 134, 138 (1944) ("Hours worked are not limited to the time spent in active labor but include time given by the employee to [sic] the employer" (citation omitted)); *see also* Ellen C. Kearns, "Off-The-Clock" Time—When Is It Compensable?, INT'L LAW. NETWORK, http://www.iln.com/bullet_iln_two_three/leipaper.pdf [<https://perma.cc/HH7V-9A3L>] (last visited Jan. 1, 2017) (stating PBT is derived from "principals from the Supreme Court's decisions in *Armour* . . . and *Skidmore*, which predate adoption of the [DOL's] regulation"). These two cases mandate that the determination of what constitutes work is fact-bound and based on the totality of the circumstances. *See id.* Together, these cases hold that work under the FLSA requires "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *See Reich*, 121 F.3d at 64 (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Additionally, the twin Supreme Court cases mandate that the determination of what is "work" is determined on a case-by-case basis according to the totality of the circumstances. *See id.* (citing *Armour*, 323 U.S. at 133 and *Skidmore*, 323 U.S. at 136). The Supreme Court further elaborates that whether time should be con-

whether employees are predominantly engaged in work-related activities during their mealtime break.⁴⁵ Under the PBT, if the employee is the primary beneficiary of the meal period, the time is not compensable.⁴⁶ Conversely, if the break time predominantly benefits the employer, the FLSA requires compensation.⁴⁷

The PBT is substantially less restrictive than the ROAD approach.⁴⁸ To illustrate, under the ROAD test, if the employer benefits at all from the break, compensation is likely required; under the PBT, the employer may benefit from the time, but as long as the break predominantly benefits the employee, compensation is not required.⁴⁹ For example, in *Alexander v. City of Chicago*,⁵⁰ police officers were subject to a variety of restrictions

sidered work hinges on “the degree to which the employee is free to engage in personal activities” during the break. *See Skidmore*, 323 U.S. at 138 (internal quotations omitted).

45. *See Armitage v. City of Emporia*, 982 F.2d 430, 432 (10th Cir. 1992) (stating “the proper standard for determining the compensability of a meal period is whether the officer is primarily . . . engaged in work-related duties during meal periods.” (internal quotation omitted)).

46. *See* Bart N. Sisk & Brent E. Siler, *Lunch, Interrupted: Compensating Employees for Work During Meal Periods*, 31 No. 1 TENN. EMP. L. LETTER 4. (2016) (explaining when employers must compensate employees for lunch breaks under FLSA); Stephanie J. Peet & Katherine Thomas Batista, *Officers’ Meal Breaks Not Compensable, Third Circuit Finds, Adopts Predominant Benefit Test*, JACKSON LEWIS P.C. (Dec. 8, 2015), <http://www.jacksonlewis.com/publication/officers-meal-breaks-not-compensable-third-circuit-finds-adopts-predominant-benefit-test> [<https://perma.cc/GGF3-4NRL>] (noting employees are not entitled to compensation when break “may be spent doing activities of the employee’s choosing”); David Treibman, *Third Circuit: Meal Breaks for Employees’ “Predominant Benefit” Are Not Worktime*, FISHER PHILLIPS: WAGE & HOUR BLOG (Nov. 30, 2015), <https://www.fisherphillips.com/Wage-and-Hour-Laws/Meal-Breaks-Predominant-Benefit-Not-Worktime> [<https://perma.cc/3E8M-JT4G>] (“[T]he prospects that a meal period will be viewed as being for an employee’s predominant benefit are greatest when an employee has maximum freedom to use the breaktime as he or she sees fit.”).

47. *See* Sisk & Siler, *supra* note 46 (“[T]he court determines whether an employee is engaged in the performance of any substantial duties during her meal period.”); *see also* Deborah H. Share, *No Such Thing as a Free Lunch*, PORZIO BROMBERG & NEWMAN P.C. (Dec. 2015), <http://www.pbnlaw.com/media/622883/elm-december-2015.pdf> [<https://perma.cc/HGF7-7M8A>] (indicating break may predominantly benefit employer if employer places specific restrictions on employees during break that restrict employees’ personal freedom).

48. *See, e.g.*, Nicholas F. Ortiz, *MA Court Adopts Relieved-of-All-Duties Standard for Meal Breaks*, MASSWAGELAW.COM (Dec. 27, 2016), <http://masswagelaw.com/blog/index.php/ma-court-relieved-of-all-duties-standard/> [<https://perma.cc/G5L4-GERZ>] (advising because PBT is more lenient than relieved-of-all-duties approach, employer can make employee perform some duties on breaks, pay nothing, and get free labor); *see also* George A. Voegele Jr., *Recent Prison Guard Case Frees Employers from Meal Period Uncertainty Under the FLSA*, COZEN O’CONNOR (Dec. 1, 2015), <https://www.cozen.com/news-resources/publications/2015/recent-prison-guard-case-frees-employers-from-meal-period-uncertainty-under-the-flsa> [<https://perma.cc/ARA3-CRDU>] (dubbing the PBT “employer-friendly” as compared to ROAD).

49. *See id.* (addressing how ROAD approach and PBT could come to contrary results in same scenario).

50. 994 F.2d 333 (7th Cir. 1993).

on their thirty-minute meal break and had to remain on-call.⁵¹ Under the ROAD test, the police officers were clearly entitled to compensation; however, on remand, the United States District Court for the Northern District of Illinois found that under the PBT, even though the officers had to be responsive, they were “fully able to ‘comfortably and adequately pass the mealtime.’” and were not entitled to compensation.⁵²

As *Alexander* shows, determining whether the break predominantly benefits the employer or the employee is highly contingent on the facts of each case.⁵³ Courts may consider any variety of factors in determining

51. *See id.* at 334–35 (“[P]laintiffs’ complaint puts forth an extensive list of requirements to which the officers must adhere during their meal breaks: officers must receive permission—frequently denied—to take a meal period, and cannot take that period during the last hour of a shift assignment; . . . they must remain in full uniform . . . officers are not permitted to take meals at locations other than establishments serving food . . . no more than two officers may be present in the same establishment; officers must refrain from conduct that the department deems inappropriate for an officer . . .”).

52. *See In re Chi. Police Dept. F.L.S.A. Meal Period Litig.*, No. 89 C 9354, 1995 WL 144500, at *7–10 (N.D. Ill. Mar. 30, 1995) (applying PBT on remand and finding that despite restrictions placed on officers, their meal periods sufficiently benefitted them to a degree where compensation was not required).

