IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

AARON L. ESPENSCHEID,
GARY IDLER and MICHAEL CLAY,
on behalf of themselves and a class of
employees and/or former employees
similarly situated,

OPINION and ORDER

09-cv-625-bbc

Plaintiffs,

v.

DIRECTSAT USA, LLC and
UNITEK USA, LLC,

Defendants.

- -

This is a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and a class action under the wage and overtime compensation laws of Wisconsin, Minnesota and Pennsylvania. The case is proceeding with the following subclasses under § 216(b), and similar subclasses for plaintiffs' state law claims:

> (a) plaintiffs who were denied overtime because they recorded a lunch break that they did not take or otherwise underreported hours they worked between their first and last installation or service job of the day;
>
> (b) plaintiffs who were denied overtime because they were not compensated

for work performed before their first installation or service job of the day or after their last installation or service job of the day; and

(c) plaintiffs whose regular and overtime wages for nonproductive work were calculated improperly.

Now before the court are the parties' cross motions for partial summary judgment, dkt. #368, #374, in which they seek determinations of law as to specific issues involved in the case. As explained below, I will grant the motions in part and deny them in part. Also before the court is defendants' motion to strike plaintiffs' damages expert report for failure to comply with this court's scheduling order and Fed. R. Civ. P. 26(a)(2)(B), dkt. #452. I will deny that motion.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

Defendant DirectSat is a Delaware limited liability company with its principal place of business in King of Prussia, Pennsylvania. It provides installation service to DirecTV at approximately 24 locations across the country. Defendant UniTek USA, LLC, is DirectSat's parent company and the sole member of DirectSat. It is also a Delaware limited liability company with corporate offices in Blue Bell, Pennsylvania.

UniTek provides finance and payroll departments, risk management and information technology services to DirectSat, as well as fleet services and assistance in finding locations for DirectSat's field offices. UniTek provides all of DirectSat's human resources services, maintains all of the human resource records, handles all workers' compensation claims and prepares nearly all of the employment policies, including the employee handbooks and policy booklets that govern day-to-day aspects of the technician's employment. In particular, UniTek prepares DirectSat's personnel policies related to training, safety, timekeeping, overtime and use of company vehicles. UniTek implements all employee discipline, recruiting, hiring and termination decisions, coordinates and provides curriculum for the weekly and biweekly meetings, manages and implements the GPS and vehicle policies. UniTek has a national training director who coordinates the training for all technicians, including the safety training that occurs at weekly meetings. Additionally, UniTek's training and development department coordinates training for DirectSat staff, such as anti-harassment training. Finally, UniTek tracks all inventory and tools used by technicians.

The technicians involved in this case are non-exempt employees who are responsible for installing, upgrading and servicing DirecTV equipment. Generally, they work by themselves in discrete locations. Named plaintiff Aaron Espenscheid was employed as an installation technician in DirectSat's Madison, Wisconsin office from June 23, 2008 until December 16, 2009. Named plaintiff Gary Idler worked out of DirectSat's Claremont,

Minnesota office from December 29, 2008 until February 5, 2010, and named plaintiff Michael Clay worked out of DirectSat's King of Prussia, Pennsylvania office from August 27, 2007 to May 12, 2008.

B. Defendant DirectSat's Employment Policies

Defendant DirectSat's national policies and practices are contained in the company's employee handbooks, policy booklets and fleet policy handbook. Officially, the policies apply uniformly to all technicians regardless of location. Supervisors and managers at field offices cannot change national policies or enact a practice that differs from what is required by DirectSat's employment manual. If an employee does not comply with company policies the employee may be subject to disciplinary action, including termination.

1. Time keeping and standard work day

Defendant DirectSat's payroll, overtime and timesheet policies apply to all technicians and are set forth in DirectSat's employee handbook, which technicians receive when they are hired. DirectSat tracks each technician's time worked on weekly timesheets that are collected at the local field offices by project administrators and supervisors and forwarded to payroll in Pennsylvania. Employees are required to sign their timesheets before submitting the final version at the end of the workweek and field supervisors and managers

are supposed to check timesheets for accuracy. Under DirectSat's policy, technicians "are responsible for ensuring that the information provided on their timesheet is recorded accurately, honestly, and submitted by the established deadline for written approval by their Manager." Dkt. ##372-1, 372-2, 372-6. Technicians are to keep a copy of their timesheets for their personal records and prohibits "altering, falsifying, tampering with timesheets, or recording time on another Employee's timesheet." Id.