53. *See id.* (considering four different factors to determine who meal period actually benefitted). In determining whether the time is for the predominant benefit of the employee or the employer, courts must assess the totality of the circumstances. *See Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264–65 (5th Cir. 1998) (holding evidence supported finding of compensation when meat-packing employees were required to maintain their radios and tools during break, could not leave the premises, and lunches were frequently interrupted by work-related duties); *Roy v. City of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998) (compensation not required for workers that remained on call and ready to respond to emergencies during their meal breaks but could otherwise leave site as long as they remained within eighty-two square miles); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 69 (2d Cir. 1997) (determining craft employees are owed compensation for their meal period when their employer required them to remain on site to watch company equipment); *Henson v. Pulaski Cty. Sherriff Dep’t*, 6 F.3d 531, 537 (8th Cir. 1993) (holding meal period was not for predominant benefit of employer when police officers had to respond to emergency calls and answer civilian questions but were otherwise unrestricted); *Avery v. City of Talladega*, 24 F.3d 1337, 1347 (11th Cir. 1994) (holding compensation was not required when officers only restrictions were staying in uniform, leaving their radios on, and not leaving their jurisdiction); *Alexander*, 994 F.2d at 334–35 (considering whether compensation was required for officers who were required to remain in uniform, on site, absent frequently denied permission to leave, and required to refrain from certain conduct such as reading non-work related publications, napping, and consuming alcohol); *Lamon v. City of Shawnee*, 972 F.2d 1145, 1156 (10th Cir. 1992) (holding compensation was required when police officers had to be reachable by telephone, respond to emergencies, answer “citizen inquires,” remain within city limits, and not “conduct personal business errands”); *Armitage v. City of Emporia*, 982 F.2d 430, 432 (10th Cir. 1992) (holding meal time predominantly benefitted police officers who were able to leave the station and eat at a location of their choosing, but were required to answer citizen questions, and had to disclose their location in case their service were required); *Hill v. United States*, 751 F.2d 810, 815 (6th Cir. 1984) (holding compensation not required for postal employees who remained accountable for mail and receipts during their designated lunch breaks).

whether the time predominantly benefits the employee or the employer.⁵⁴ However, courts have diverged on whether the existence of a CBA may be a factor considered in a FLSA mealtime compensation case.⁵⁵

III. THE THIRD CIRCUIT TAKES ON THE JOB OF CLARIFYING MEALTIME COMPENSATION CASES

In *Babcock*, the Third Circuit adopted the PBT.⁵⁶ In applying the PBT, the court factored in both the existence of a CBA and the restrictions imposed upon the officers in *Babcock*.⁵⁷ The court held the break in question was not subject to compensation because it did not predominantly benefit the employer.⁵⁸ The dissent argued that while the PBT was the proper test, the majority erred in their application of the PBT by improperly dismissing the suit, overvaluing the existence of a CBA, and refusing to permit the plaintiffs to engage in additional discovery.⁵⁹

54. *See, e.g.*, *Babcock v. Butler Cty.*, 806 F.3d 153, 155, 157–58 (3d Cir. 2015) (commenting that some relevant factors include whether employees are permitted to leave their work station or frequency of work-related interruptions to employee’s break, but also emphasizing importance of CBA language); *see also* *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (explaining how to determine whether meal period is bona fide meal period or compensable rest period); Mark Stanisz, *Third Circuit Rules that “Predominant Benefit” Test Determines FLSA Meal Period Compensability*, DUANE MORRIS INST. (Dec. 3, 2015), <http://duanemorrisinstitute.com/blog/?p=978#.WGwNh3eZO1s> [<https://perma.cc/3LTT-XYR8>] (commenting PBT “turns on the balancing of multiple factors that could lead reasonable minds to reach divergent conclusions about whether the employer or the employee is the predominant beneficiary of a meal period”).

55. *Compare* *Leahy v. City of Chi.*, 96 F.3d 228, 232 (7th Cir. 1996) (finding CBA “is a defense to liability under the FLSA [such that a] plaintiff’s suit cannot succeed”), *with* *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264–65 (5th Cir. 1998) (arguing *Leahy*’s holding that CBA can act as a defense is “preposterous,” and a plaintiff’s “right to pursue a suit in the FLSA is completely independent from their rights under the CBA”). In general, some courts have allowed a CBA to be used a complete defense to FLSA liability, while other courts have refused to recognize the CBA at all as a factor in determining whether time is compensable. *See, e.g.*, *Leahy*, 96 F.3d at 232.

56. *See Babcock*, 806 F.3d at 156 (announcing use of PBT over ROAD approach).

57. *See id.* at 157–58 (evaluating plaintiff’s claim to determine whether it was sufficient to state claim upon which relief could be granted).

58. *See id.* (finding time predominantly benefited employees).

59. *See id.* at 158 (Greenaway, J., dissenting) (“Today the Majority holds that Plaintiffs’ Fair Labor Standards Act (‘FLSA’) claims should be dismissed based upon a flawed application of the predominant benefit test.”). The dissent noted:

In their Complaint, Plaintiffs set forth sufficient allegations to state a claim that their meal period should be considered compensable work under the FLSA. For this reason alone, their claims should not have been dismissed. Further, while discounting Plaintiffs’ factual allegations, the Majority decides this matter by overvaluing the CBA’s compensation provisions—disregarding relevant Supreme Court precedent in the process. Ending this lawsuit now is clearly improper. I respectfully dissent.

Id. at 162.

A. *The Breakdown: Facts and Procedure in Babcock*

Sandra Babcock, a corrections officer at the Butler County Prison, brought a collective action (plaintiffs) against Butler County for failing to properly compensate current and former employees for unpaid break time.⁶⁰ Under the CBA entered into by the corrections officers and the prison, officers were required to take a one-hour lunch break, forty-five minutes of which was compensated.⁶¹ During the uncompensated fifteen minutes, employees were unable to leave the prison absent special permission by the warden and were required to remain on-site, in uniform, and located near equipment in order to respond to emergencies.⁶² The plaintiffs argued they were essentially on-duty during those fifteen minutes and thus should be compensated under the FLSA.⁶³

The defendant responded to the plaintiffs' complaint by filing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming the plaintiffs failed to state a claim upon which relief could be granted.⁶⁴ In evaluating the claim, the United States District Court for

60. *See id.* at 155 (explaining Babcock was named plaintiff in putative class action of corrections officers).

61. *See id.* (stating that CBA between plaintiffs and Butler County Prison provided one hour meal periods per shift). The CBA, in relevant part, stated: Eight and one quarter (8¹/₄) consecutive hours of work shall constitute a work shift The lunch period shall be a duty-free period of one (1) hour (three-quarters (³/₄) of an hour (45 minutes) of which will be paid, and one-quarter (¹/₄) of and [sic] hour (15 minutes) of which will be unpaid.) If the duty-free period is interrupted, the time will be compensable. Employees must remain within the facility during the lunch period unless authorized to leave by the Warden/Deputy Warden.

Babcock v. Butler Cty., No. 12CV394, 2012 WL 3877612, at *2 (W.D. Pa. Sept. 6, 2012) (quoting trial court's motion to dismiss opinion).

62. *See Babcock*, 806 F.3d at 155 (listing restrictions on officers).

63. *See id.* (noting plaintiffs claim they are entitled to compensation for fifteen-minute period under FLSA).

64. *See Babcock v. Butler Cty.*, No. 12CV394, 2014 WL 688122, at *2 (W.D. Pa. Feb. 21, 2014), *order aff'd*, 806 F.3d 153 (3d Cir. 2015); *see also* FED. R. CIV. P. 12(b)(6) (listing "failure to state a claim upon which relief can be granted" as defense which may be raised by motion). Prior to this motion, the defendant had successfully filed a Motion to Stay Proceedings under 12(b)(1) for lack of subject matter jurisdiction under the Federal Rules of Civil Procedure. *See Babcock*, 2012 WL 3877612, at *2. The court upheld the defendant's motion because the plaintiffs failed to comply with their CBA, which required a "four step mandatory grievance procedure" including arbitration for disputes. *See id.* at *2-3. (providing reasoning for granting motion to dismiss). The court held the CBA, which mandated the grievance process for "any dispute . . . concerning the wages, hours and working conditions of employees covered by this [CBA]," included Babcock's claim. *See id.* at *4. The court ordered the plaintiffs to "exhaust all their administrative remedies" in accordance with the CBA procedures prior to bringing suit. *See id.* The plaintiff then submitted to the process outlined in the CBA, resulting in an arbitration decision in favor of the defendant. *See Babcock*, 2014 WL 688122, at *2 (explaining that plaintiffs filed motion to reopen following conclusion of grievance procedures). Shortly after, plaintiffs filed a "Motion to Lift the Stay and a Motion for Conditional Collective Action Certification Pursuant to the FLSA";

the Western District of Pennsylvania first recognized that the Third Circuit had yet to determine the proper standard for analyzing meal period claims.⁶⁵ Absent guidance from the Third Circuit, the district court decided to use the PBT and granted the defendant's motion, finding the plaintiffs were unable to demonstrate that they were deprived of the predominant benefit of their break.⁶⁶ The plaintiffs appealed to the Third Circuit, agreeing that the predominant benefit test was the correct standard but arguing their pleadings established a plausible claim for relief.⁶⁷