Both UniTek's and DirectSat's employee handbooks instruct technicians to "record the actual time worked," which includes "the time you begin and end work, as well as the beginning and ending time of each meal period or extended break." Dkt. ##372-1, 372-2, 372-4, 372-6. Generally, supervisors, managers and DirectSat policy instruct technicians that work "begins" when they reach their first customer job and concludes when they leave their last job for home. If the technician needs to return to the field office or warehouse, the technician's day officially concludes when that technician leaves the warehouse. Multiple managers and supervisors from different offices instructed technicians to record time on their time sheets for work performed in this window only, that is, from the time they reach the first customer job to the time they leave for home. The DirectSat employee handbook also states that it compensates employees "for their work beginning when an Employee performs the 'first principal activity' of the workday . . . [until] an Employee finishes the last principal activity of the workday." Dkt. #372-2. Technicians are instructed to exclude from their

timesheets their commuting time between home and their first job or the field office and between their last customer job and home.

Under DirectSat's written policy, technicians are to take a mandatory lunch break each day and to record the lunch break on their time cards. However, DirectSat regularly pays technicians who have not recorded lunch breaks on their time cards.

2. Vehicle policy

DirectSat has a national fleet policy handbook setting out the policies related to the class members' work vehicles, including traffic violations, fleet maintenance and safety. Dkt. #357-5. These policies apply across the country and are mandatory for all DirectSat employees. The company-owned vehicle policy requires technicians to perform daily inspections of their vehicles, keep the vehicles in safe working condition and maintain the vehicles according to the company's vehicle operator policy. Under the policy, technicians are solely responsible for maintenance and cleanliness of company-owned vehicles. Maintenance includes oil changes, brake work and other normal vehicle maintenance.

DirectSat also has a personally-owned vehicle policy. Under both the company and personally-owned vehicle policies, technicians are required to unload tools and equipment from company-owned vehicles when they arrive home at night and load these same items in the morning. If tools or equipment are stolen or lost, the technician will be expected to pay

for the loss and may be subject to discipline. DirectSat has charged technicians who have had equipment stolen from their vehicles. Several technicians testified that they unloaded tools and equipment from their trucks each night, spending 10 minutes to one hour, depending on the number of jobs they had that day. (Defendants contend that neither the policy requiring daily vehicle inspections and maintenance nor the policy requiring technicians to unload their tools every night is enforced by DirectSat or followed by technicians. They point to the deposition testimony of a few technicians who did not unload their tools each night or unloaded only certain tools. Plaintiffs contend that the policies are enforced, pointing to testimony of corporate officials who wrote the policies and technicians who followed them.)

3. GPS policy and Siebel system

As part of its vehicle policy, defendant DirectSat began to administer a national GPS policy at some point during the class period. DirectSat installs GPS tracking devices in the company-owned vehicles assigned to the technicians to insure that "company policies are followed regarding the use of Company Owned Vehicles" and to monitor and improve the efficiency of the technicians. DirectSat tells technicians that the "system will monitor speed, work hours surrounding arrival and departure times, job duration and after hour vehicle usage."

The GPS system can follow the movement of every technician on a "real time" basis and determine when a company-owned vehicle is in motion and therefore, determine a technician's drive time. Through its third-party vendor, DirectSat receives reports regarding vehicle movements throughout the day. The GPS policy states that "employee time sheets shall be audited against data obtained from the GPS system to verify the accuracy of times submitted for pay." Dkt. #96-4.