B. *Is It Worth It? Let Me Work It: The Majority Reviews the Predominant Benefit Test and Does Not Reverse It*

The Third Circuit in *Babcock* formally adopted the PBT.⁶⁸ In discussing its decision, the court highlighted that both parties in *Babcock* supported the use of the PBT and the test had been adopted by the vast majority of circuit courts.⁶⁹ The Third Circuit explained that the underlying question behind the PBT of “whether the officer is primarily engaged in work-related duties during meal periods” is determined “on a case-by-case basis.”⁷⁰ The Third Circuit also emphasized that while courts can consider a variety of innumerable factors in coming to a decision, the “essential consideration . . . is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal.”⁷¹

the defendant responded with a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See id.*

65. *See Babcock*, 2014 WL 688122, at *4 (“The United States Court of Appeals for the Third Circuit has not yet had an the opportunity to establish an applicable test [for determining] whether a compensation agreement complies with [the DOL’s bona fide] meal period regulation.” (citation omitted)).

66. *See id.* at *4–5 (explaining that majority of circuits employ PBT test and parties agree that it should be governing rule). In coming to this decision, the court asserted that just because an employer is benefiting from certain restrictions during a meal period, such as having the officers remain on site, does not necessarily mean that the employee is working. *See id.* at *4–5 The district court found the case comparable to *Avery* where employees were able to “spend their meal breaks in any way they wish so long as they remain in uniform, leave their radios on, and do not leave the jurisdiction.” *See id.* at *8 (discussing *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994)). The court additionally remarked that keeping the correction officers on site and in uniform is of “equal benefit” to the employer and the employees because it ensures the safety of the officers by mitigating the likelihood of injury-inducing prison riots. *See id.* at *9.

67. *See Babcock*, 806 F.3d at 156 (explaining that plaintiffs argued that even though employer-friendly PBT applied, they still stated plausible claim).

68. *See id.* at 156 (announcing adoption of PBT in line with sister circuits).

69. *See id.* (recognizing majority of circuit courts that have adopted PBT and views of parties to case who both supported use of PBT).

70. *See id.* at 156–57 (requiring that to determine “to whom the benefit of the meal period inures” requires courts to consider the totality of the circumstances on a case-by-case basis (citing *Armour & Co v. Wantock*, 323 U.S. 126, 133 (1944))).

71. *See id.* (citing *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1477 (11th Cir. 1990)) (explaining main inquiry in PBT analysis).

Applying the newly adopted PBT to the case at hand, the Third Circuit acknowledged the variety of restrictions imposed upon the officers.⁷² Nevertheless, the court found that despite the restrictions, the break as a whole still predominantly benefited the officers.⁷³ The Third Circuit came to this conclusion by comparing the facts of *Babcock* with other cases involving meal time compensability and law-enforcement officers, namely the Seventh Circuit's holding in *Alexander*.⁷⁴ The Third Circuit found the allegations in the plaintiffs' complaint insufficient because, unlike in *Alexander*, during breaks the employees could leave their desk, leave the prison with permission, and did not face additional restrictions, such as limitations on reading material.⁷⁵

The Third Circuit also considered the CBA in concluding the break predominantly benefited the employees.⁷⁶ The court relied heavily on another law-enforcement case, *Leahy v. City of Chicago*⁷⁷ in coming to this conclusion.⁷⁸ In *Leahy*, the Seventh Circuit dismissed an FLSA compensation claim brought by police officers because of the existence of a CBA that characterized the time as not compensable but provided for compensation when work was performed.⁷⁹ The Third Circuit explained that while the CBA in *Babcock* did not contemplate the compensability of the fifteen-minute period in dispute, the CBA required compensation for work during time that would not otherwise be compensated.⁸⁰ Based on *Leahy*, the Third Circuit found that the CBA characterized the time as a break and sufficiently protected the employees, noting "the FLSA requires no more."⁸¹ However, the Third Circuit stressed that a CBA is not a "de-

72. *See id.* at 155 (noting "number of restrictions" imposed on officers).

73. *See id.* at 157–58 (analyzing restrictions to determine whether break predominantly benefited plaintiffs or defendant).

74. *See id.* at 157 ("In comparison to the cadre of case law addressing meal-time compensability in the law enforcement context, the allegations in Plaintiffs' complaint do not suffice.").

75. *See id.* 157–58 (addressing restrictions which may have converted break into compensable work time).

76. *See id.* (addressing language and function of CBA between plaintiffs and defendant).

77. 96 F.3d 228 (7th Cir. 1996).

78. *See id.* at 232 (holding that CBA is defense to FLSA liability for mealtime compensation).

79. *See id.* at 232 ("[I]f the collective bargaining agreement's guarantee of overtime compensation for time worked in excess of eight hours in an eight-and-one-half hour tour of duty protects Chicago police officers' FLSA rights to overtime compensation, then the agreement is a defense to liability under the FLSA and the plaintiffs' suit cannot succeed.").

80. *See id.* at 232–33 ("The parties' agreement therefore that generally an officer is not working during a meal period, but provides for appropriate compensation when an officer actually does work during the meal.").

81. *See Babcock*, 806 F.3d at 157 (quoting *Leahy*, 96 F.3d at 232).

fense to liability under the FLSA.”⁸² Rather, a CBA is another factor courts may consider in determining the compensability of a meal period.⁸³

Considering the restrictions alleged in the complaint and the existence of the CBA, the Third Circuit found that the time predominantly benefited the employees.⁸⁴ Specifically, the Third Circuit held that the restrictions did not prevent employees from “pass[ing] the mealtime comfortably.”⁸⁵ As such, the Third Circuit found the plaintiffs did not sufficiently state a claim upon which relief could be granted.⁸⁶ The Third Circuit thus affirmed the district court’s decision to dismiss the suit.⁸⁷

C. *Time to Break Up: The Dissent Departs from the Majority’s Application of the Predominant Benefit Test*

The dissent argued that the majority utilized a “flawed application” of the PBT and came to the wrong conclusion in *Babcock*.⁸⁸ First, the dissent argued the plaintiffs should have survived the 12(b)(6) motion because they raised a plausible claim that their meal periods were for the predominant benefit of the defendant.⁸⁹ The dissent highlighted *Reich v. Southern*

82. *See id.* at 158 (quoting *Leahy*, 96 F.3d at 232) (noting that unlike in *Leahy*, CBA is not dispositive in determining whether break period predominantly benefits employers or employees).

83. *See id.* (discussing role of CBAs in evaluating meal time compensability claims under PBT). Responding to the dissent’s critique of the majority’s use of the CBA, the majority explained:

[O]ur approach is consistent with the weight of precedent, considers the CBA as one relevant—though not dispositive—factor Although we find the Seventh Circuit’s analysis in *Leahy* useful for comparison, the Dissent is correct that the instant case is distinguishable, which is why, unlike the *Leahy* court, we do not hold that “the [collective bargaining] agreement is a *defense* to liability under the FLSA.