At some point during the class period, DirectSat began using the Siebel system with handheld devices to track jobs and create reports. Technicians received a handheld device in order to receive route assignments. (Before handhelds, technicians called dispatch to acknowledge jobs and called supervisors to notify them when they completed their day.) In addition, technicians use the handhelds to verify the status of jobs throughout the day, such as whether the technician is en route, on site or finished with a job. The Siebel system also contains estimates as to how many minutes each job should take on average. The estimates are based on field studies done by DirecTV.

4. Mandatory calls

Defendant DirectSat has a national technician cell phone policy that requires the technicians to call all of their customers by 8:30 a.m. to provide an estimated time of arrival. Failure to abide by the technician cell phone policy may result in "disciplinary

consequences." Several technicians testified that they made these calls from home before leaving for their first job of the day and that the phone calls were approximately four to five minutes each. The cell phone policy prohibits technicians from using their cell phones while driving, though some technicians admitted that they called customers while driving or waited until later in the day to call all of their customers.

5. Meetings and equipment pickup

Technicians are required to attend a variety of meetings, including weekly technician meetings, tailgate meetings, safety meetings and training. Technicians can be disciplined for failing to attend.

Generally, technicians pick up equipment from the warehouse on a weekly basis. The pick-ups can take up to an hour, depending on how much equipment is needed. Once a month, technicians go to the warehouse to perform an inventory of all the equipment in their vehicles. This can take three to four hours.

6. Paperwork and other responsibilities

Work orders are distributed to technicians on a daily basis. As a general rule, during the time period relevant to this case, defendant DirectSat sent daily job assignments to plaintiffs' homes by fascimile, email or a handheld device, although some technicians went

to the office each day to pick up equipment or their assignments. Those technicians who did not receive work orders at home often received little or no email or fax communication from DirectSat at all. Of the technicians who received their routes at home, some technicians reviewed the routes the night before their jobs and others reviewed the routes in the morning. Several technicians testified that they planned their routes using MapQuest or another computer map program, although a few technicians testified that they did not map their routes either because they did not have a computer or because they picked up their routes at the field office everyday. After reviewing their daily work assignments, technicians either had to call dispatch to check in or acknowledge the routes on their handheld. At the end of each day or the following morning, technicians complete and submit to their supervisor the completed and incomplete work orders from the previous day. Several technicians testified that they received email communications from their supervisors or managers that they reviewed and responded to in the morning or evening.

DirectSat has no written policy about working from home. Many technicians spent between 20 minutes and one hour at home each night completing required paperwork, including timesheets and daily logs.

7. Overtime policy

The employee policy booklet's "overtime policy" states that overtime is not

"generally" permitted. The overtime policy explains how technicians are monitored with respect to "nonproductive" work and overtime:

> Please note: All technicians will be monitored on revenue per truck goals daily. Each technician is expected to complete the designated amount of jobs per day with minimal overtime. If there is a trend of non-productive work and excessive hours, the manager will assess whether or not it is a training need or a performance discrepancy. At that time corrective action or more training may be recommended.

Dkt. #251-20.

Although DirectSat discourages overtime and its corporate officers seek actively to reduce the amount of overtime reported, technicians are eligible to receive overtime compensation for any hours of overtime that they work. They are required to seek approval for all overtime they work before crossing the 40-hour threshold. If employees do not seek approval, they may be disciplined up to and including termination. However, even if the employee does not seek approval, it is DirectSat's official policy to pay that employee for all earned overtime. DirectSat pays overtime to technicians on a regular basis.

8. Payment policies

Generally, DirectSat technicians are paid for each job completed. In other words, the technicians are paid on the basis of the quantity and type of work they complete at a subscriber's home rather than receiving a typical hourly wage, with exceptions for certain

tasks that are paid on a commission basis and other tasks that are paid on an hourly or daily basis. DirectSat assigns a monetary value to each job and credits the technician with the value assigned to that task once the technician has completed the job. A single trip to a subscriber's home or office can result in multiple and distinct tasks, each of which carries a separate piece rate. Technicians are paid the piece rate only for the jobs they complete. The value assigned to each task varies depending on the geographic region in which a DirectSat field office is located. At the end of the week, the value of the jobs performed is aggregated to determine the technician's production value for the week. This value is used to calculate wages, including overtime.