Id. (citing *Leahy*, 96 F.3d at 232). The court also noted that plaintiffs could negotiate the compensability of the fifteen-minute period during the next collective bargaining contract. *See id.*

84. *See id.* at 157–58 (holding that “on balance” break predominantly benefited officers).

85. *See id.* at 158 (requiring “sufficient development of the facts to enable a capable application of the appropriate predominant benefit standard, including a determination of whether the officers are unable to pass the mealtime comfortably because their time or attention is devoted primarily to official responsibilities” (citing *Alexander v. City of Chi.*, 994 F.2d 333, 339 (7th Cir. 1993))).

86. *See id.* (“[W]e find that [employees] receive the predominant benefit of the time in question and are not entitled to compensation for it under the FLSA We will accordingly affirm the District Court’s order granting [defendant’s] motion to dismiss.”).

87. *See id.* (dismissing suit for failure to state claim under Federal Rule of Civil Procedure 12(b)(6)).

88. *See id.* at 158–62. (Greenaway, J., dissenting) (critiquing majority’s reasoning and holding).

89. *See id.* at 160 (containing heading which states, “Plaintiffs Raise a Plausible Claim that Uninterrupted Meal Periods Are Compensable Work.”).

*New England Telecommunications Corp.*⁹⁰ that held workers who remained on their worksite to watch company equipment during their meal period were entitled to compensation.⁹¹ The dissent explained that *Babcock* bears similarity to *Reich* in that had the plaintiffs not stayed at the prison during their breaks, the defendant would have needed to hire additional employees to comply with regulations that require a certain ratio of officers to inmates.⁹² As such, the plaintiffs had sufficiently stated a claim and the suit should not have been dismissed.⁹³

The dissent also emphasized that the majority should have permitted the plaintiffs to engage in discovery to support their claim.⁹⁴ In support of this argument, the dissent addressed the similarity between *Babcock* and *Alexander*, noting both cases required employees to remain within a certain designated area, in uniform, and ready to respond to emergencies.⁹⁵ The dissenting opinion acknowledges that *Alexander* contained some restrictions absent from *Babcock*, mainly a restriction on non-departmental publications.⁹⁶ However, the dissent asserts that additional restrictions, mirroring those in *Alexander*, would have been shown had the plaintiffs

90. 121 F.3d 58, 65–69 (2d Cir. 1997) (holding inactive work may still constitute work under FLSA if time as whole is used for predominant benefit of employer rather than employee).

91. *See Babcock*, 806 F.3d at 160–61 (finding *Babcock* analogous to *Reich*). The dissent further elaborated on *Reich*, explaining in that case the Second Circuit reasoned that although the workers were performing a separate function than their usual job by watching company equipment during the break, the requirement that workers ate lunch on site predominantly benefited the employer. *See id.* (comparing case to *Reich*). The dissent further noted that the Second Circuit found that had the employees in *Reich* not been present on site during the meal-period, the employers would have had to hire additional workers to watch and safe-keep the company's property. *See id.* (“[B]y not compensating these workers, [the employer] is effectively receiving free labor.” (citing *Reich*, 121 F.3d at 65)).

92. *See id.* at 161 (explaining “state regulations require certain staffing levels be maintained at all correctional facilities at all times [W]ithout Plaintiffs’ presence at the facility during meals, Defendant could be required to hire others during that time period.” (footnote omitted)). Although the dissent cites to a Pennsylvania statute, the dissent notices that the “specific standards set for the [Defendant] are not in the record at this time; this is . . . [a] type of fact-gathering that may be conducted during discovery.” *See id.* at 161 n.6.

93. *See id.* 160–61 (emphasizing plaintiffs made plausible claim such that defendant’s 12(b)(6) motion should not have been sustained).

94. *See id.* at 159 (“Although the Majority acknowledges the fact-intensive and circumstance-specific nature of the totality-of-the-circumstances inquiry under the predominant benefit test . . . the Majority does not permit the Plaintiffs in this case to conduct the discovery that would permit them access to the facts and circumstances to meet that standard.”).

95. *See id.* at 161 (concluding restrictions in both *Babcock* and *Alexander* required employees to “maintain a physical and mental readiness primarily for the benefit of their employer”).

96. *See id.* at 161 n.7 (explaining that restriction on reading materials that *Alexander* plaintiffs faced should not be held against *Babcock* plaintiffs because similar restrictions could come out in discovery).

been permitted to engage in discovery.⁹⁷ The dissent argued the majority should have permitted additional discovery before dismissing the plaintiffs' complaint for failure to state a claim.⁹⁸

Lastly, the dissent argued that the CBA should not have been considered as an analytical factor and the majority improperly relied on *Leahy*.⁹⁹ The dissent distinguishes the cases by noting that the CBA in *Babcock*, unlike in *Leahy*, did not grant an arbitrator the power to determine FLSA compliance, as the two are separate issues which should not impact one another.¹⁰⁰ Additionally, the dissent commented that general reliance on *Leahy* may be legally unsound given that the holding is not widely sup-

97. See *Babcock*, 806 F.3d at 161 (noting “the Majority’s reliance on *Alexander* to compel a different result here is misplaced”). The dissent points out that restrictions found in *Alexander*, such as the fact that employees were restricted from reading non-departmental publications, could have been found in *Babcock* had the plaintiffs had the opportunity to engage in discovery prior to the ruling on the 12(b)(6) motion. See *id.* The dissent points out that during oral arguments, plaintiffs had mentioned that defendant had placed restrictions on plaintiffs’ reading materials during meal periods, as was the case in *Alexander*. See *id.* The dissent asserts that these facts should have been further developed, adding:

[Information regarding additional restrictions] is [another] . . . example of an area in which factual development should have been allowed. Nevertheless, the Majority concludes that there has been “sufficient factual development of the facts to enable a capable application of the appropriate predominant benefit standard.” Plaintiffs, however, are entitled to a correct application of the predominant benefit standard to an appropriately developed record.

Id. at 161 n.7

98. See *id.* (arguing that plaintiffs should have been permitted to engage in discovery). The dissent adds that “[e]ven if . . . the Complaint had been insufficiently pled, the dismissal still would have been improper [B]ecause amendment would not have been futile, Plaintiffs should have been given leave to amend.” *Id.* at 161 n.7 (citing *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008)).

99. See *id.* at 161–62. The dissent noted:

[T]he Majority erroneously concentrates on whether, under the parties’ collective bargaining agreement . . . Plaintiffs are currently paid for a portion of their meal period. The Majority thereby disregards Supreme Court precedent on the definition of work. Indeed, Plaintiffs’ current contractual compensation, upon which the Majority focuses, is a red herring that improperly detracts from the factual allegations in the Complaint.

Id. at 158–59 (footnote omitted).

100. See *id.* at 162 (arguing *Leahy*’s holding that CBA is defense to liability under FLSA should not be applied to *Babcock* because of factual differences in cases). Specifically, the dissent notes that unlike in *Leahy*, the CBA in *Babcock* “explicitly precludes the arbitrator from making determination concerning compliance with the FLSA.” See *id.* (footnote omitted). The dissent also highlights that even the arbitrator recognized its inability to determine FLSA claims. See *id.* at 162 n.8 (quoting arbitrator’s decision: “Simply stated, the CBA does not authorize an arbitrator to resolve FLSA claims . . . I have not reviewed or considered the FLSA in rendering an Award, and I express no opinion regarding whether or not the FLSA has been violated.”).

ported and may have been overturned.¹⁰¹ The dissent found that the majority's reliance on *Leahy* was both factually and legally improper, and thus the court should not have relied on *Leahy* in rejecting the plaintiffs' claim.¹⁰²

IV. TOUGH BREAK: *BABCOCK*'S AMBIGUOUS IMPLICATIONS AND ADVICE TO PRACTITIONERS FOR DEALING WITH THE UNCERTAINTY

The Third Circuit's holding in *Babcock* established that the compensability of meal periods hinges on whom the time predominantly benefits.¹⁰³ While *Babcock* clarified the legal standard used in determining mealtime compensation cases, how the PBT will be applied in other cases remains uncertain because of *Babcock*'s unique facts and the indeterminate weight that the court afforded to the CBA.¹⁰⁴ In light of both the guidance and ambiguity left in the wake of *Babcock*, attorneys representing employers should carefully create break policies and avoid over-reliance on the existence of a CBA.¹⁰⁵ In contrast, employees should ensure their complaints include as much detail as possible and should carefully negotiate the compensation terms of their CBAs.¹⁰⁶

A. *Stop the Clock: The Indeterminable Application of the Predominant Benefit Test in Future Cases*

While *Babcock* could be seen as a victory for employers because it is an employer-friendly test for compensability, the court in *Babcock* made it abundantly clear that compensability cases must be analyzed based on the

101. *See id.* at 159 (claiming *Leahy* "is inapposite to the instant case, has been soundly rejected by the two circuits that have considered it, and has been called into question by subsequent Supreme Court precedent" (footnote omitted)). The dissent explains that the *Leahy* holding is "questionable" following the Supreme Court's holding in *Wright v. Universal Maritime Service Corp.* *See id.* at 162 (critiquing majority's use of *Leahy*) (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998)). Additionally, the dissent notes that in the nineteen years since it was issued, "no court of appeals has followed *Leahy* . . ." *See id.* In fact, the dissent highlights that the courts that have addressed *Leahy* have rejected and criticized the holding. *See id.* (discussing the Fifth Circuit's statement that the *Leahy* holding was "improper" and contrary to Supreme Court precedent, and the First Circuit's holding that *Leahy* "conflates contractual rights with statutory ones." (first citing *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 263–64 (5th Cir. 1998) then citing *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 52 n.9 (1st Cir. 2013))).

102. *See id.* ("Given the paucity of support for *Leahy* and the likelihood that its holding did not survive *Wright*, the Majority's reliance on *Leahy* to dismiss Plaintiffs' claims is mistaken.").

103. *See id.* at 155 (majority opinion) (declaring court intended to adopt PBT as mechanism for ascertaining meal period compensability).

104. For a further discussion of the source of ambiguity, see *infra* notes 106–34 and accompanying text.

105. For additional advice to attorneys representing employers, see *infra* notes 138–47 and accompanying text.

106. For additional advice to attorneys representing employees in FLSA mealtime compensation cases, see *infra* notes 148–60 and accompanying text.

totality of the circumstances.¹⁰⁷ Due to the unique facts of *Babcock* and the court's heavy consideration of the CBA, it is challenging to predict the results of a PBT analysis in the future.¹⁰⁸ While *Babcock* added clarity to the legal community by delineating the operative test, there is still a substantial amount of ambiguity in its application.¹⁰⁹

1. *The Unique Facts of Babcock*

The facts in *Babcock* were unique and thus will likely provide little insight into how the court would analyze a future case.¹¹⁰ One distinctive element of *Babcock* was that it involved law enforcement personnel.¹¹¹ The court came to the conclusion that the time did not predominantly benefit the employees by comparing *Babcock* to other meal compensability cases that specifically dealt with law enforcement officers.¹¹² While the facts in *Babcock* failed the PBT, it is possible that a similar set of facts applied to non-law enforcement personnel could be sufficient to state a claim upon

107. See *Babcock*, 806 F.3d at 157 (stating “the predominant benefit test is necessarily a fact-intensive inquiry”). Compared to the relieved of all duties approach, the PBT is considered an employer-friendly standard because, under it, employers may impose restrictions on employees without required compensation. See Miller & Bider, *supra* note 40 (explaining that in contrast to PBT, ROAD test could mean “a mere minute or two of work for the employer’s benefit—or a few restrictions on an employee’s break time—can turn an entire meal break into paid time”); Robertson, *supra* note 23 (declaring relieved of all duties test is “much stricter, employee-friendly test than the predominant benefit test” (internal quotations omitted)).

108. See Stanisz, *supra* note 54 (highlighting difficulty in applying *Babcock* to other cases).

109. See *id.* (describing ambiguity in *Babcock*'s application).

110. See *id.* (“*Babcock* makes clear that, although the predominant benefit test applies in the Third Circuit, it is not a bright-line rule. The test turns on the balancing of multiple factors that could lead reasonable minds to reach divergent conclusions.”). In addition to the fact-intensive nature of the test, it is also difficult for employers to know how the court could rule on different cases in the future because the facts in *Babcock* were unique and therefore a consistent result cannot be expected for other cases. See Sugiura Jr., *supra* note 26 (“The facts in *Babcock* were unique and the ruling of the Third Circuit will likely have limited application moving forward.”).

111. See *Babcock*, 806 F.3d at 155 (describing facts of case, particularly that “putative class action” was on behalf of corrections officers at Butler County Prison).

112. See *id.* at 157 (comparing facts of *Babcock* to the “cadre of case law addressing mealtime compensability in the law enforcement context”). The majority discusses several cases, all of which specifically address law enforcement personnel. See, e.g., *Leahy v. City of Chi.*, 96 F.3d 228, 230–31 (7th Cir. 1996) (concerning police officers in Illinois); *Avery v. City of Talladega*, 24 F.3d 1337, 1340–41 (11th Cir. 1994) (concerning police officers in Alabama); *Henson v. Pulaski Cty. Sherriff Dep’t*, 6 F.3d 531, 533 (8th Cir. 1993) (concerning police officers in South Dakota); *Alexander v. City of Chi.*, 994 F.2d 333, 335 (7th Cir. 1993) (concerning police officers in Illinois); *Armitage v. City of Emporia*, 982 F.2d 420, 432 (10th Cir. 1992) (discussing police officers in Kansas); *Lamon v. City of Shawnee*, 972 F.2d 1145, 1147–48 (10th Cir. 1992) (concerning police officers in Kansas).

which relief could be granted.¹¹³ Therefore, it is difficult to use *Babcock* as a basis for determining how courts would rule in cases that do not involve police or correction officers.¹¹⁴

Babcock also only considered mealtime compensability within the state of Pennsylvania.¹¹⁵ Pennsylvania is a state that does not impose mandatory meal breaks, and therefore, the court did not have to assess any applicable state laws in weighing the PBT.¹¹⁶ However, some jurisdictions in the Third Circuit, including Delaware and the United States Virgin Islands, have enacted mandatory meal-break statutes.¹¹⁷ *Babcock's* narrow holding did not address any alterations in its analysis to integrate different state laws.¹¹⁸ The court's failure to address how its analysis may have

113. See *Babcock*, 806 F.3d at 157 (finding that plaintiffs failed to state claim by specifically comparing facts in *Babcock* to other cases involving law-enforcement personnel). Given the highly fact-specific nature of the PBT and the court's use of similar cases to come to a conclusion in *Babcock*, it seems highly unlikely that the court would rely on law-enforcement case law in conducting a PBT analysis as it would apply to a non-law enforcement employee. See *id.*; see also *Leahy*, 96 F.3d at 232 (comparing its facts to *Alexander*). As such, the finding that *Babcock* failed to state a claim would not easily lend itself to a non-law enforcement context conceivably a non-law enforcement case with similar facts could yield an opposite finding. See also *Sugiura Jr.*, *supra* note 26 (explaining uniqueness of *Babcock*).