The precise rate paid to a particular technician is also determined by the "level" at which the technician is designated by DirectSat. The higher a technician's level, the higher the piece rate will be for each job. A technician's individual rate is a determined using a scorecard system that takes into account how efficient the technician is in completing installations. This efficiency rating is determined by dividing the total compensation for piece-rate tasks by the number of hours that the class members reported on their time sheet. The higher the efficiency rating, the more points the class members earn on their scorecards. Those class members who have more points on their scorecards have a better chance of keeping their technician class level and avoiding disciplinary action. Under the efficiency system, DirectSat expects technicians to achieve a base hourly rate of $15.00 an hour. A

technician may be disciplined and even terminated if the technician does not meet the $15.00 an hour standard for multiple quarters.

To calculate a technician's effective hourly rate, the payroll department takes the production value for each week, that is, the aggregate value of each job rate, and divides that value by the total number of productive and nonproductive hours reported by the employee during the relevant week. For example, if a technician has a productive value of $1,200 for a given week and a total of 40 productive and nonproductive hours, the effective hourly rate is $30.00 an hour ($1,200/40 hours = $30.00/hour). The technician's gross pay for the week is $1,200. When a technician's effective hourly rate is less than the applicable state or federal minimum wage, DirectSat's official policy is to adjust the technician's hourly rate so that the technician receives the appropriate minimum wage.

If an installation technician works more than 40 hours in a single week, the technician's effective hourly rate is calculated in the same manner as above, by dividing the production hours for the week by the number of hours worked. For example, if the technician's production value for the week is $1,200 and that technician has recorded 50 hours, the technician's effective hourly rate is $24.00 an hour ($1,200/50 hours = $24.00 an hour). To calculate the technician's pay for the week, DirectSat multiples the total hours worked (50) by the effective rate ($24.00) to reach the employee's "regular wages." To calculate overtime wages, DirectSat multiplies the overtime hours (10) by one-half the hourly

rate ($12.00). The regular hours and overtime are then added together to determine a technician's pay ($1,200 + $120 = $1,320).

In October 2009, DirectSat changed the manner in which it required technicians to record their time. Before October 2009, technicians were not paid a separate hourly rate for nonproductive work such as meeting attendance or picking up equipment. Instead, if employees included time they spent performing such tasks on their timesheets, the nonproductive tasks were grouped with productive hours and the total hours were divided into the technicians' total compensation for the week. In October 2009, DirectSat modified the timesheet to include separate columns for technicians to record "training" time, "meeting" time and "other" time. DirectSat instructed technicians that the "other"category included time spent at the warehouse and performing vehicle maintenance. As of the week of October 4, 2009, technicians were paid a specific, predetermined hourly rate for time recorded in these three new columns of the timesheet. The hourly rate payable for hours recorded in the three new columns is premised upon technician level.

C. Training and Non-Technician Positions

Many technicians begin their employment with DirectSat in training, which lasts anywhere from two days to two months, depending on the progression of the trainee, with the typical period ranging four to five weeks. While in training, technicians are paid a flat

hourly rate for the hours they work. Some employees quit before completing training and thus are never paid under the piece-rate system.

While hired as technicians, several plaintiffs were either promoted or transferred into non-technician positions during their employment, such as field supervisor, trainer or warehouse assistant. (Defendants submitted a spreadsheet with dates in which certain plaintiffs worked in non-technician capacities. Dkt. #369-7). For the portions of time that these individuals worked in these non-technician capacities, they were not paid under DirectSat's piece-rate payment system. Technicians who are injured on the job and are placed on workers' compensation or light duty are not paid under the piece-rate system.

D. Testimony of Named, Opt-in Plaintiffs and Corporate Representatives

Plaintiffs submitted approximately 70 declarations from opt-in plaintiffs and putative class members. Plaintiffs also deposed defendants' corporate representatives, including Daniel Yannantuono, the CEO of DirectSat, Yvette Shockman, the director of human resources for DirectSat, and Cathy Lawley, the human resources manager at defendant UniTek, as well as several field managers. Defendants took depositions of the named plaintiffs and approximately 35 opt-in plaintiffs. Many technicians testified either through their declarations or depositions that they were not allowed to record work performed before they arrived at their first installation or service call of the day or after they completed their

final installation or service call of the day. Specifically, several technicians testified that they completed the following tasks outside the official work day window for which they could not record their time:

- loading tools and equipment into their work vehicles and unloading equipment into their homes;
- receiving job assignments, planning routes and completing paperwork;
- calling customers to provide estimate arrival times;
- driving from their homes to their first installation or service call and from their final installation or service call back to their homes;
- restocking equipment;
- cleaning and maintaining work vehicles;
- constructing satellite dishes;
- attending weekly safety and training meetings; and
- attending monthly inventory meetings and quarterly technician meetings.

Not all technicians performed all of these tasks or performed them every day or for a consistent period of time each day. For example, some technicians testified that they spent a significant amount of time loading and unloading equipment from their vehicles every day, while others admitted that they rarely if ever unloaded equipment. Some technicians did little paperwork at home and did not receive email or fax communication from their supervisors. Similarly, some technicians testified that they may have included time spent in

meetings on their timesheets, while others stated that they never included this time. (Defendants have submitted several timesheets in which technicians recorded their start time as one hour earlier on one day than on every other day, suggesting that this was the meeting day.)

Many technicians testified that they did not record time for activities that occurred between the first installation or service call and the final installation or service call, including assisting other technicians with installation or service calls; returning to an installation site to address customer questions or complaints; and performing installations and service calls that were not completed for reasons beyond the technician's control. Those who did not record time spent on these tasks did not perform them for the same amount of time every day or even every week. In addition, some technicians testified that they recorded time for all work performed during the work window.

Finally, many technicians testify that they underreported the actual number of hours they worked during the day performing installations and service calls. The technicians testified to a variety of reasons for underreporting, such as the encouragement of their supervisors, their need to increase their efficiency ratings, scoldings they had received for accumulating too many hours or overtime hours or "that [it] is just the way the job worked." Some technicians underreported hours by shaving off an hour or two every day, some excluded their driving time between jobs, some used mathematical formulas that they

believed would give them the best efficiency rating and several others testified that they recorded taking a lunch break when they actually worked through their lunch break regularly. Although most technicians contend that defendants owe them for uncompensated overtime, some technicians recorded overtime on their timesheets on several occasions and were paid for overtime when it was recorded. In addition, some technicians admit that they were paid for all of their time between their first and last customer jobs of the day and only recorded a lunch break when they actually took one.

E. Defendants' Knowledge of Underreporting

Several technicians testified that they complained to their supervisors or managers about not getting paid for certain tasks and not being able to record time spent in these tasks. Some field managers and supervisors were aware that technicians underreported their hours and actually encouraged or instructed technicians to underreport. Some managers testified that the efficiency rating system led to the underreporting of hours.

Email communication among corporate officers suggests that they were concerned that technicians were underreporting hours and that technicians had complained about not being paid for all hours worked, though the parties dispute whether CEO Yannantuono and others believed underreporting to be a widespread or serious problem.

Some managers testified that they were aware that technicians skipped lunch breaks,

and the managers had discussions with the human resources department about technicians not taking their lunch breaks. Some supervisors told to technicians to record a lunch break regardless whether the technician actually took a break. One manager forwarded an email to all of his technicians indicating that they must show a lunch as taken each day even if they do not take a lunch break.

CEO Yannantuono and at least one general manager were aware the technicians took vehicles in for maintenance on their own time. At least one manager testified that he knows that technicians call their customers before getting into their vehicles.

F. Defendants' Expert Witness

Defendants offer Robert Crandall as an expert in statistical analyses of the timekeeping and payroll data in this case. Crandall compared weekly payroll records with GPS data and concluded that a comparison of the two data sets shows that the average weekly hours from payroll data exceeded the average reported hours in GPS. In his opinion, the findings are consistent with the theory that technicians *over-reported* their hours.