114. See *Babcock*, 806 F.3d at 157 (emphasizing difficulty of applying *Babcock* outside law enforcement situations because it is "fact intensive").

115. See *id.* at 155 (stating defendant is located in Pennsylvania).

116. See *General Wage and Hour Questions*, PA. DEP'T OF LAB. & INDUS., <http://www.dli.pa.gov/Individuals/Labor-Management-Relations/lmc/Pages/Wage-FAQs.aspx#10> [<https://perma.cc/LN66-WCHC>] (stating Pennsylvania does not impose mandatory meal periods for employees eighteen years and older) (last visited Jan. 28, 2017). In addition to Pennsylvania, New Jersey similarly does not impose mandatory meal or rest periods for adult employees. See *Wage and Hour Compliance FAQs*, STATE N.J., DEP'T LAB. & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/wagehour/content/wage_and_hour_compliance_faqs.html [<https://perma.cc/4XKG-LRHS>] (last visited Jan. 28, 2017) (showing similar law in neighboring state).

117. See 19 DEL. CODE ANN. TIT. 19, § 707 (West 2016) (requiring mandatory meal breaks in Delaware); see also 24 V.I. CODE ANN. TIT. 24, § 20b (2006) (requiring mandatory meal breaks in U.S. Virgin Islands).

118. See *Treibman*, *supra* note 46 (discussing how it is difficult to predict future Third Circuit rulings after *Babcock* failed to address how their holding would change in jurisdictions outside of Pennsylvania); see also *Stanisz*, *supra* note 54 (discussing limitations of *Babcock*). To illustrate the significance of *Babcock's* failure to address jurisdictional differences, *Stanisz* comments:

It is also important to remember that applicable state wage and hour laws may have rules and requirements that are more stringent than the FLSA's requirements. By way of example, under Pennsylvania and California wage and hour laws, when an employee is required by the employer to remain at the employer's premises, that time is compensable. Under New York law, in contrast, there is no rule that requires an employee to be permitted to leave the work premises during an uncompensated meal period. Remember: employees get the benefit of federal or state law, whichever is more favorable.

Id.

changed if meal periods were required makes it difficult to extend the logic of *Babcock* to future cases.¹¹⁹

2. *The Undetermined Weight Assigned to the CBA*

In addition to the case's unique facts, it is unclear how much weight the *Babcock* court afforded the CBA.¹²⁰ The court stated that a CBA is a relevant, yet non-determinative factor in ascertaining mealtime compensability, but never elaborated on the extent to which a CBA can impact a holding.¹²¹ Given the lack of transparency, it is unclear whether the CBA is weighed more than, equal to, or less than the restrictions imposed upon employees.¹²² It is also possible that the weight afforded to the CBA is contingent upon the language of the CBA itself.¹²³

Considering what the result of *Babcock* would have been in the absence of the CBA highlights the ambiguity associated with the CBA.¹²⁴ Based on *Babcock's* set of facts, one Third Circuit judge believed the facts suggested the predominant benefit of the time was for the employer, while the other two judges found it was for the employees.¹²⁵ Considering the CBA weighed in favor of the employer, in its absence, it is possible the restrictions imposed on employees could have been sufficient to state a claim for relief.¹²⁶

In evaluating whether the meal period was compensable, the court found that “although Plaintiffs face a number of restrictions . . . on bal-

119. See *Babcock*, 806 F.3d at 157–58 (constraining holding based on existence of CBA language); see also Stanisz, *supra* note 54 (noting *Babcock* did not address other “state wage and hour laws” which may be more “stringent” than FLSA).

120. See *Babcock*, 806 F.3d at 157 (using CBA as factor in evaluating whether meal breaks predominantly benefit plaintiffs or defendants).

121. See *id.* at 158 (stating CBA is factor and in *Babcock* its existence was factor in favor of affirming dismissal of suit).

122. See *id.* (acknowledging CBA is not dispositive factor in decision).

123. See *id.* at 157–58 (distinguishing *Leahy* because in that case CBA language specifically covered mealtime compensation). For instance, the court states that because the CBA at issue in *Babcock* is different than the CBA at issue in *Leahy*, the court would not hold that the CBA could excuse liability under the FLSA. See *id.* at 158 (“Although we find the Seventh Circuit’s analysis in *Leahy* useful for comparison, the Dissent is correct that the instant case is distinguishable . . .” (citing *Leahy v. City of Chi.*, 96 F.3d 228, 232 (7th Cir. (1996))). Under this language, if the CBA in *Babcock* was more similar to the CBA in *Leahy*, it is possible the court would have afforded additional weight to the CBA.

124. See, e.g., Peet & Batista, *supra* note 46 (highlighting undetermined value of having CBA in mealtime compensation claim).

125. See *Babcock*, 806 F.3d at 153 (majority opinion); *id.* at 158 (Greenaway, J., dissenting).

126. See *id.* at 157–58 (majority opinion) (finding CBA weighs in favor of finding time is break because CBA already provides for compensation in event employees are working during that time). But see *id.* at 159 (Greenaway, J., dissenting) (arguing that plaintiffs complaint is sufficient and should at least entitle them to discovery period).

ance, these restrictions did not predominantly benefit the employer.”¹²⁷ This language could be interpreted in divergent ways.¹²⁸ First, it was possible that the restrictions alone were insufficient to state a claim upon which relief could be granted.¹²⁹ This would mean that the existence of the CBA did not impact the holding; however, the phrase “on balance” could indicate that the court was considering the CBA in concluding the restrictions were insufficient to state a claim.¹³⁰ Under this reading, the absence of a CBA could have changed the court’s holding. It is unknown which of these two readings of the court’s language is correct, and as such, it is unclear how much weight the CBA in *Babcock* was afforded, and how the presence of a CBA could affect future holdings.¹³¹

B. *Not on My Watch: Advice to Practitioners Protecting Both Employers and Employees in FLSA Mealtime Compensation Cases*

In assessing mealtime compensation practices, practitioners should consider both the holding in *Babcock* and its indeterminable applicability to future cases.¹³² Employers can avoid litigation by remaining cautious when constructing their meal policies, ensuring limited restrictions during breaks, and avoiding overreliance on the existence of a CBA in defending an FLSA compensation claim.¹³³ In contrast, employees can increase their chances of obtaining compensation for break time by ensuring their complaints contain as much information as possible and by carefully negotiating their CBAs to include compensation for breaks.¹³⁴

127. *See id.* at 157 (majority opinion) (evaluating restrictions imposed on employees).

128. *See infra* notes 132–34 and accompanying text for a discussion of the two potential interpretations of the court’s holding.

129. *See Babcock*, 608 F.3d at 161 (Greenaway, J., dissenting) (arguing that majority’s interpretation of who mealtime restrictions benefitted could easily cut for other side). *But see* *Lamon v. City of Shawnee*, 972 F.2d 1145, 1156–58 (10th Cir. 1992) (reasoning that relatively similar restrictions placed on officers as were placed on plaintiffs in *Babcock* were grounds for finding that mealtime predominantly benefitted employer).

130. *See Babcock*, 806 F.3d at 158 (“We have been advised at argument that the CBA is soon to expire. During the collective bargaining for the new contract, the parties will have a fresh opportunity to consider the issue of compensation for the fifteen minutes in this case.”).

131. *See, e.g.,* Voegelé, Jr., *supra* note 48 (advising employers to be wary of reliance on CBAs because it is unclear how much weight CBAs have in court’s analysis).