In addition, Crandall analyzed payroll data from 13 field offices in Minnesota, Pennsylvania and Wisconsin and found a statistically significant rate of overtime reporting in those offices. In particular, roughly 40% of the technicians surveyed averaged more than 40 hours a week and more than 71% of all technicians in these three states recorded at least

some overtime. Crandall concluded that "[t]hese results would not be expected if there was a uniform policy in place that forces technicians not to record hours worked to avoid overtime."

Finally, using GPS data, Crandall found that on more than 60% of the days during which Pennsylvania, Wisconsin and Minnesota technicians were eligible for a meal break, they took a non-work related stop of thirty minutes or more.

G. Subclasses

On February 10, 2011, I certified the following FLSA subclasses, noting that it was likely that not every opt-in plaintiff would have a claim in each subclass:

> (a) plaintiffs who were denied overtime because they recorded a lunch break that they did not take or otherwise underreported hours they worked between their first and last installation or service job of the day;
>
> (b) plaintiffs who were denied overtime because they were not compensated for work performed before their first installation or service job of the day or after their last installation or service job of the day; and
>
> (c) plaintiffs whose regular and overtime wages for nonproductive work were calculated improperly.

I certified similar classes for plaintiffs' claims falling under Wisconsin, Minnesota and Pennsylvania state wage and hour law.

OPINION

A. Defendants' Motion for Partial Summary Judgment

In their motion for partial summary judgment, defendants seek to clarify and narrow plaintiffs' claims and the particular plaintiffs who may assert those claims. Specifically, defendants seek summary judgment on two legal issues: (1) whether plaintiffs' purported "straight time" and "gap time" claims are cognizable under the FLSA as a matter of law; and (2) whether plaintiffs' claims for damages arising from receipt of routes, mapping of routes or maintenance of vehicles are precluded by the Portal-to-Portal Act and the Employer Commuter Flexibility Act.

In addition, defendants move for judgment with respect to all or part of the claims brought by the following categories of individuals: (1) plaintiffs for whom some or all of their employment for defendants was outside the FLSA's three-year statute of limitations; (2) plaintiffs who worked for defendants after October 4, 2009, when DirectSat changed the manner in which it compensated technicians; (3) plaintiffs who worked in capacities other than "technician" during their employment with DirectSat; (4) plaintiffs who worked for DirectSat as trainees for part of their tenure with defendants; (5) plaintiffs who were compensated through workers' compensation or light duty during some portion of the relevant limitations period; (6) individual plaintiffs who testified that they did not perform specific tasks or were already compensated for specific tasks; and (7) three individual

plaintiffs who failed to attend their noticed depositions. I will address defendants' arguments in the order listed above, with the exception of defendants' argument arising under the Portal-to-Portal Act, which I will address in the context of plaintiffs' motion on the same subject.

1. "Gap time" or "straight time" claims

One of the subclasses certified in this action is made up of plaintiffs who assert that their "regular and overtime wages for nonproductive work were calculated improperly." Plaintiffs in this subclass contend that defendants failed to compensate them for nonproductive hours they worked both inside and outside the official work window (between the start of the first and the end of the last customer jobs of the day) and both over and under the overtime threshold.

Defendants contend that the FLSA does not allow plaintiffs' claims for uncompensated non-overtime hours, commonly known as "straight-time" or "gap-time" claims, because those hours are not overtime and plaintiffs have not argued that their total compensation for any period divided by the hours worked in that period fell below the minimum wage. (Defendants have not moved for summary judgment as to plaintiffs' claims for uncompensated overtime for nonproductive work or for any claims for regular wages plaintiffs are asserting under state law. Plaintiffs' claim for miscalculated overtime is

discussed in the context of plaintiffs' motion for summary judgment later in this opinion.)