132. *See, e.g.,* Peet & Batista, *supra* note 46 (advising employers on implications of *Babcock*).

133. *See, e.g.,* Voegelé, Jr., *supra* note 48 (“[W]hile a provision in a collective bargaining agreement addressing compensation for meal break time will likely weigh in the employer’s favor should its meal break pay practice be challenged, employers cannot assume that a such a provision will serve as a silver bullet.”). For an analysis of how *Babcock* impacts employers in meal period compensation cases, see *supra* notes 138–47 and accompanying text.

134. *See Babcock*, 806 F.3d at 161 n.7 (Greenaway, J., dissenting) (noting that plaintiffs raised fact that their permissible reading materials were limited at breaks

1. *Sticks and Stones May Break Your Bones, But a Break Could Hurt Your Wallet: Advice to Practitioners Counseling Employers on Avoiding Liability Under the FLSA*

Under *Babcock*, employers can impose some restrictions upon employees' meal breaks.¹³⁵ However, once the break is essentially no longer the employee's own, employers must provide compensation.¹³⁶ A potential FLSA violation could pose significant liability to employers, especially when a class action is possible.¹³⁷ As a result, employers must ensure that their meal period policies comply with the guidance from *Babcock* and should be aware that a CBA is not a shield from a finding of compensability.¹³⁸

To reduce exposure to liability, employers should ensure that their employees are aware that the meal period is the employee's own time, and

and that if such facts were established through discovery or alleged in complaint, then plaintiffs may have prevailed). For an analysis of how *Babcock* impacts employees in meal period compensation cases, see *infra* notes 148–60 and accompanying text.

135. See *Babcock*, 806 F.3d at 157 (majority opinion) (finding that meal period predominantly benefited employees despite existence of variety of restrictions on the employees break period); see also Stanisz, *supra* note 54 (explaining PBT “may be a powerful employer defense that will enable an employer to maintain uncompensated meal periods and still impose some restrictions on their usage (at least under federal law)”).

136. See *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 65–66 (2d Cir. 1997) (explaining that when “workers’ on-site presence (during lunch time) is solely for the benefit of the employer” then FLSA liability is proper); Voegelé, Jr., *supra* note 48 (explaining that employers should ensure that “on balance” meal breaks predominately benefit employees).

137. See Long, *supra* note 22 (“Meal break cases present significant liability concerns for employers, as they easily can become class action lawsuits covering many employees”); see also *Meal and Rest Breaks*, WORKPLACEFAIRNESS.ORG, <http://www.workplacefairness.org/meal-rest-breaks> [<https://perma.cc/Y2YT-X3LB>] (last visited Jan. 21, 2016) (explaining liability for FLSA violation for mealtime compensation could include back wages and liquidated damages, which could potentially double amount of total damages employer must pay, along with attorney’s fees and court costs). Additionally, it is important to note, even if an employer is likely to win a suit, the employer is still likely to “incur large litigation costs to prevail.” See Stanisz, *supra* note 54 (discussing drawbacks of FLSA litigation).

138. See Sisk & Siler, *supra* note 45 (advising employers to ensure their policies “reflect [their] intent to pay employees for all hours worked” and recommending that employers shift burden of reporting time adjustments to employees); see also Franz Español, *Third Circuit Adopts ‘Predominant Benefit’ Test for Paid Meal Breaks Under FLSA*, FOX ROTHSCHILD (Dec. 10 2015), <http://www.foxrothschild.com/labor-employment/publications/third-circuit-adopts-predominant-benefit-test-for-paid-meal-breaks-under-flsa/> [<https://perma.cc/9UB8-4MXH>] (explaining that as result of *Babcock*, “[e]mployers should be mindful of what their meal break policy says, how the policy is implemented, and whether other workplace policies interfere with employees’ meal breaks”); Voegelé Jr., *supra* note 48 (“[W]hile a provision in a collective bargaining agreement addressing compensation for meal break time will likely weigh in the employer’s favor should its meal break pay practice be challenged, employers cannot assume that such a provision will serve as a silver bullet.”).

the break does not need to occur at the employee's desk or workstation.¹³⁹ If feasible, employers should also permit employees to leave the work site, relieve employees of the duty of responding to emergencies, and avoid additional restrictions such as forbidding an employee from resting during their break or having an overly broad restriction on permissible reading material.¹⁴⁰ In general, the more the employees can use the break as they wish, the less likely the company is violating the FLSA.¹⁴¹

Additionally, employers should not over rely on the existence of a CBA in protecting them from FLSA liability.¹⁴² *Babcock* made clear that a CBA is only one factor in determining compensability, and given the dissent's strong opposition to the use of the CBA at all, it is possible that a case with a CBA and slightly altered facts from *Babcock* could be sufficient for a plaintiff to state a claim for relief.¹⁴³ A CBA will not act as an impenetrable shield in future cases, and thus employers should ensure that, in

139. See Voegelé, Jr., *supra* note 48 (analyzing employer meal time rules for compliance after *Babcock*). In determining that the meal period at issue in *Babcock* was not compensable, the court emphasized that employees were not required to eat at their desks. See *Babcock*, 806 F.3d at 157. Additionally, the DOL regulation specifically states that “an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.” See 29 C.F.R. § 785.19(a) (2016). As such, employers should be exceptionally careful to ensure their employees are not eating in their workspace, considering such a restriction would likely fail the PBT. See Minehan, *supra* note 39 (suggesting employers reduce liability by “incorporating meal break policies into employee handbooks, considering stand-alone acknowledgment forms through which employees certify they understand meal break policies, and ensuring time sheets have language within them that indicates the employee agrees he or she has worked all hours indicated and taken all meal breaks as specified”).

140. See, e.g., Peet & Batista, *supra* note 46 (recommending employers should allow employees to “leave the premises, take naps, run personal errands, or socialize”); see also Roberts, *supra* note 26 (advising employers to “state clearly that the meal period is the employees’ time to take break”); Share, *supra* note 47 (recommending employers who seek to avoid potential liability under *Babcock* and FLSA relieve employees of “readiness to act” such that employees “are not expected to be called back to their duties to serve during uncompensated meal times”); Suguira Jr., *supra* note 26 (stating that absent CBA, employer requiring employees to be on call may violate FLSA).

141. See, e.g., Sisk & Siler, *supra* note 45 (recognizing that more restrictions on an employees’ personal freedom during break, more likely meal period will be considered compensable work).

142. See Peet & Batista, *supra* note 46 (advising employers to not rely too heavily on CBAs in determining whether they are likely to prevail in meal time compensation case, commenting “given the dissent’s position on the effect of a collective bargaining agreement and case law clearly establishing that parties may not contract to evade federal law, employers should be wary of relying on a collective bargaining agreement”); see also Treibman, *supra* note 46 (“[O]ne of the three judges who heard the case dissented from the ruling in strong terms, and his dissent could play a role in how the case is ultimately viewed.”).

143. Cf. *Babcock*, 806 F.3d at 158 (considering CBA to be non-dispositive factor in determining whether predominant benefit of break inures to employee or employer).

addition to the existence of a CBA, their company policies do not place too many restrictions on meal periods.¹⁴⁴

2. *Have a Happy Meal: Recommendations to Attorneys Representing Employees' Rights to Time and Compensation*

In *Babcock*, the plaintiffs did not include the fact that they were limited in their permissive reading materials during mealtime in their complaint.¹⁴⁵ Under a 12(b)(6) motion, judges are only to consider the complaint itself, so the court did not consider any additional facts, such as the reading material restriction.¹⁴⁶ As a result, the court concluded based on only the facts listed in the complaint that the plaintiffs had failed to state a claim.¹⁴⁷ The plaintiffs' failure to include the reading material restriction in their complaint was detrimental, as the court used that factor to distinguish *Babcock* from *Alexander*, where the restrictions converted the meal period into time that predominantly benefited the employer.¹⁴⁸

The plaintiffs' failure to include all restrictions in their complaint made it more difficult for them to survive the 12(b)(6) motion.¹⁴⁹ As was

144. See Peet & Batista, *supra* note 46 (emphasizing that employers should not rely on existence of CBA to defend against FLSA violation); Voegelé, Jr., *supra* note 48 (advising CBA language is not "silver bullet" to FLSA liability).

145. See *Babcock*, 806 F.3d at 161, n.7 (Greenaway, J., dissenting) (noting fact that employees faced restrictions on reading materials was revealed during plaintiffs' oral argument). The complaint asserted that plaintiffs were unpaid for a fifteen-minute period, were not allowed to leave the prison, were not permitted to go outside, were not permitted to run personal errands, were restricted from sleeping during the break, had to remain on-call, and had to respond to emergencies in uniform with emergency response gear. See Plaintiffs' Complaint at 5, *Babcock v. Butler Cty.*, 806 F.3d 153 (3d Cir. 2015) (No. 2:12CV00394).

146. See FED. R. CIV. P. 12(b)(6). In ruling on a 12(b)(6) motion, courts must evaluate whether "under any reasonable reading of the pleadings", the plaintiff is entitled to relief; in making this evaluation, courts are to "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." See, e.g., *Naim v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996) (citing *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993)). A court will dismiss a 12(b)(6) motion for alleging sufficient facts if the complaint "adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." See *id.* In assessing the 12(b)(6) motion, courts must consider the pleadings, but may also consider additional information derived from public record, orders, and exhibits attached to the complaint. See, e.g., *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994).

147. See *Babcock*, 806 F.3d at 158 (majority opinion) (affirming dismissal of case under 12(b)(6)).

148. See *id.* at 157 (emphasizing that facts pled in plaintiffs' complaint did not demonstrate that time predominantly benefited the employer). The court justified this determination by comparing the facts of *Babcock* to that of *Alexander*, commenting that the plaintiffs in that case "were required to receive permission to take a meal period," a fact also present in *Babcock*, but the officers were also "not permitted to read nondepartmental publications." See *id.* (quoting *Alexander v. City of Chi.*, 994 F.2d 333, 335 (7th Cir. 1993)).

149. See *id.* Had the plaintiffs included the restriction in their complaint, it would have been more difficult for the majority to differentiate *Babcock* from *Alexander*. While the addition would have made it more likely the plaintiffs would have

emphasized in *Babcock*, plaintiffs might not be given an opportunity to engage in additional discovery, increasing the importance of a detailed pleading.¹⁵⁰ Thus, to decrease the chances of losing to an opposing party's 12(b)(6) motion, employees filing suit against their employer for mealtime compensation claims must be extremely careful to include all relevant restrictions in their pleadings.¹⁵¹ If there are any pertinent restrictions, such as the reading material limitation in *Babcock*, they should be included in the complaint.¹⁵²

Next, employees should be wary of the terms and phrases included in their CBAs because a CBA may be a double-edged sword: sometimes a CBA protects compensation, while other times, such as in *Babcock*, the CBA is a factor that prevents compensation.¹⁵³ The court in *Babcock* used the CBA as a factor that weighed against a finding for the plaintiffs, arguing that the CBA protected the plaintiffs by ensuring compensation if employees worked during breaks.¹⁵⁴ As such, one threat for potential plaintiffs is that the terms of their CBAs could decrease their chances of prevailing on their compensation FLSA claim.¹⁵⁵ This concern is exacerbated given the undetermined weight the court gave the CBA in *Babcock*; therefore, employees should be extremely cautious when negotiating the terms of their

prevailed, whether they would have actually done so is unclear given the court's unquantified consideration of the CBA as a relevant factor in determining compensability. *See id.* at 158. If the court would still affirm the 12(b)(6) motion even with the reading restriction in the complaint, it would indicate that the CBA is granted a substantial amount of weight in coming to a conclusion.

150. *See id.* at 159 (Greenaway, J., dissenting) (commenting that majority wrongly failed to permit plaintiffs to engage in discovery to gain "access to the facts and circumstances" that could help them state claim upon which relief could be granted).

151. *See supra* notes 148–55 and accompanying text for a discussion of the importance of plaintiffs' inclusion of all relevant restrictions in their complaints.

152. *See Babcock*, 806 F.3d at 161 n.7 (discussing that reading material restrictions were absent from complaint but mentioned during plaintiffs' oral argument).

153. *See generally id.* 162 n.8 (explaining how arbitrator expressed no opinion on how CBA language affected mealtime compensation under FLSA; thus, leading to inference that majority overvalued language in CBA).

154. *See id.* at 158 (majority opinion) (noting that although CBA does not specifically address compensability of fifteen minute period during break, it requires compensation if employee is required to work during break).

155. *See Minehan, supra* note 39 (cautioning plaintiffs in such cases). A plaintiff's CBA could make it more difficult to survive a 12(b)(6) motion if, for example, the plaintiff's CBA contained a similar provision to that in *Babcock* where the specific period of time is not addressed, but there is a provision that requires compensation for time worked. *See Babcock*, 806 F.3d at 157–58. Nevertheless, a CBA which designates a time period specifically as a break would also make it more difficult to survive a 12(b)(6) motion because the court has stated it will consider "the agreed-upon characterization" of a time period "as a factor in analyzing to whom the predominant benefit of the period inures." *See id.* at 158. Therefore, if a period of time is not compensated for under the CBA because it is considered a break, the court may consider that characterization in determining whether the time predominantly serves the employee or employer.

CBAs.¹⁵⁶ If employees that are given breaks with substantial restrictions have the opportunity, they should renegotiate the terms of the CBA to provide for compensation during that time.¹⁵⁷

V. CLOCKING OUT: SUMMING UP THE IMPACT OF *BABCOCK*'S HOLDING

The Third Circuit's holding in *Babcock* established that whether a meal period predominantly benefits the employee or the employer determines whether the time is compensable.¹⁵⁸ In coming to this conclusion, the court considered the restrictions imposed upon employees and the existence of a collective bargaining agreement between the parties.¹⁵⁹ While *Babcock* provided some clarity to mealtime compensation cases by formally adopting the PBT, it is still difficult to predict how courts will rule in other cases.¹⁶⁰ In the aftermath of *Babcock*, practitioners should be aware of the factors the court considered, as well as the uncertainty that remains.¹⁶¹

156. See generally Peet & Batista, *supra* note 46 (discussing concerns resulting from *Babcock*).

157. See *Babcock*, 806 F.3d at 158 (suggesting that because CBA would shortly expire, during renegotiations for CBA, plaintiffs should consider arguing for compensation for fifteen-minute period at issue where plaintiffs are not compensated, yet still required to remain on site, in uniform, and prepared to respond to emergencies).

158. See *id.* at 156 (announcing court's intention to utilize PBT).

159. See *id.* at 157–58 (declaring that PBT is fact-intensive inquiry that considers specific restrictions imposed as well as existence of CBA).

160. For a discussion of why the court's holding in *Babcock* does not shed significant light on how courts will analyze future cases, see *supra* notes 106–34 and accompanying text.

161. For advice to employers on avoiding mealtime compensation cases following *Babcock*, see *supra* notes 138–47 and accompanying text. For advice to employees on how to litigate a mealtime compensation claim, see *supra* notes 148–60 and accompanying text.