Plaintiffs' claims for "straight time" wages for nonproductive work (non-overtime hours) fall into two categories: (1) claims for straight time wages in weeks in which plaintiffs worked no overtime, otherwise known as "pure" gap-time claims; and (2) claims for straight time wages in weeks in which plaintiffs worked overtime. The Court of Appeals for the Seventh Circuit has not addressed the question whether any gap time claim may be asserted under the FLSA. As discussed below, the courts to consider the issue have reached varying conclusions as to the circumstances in which a gap time may be asserted under the FLSA.

a. "Pure" gap-time claims

The FLSA prescribes minimum wage and overtime pay requirements, 29 U.S.C. §§ 206- 207, and strictly speaking, claims for gap time are neither, although failure to pay gap time could become a minimum wage violation in some circumstances. "Pure" gap time claims are claims for straight time in weeks in which the employee worked no overtime. Most courts to consider the issue have concluded that plaintiffs cannot bring "pure" gap-time claims under the FLSA. These courts reason that the FLSA does not provide a remedy for workers who have received at least the minimum wage for a pay period in which they have not worked overtime. This makes sense. After all, if an employee's average wage exceeds the legal minimum, then no minimum wage violation has occurred; in pay periods without

overtime, there can be no violation of the maximum hours provisions. Monahan v. County of Chesterfield, 95 F.3d 1263, 1281 (4th Cir. 1996) ("If the employee has not worked any overtime and has received an hourly wage equal to or in excess of the statutory minimum wage, there can be no FLSA violation."); Hensley v. MacMillan Bloedel Containers, Inc., 786 F.2d 353, 357 (8th Cir. 1986); United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 490 (2d Cir. 1960); Brown v. Lululemon Athletica, Inc., 2011 WL 741254, *4 (N.D. Ill. Feb. 24, 2011); Valcho v. Dallas County Hospital District, 658 F. Supp. 2d 802, 811 (N.D. Tex. 2009); Arnold v. Arkansas, 910 F. Supp. 1385, 1393 (E.D. Ark. 1995). But see Lamon v. City of Shawnee, 972 F.2d 1145, 1155 (10th Cir. 1992) (recognizing pure gap time claim); Schmitt v. Kansas, 844 F. Supp. 1449, 1458 (D. Kan. 1994) (same).

b. Gap-time claims for weeks in which plaintiffs worked overtime

Although the majority of courts reject pure gap-time claims, many courts have recognized gap time claims if (1) an employee exceeds the overtime threshold; and (2) the employment contract does not expressly or implicitly compensate the employee for all non-overtime hours. Monahan, 95 F.3d at1272-73; Valcho, 658 F. Supp. 2d at 811-12; Koelker v. Mayor and City Council of Cumberland, 599 F. Supp. 2d 624, 635 (D. Md. 2009).

Usually, these courts have adopted the Department of Labor's interpretation of the FLSA's overtime requirements, as codified in 29 C.F.R. §§ 778.315, 778.317. Section

778.315 states that overtime compensation "cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid." Section 778.317 states that "[a]n agreement not to compensate employees for certain nonovertime hours [is impermissible] since it would have the same effect of diminishing the employee's total overtime compensation." The regulation provides an example of an employer who has failed to comply with the FLSA's overtime requirements, stating that

> An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $5 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $7.50 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid $25 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act. Unless the employee is first paid $5 for each nonovertime hour worked, the $7.50 per hour payment purportedly for overtime hours is not in fact an overtime payment.

29 C.F.R. § 778.317.

Courts recognizing gap-time claims for weeks in which employees worked more than 40 hours rely on these regulations to construe the gap-time claim as an overtime violation, thereby bringing it under the FLSA. Relying on these regulations, these courts conclude that an employer has not paid overtime in accordance with the FLSA unless the employer has paid the employee at her regular rate for all straight time worked in that period. Valcho, 658

F. Supp. 2d at 811-12 (citing 29 C.F.R. § 778.315). The same courts reason that if there is an agreement between employer and employee that employees' wages are intended to compensate them for all hours worked up to the overtime threshold, there can be no viable claim for gap time under the FLSA, though there may be a claim under state law for violation of the employment agreement. Monahan 95 F.3d at 1272-73.

c. No gap-time claims of any kind

A few courts have disagreed with the reasoning expressed by the majority of courts or expressed doubt whether gap-time claims may be brought under the FLSA at all. Wolman v. Catholic Health System of Long Island, 2010 WL 5491182, *5 (E.D.N.Y. Dec. 30, 2010) (expressing "serious concerns about the majority view, even after considering the applicable regulations," but dismissing plaintiff's claims on grounds that employment agreement provided compensation for all non-overtime hours); Farris v. County of Riverside, 667 F. Supp. 2d 1151, 1162 (C.D. Cal. 2009) (gap-time claims not cognizable without minimum wage violation); Arnold, 910 F. Supp. at 1394 (expressing "doubt about the authority of the Secretary, by regulation, to extend federal court jurisdiction beyond that clearly created by the statute," but deferring resolution of ultimate question).

With respect, I agree with these courts and disagree with those courts that recognize gap-time claims under the FLSA in any circumstance. The courts applying § 778.315 and

§ 778.317 of the Department of Labor regulations interpret those regulations as meaning that an employer has not complied with the maximum hours requirement of the FLSA if the employer does not pay its employee for all straight time. This makes some sense because, as the regulations point out, even if an employer pays premium pay to an employee who works more than 40 hours in a week, the employer's failure to pay that employee for some nonovertime hours has "the effect of diminishing the employee's total overtime compensation." § 778.317. However, this is not quite accurate because an employer's failure to pay for nonovertime hours does not diminish an employee's *overtime* compensation. Rather, it diminishes the employee's *overall* compensation, but there is no language in the FLSA creating a cause of action for diminished overall compensation. As the court of appeals pointed out in Klinghoffer, 285 F.2d at 494, because the FLSA itself requires only payment of minimum wages and overtime wages, nothing in the statutory text expressly prevents employers from requiring employees to work some hours below the overtime threshold for "free," provided that the employees' average wage exceeds the minimum. Id. (pay plan "does not become illegal merely because it takes the form of additional hours worked without compensation, rather than of an express reduction of the hourly rate").

Section 215 of the FLSA lists "prohibited acts" as being a violation of § 206 (minimum wage provision), § 207 (maximum hours provision), § 212 (child labor provision), § 211(c) (record keeping requirements) or regulations issued under §214 (records

requirement for employment of apprentices and those whose earning capacity is impaired by certain characteristics). It does not include in the list a violation for failure to pay straight or gap time wages or the overall compensation anticipated by an employee agreement. In addition, the relief afforded employees aggrieved by violations of § 206 or § 207 is limited to "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute makes no mention of relief in the form of unpaid regular wages for a violation of the maximum hours provision. Stated simply, the FLSA provides no avenue for the recovery of straight-time pay. Moreover, although the regulations provide interpretation for applying the overtime and minimum wage requirements, they cannot create new causes of action for uncompensated straight-time.

Plaintiffs contend that the FLSA should be interpreted liberally to encompass such claims in order to fulfill its remedial purposes. However, the core rights and obligations created by the FLSA are the minimum wage levels and entitlement to overtime pay for work above specified maximum hours set forth in § 206 and § 207. The general "remedial purpose" of the FLSA does not support its expansion to a mechanism for employees to enforce a broad range of employers' obligations beyond the minimum wage and overtime requirements enacted by Congress. I have stated before that under the FLSA, "employers must pay their employees a wage for all of the 'work' that they do." Spoerle v. Kraft Foods

Global, Inc., 527 F. Supp. 2d 860, 862 (W.D. Wis. 2007). This is true. However, this principle is not violated if the product of an employee's number of hours worked divided by wages received exceeds the FLSA's minimum wage requirements.

Finally, the cases holding otherwise do not explain how the potentially arbitrary consequences of their rules are supported by the language of the FLSA. In particular, they do not explain adequately why the remedial purpose of the FLSA is furthered by prohibiting employees who work just below the overtime threshold from asserting gap-time claims, but allowing an employee who works just one hour or one minute past the overtime threshold to assert such a claim. I can find no language in the FLSA to support such a rule. As the court pointed out in Wolman, 2010 WL 5491182, n.10, such a result is "inexplicable":

> [B]y recognizing gap time claims only in weeks when overtime occurs, the majority rule effectively imposes an extremely high marginal pay rate on the hour past the overtime threshold. If, for example, an employee subject to a 40 hour overtime threshold earns $20/hr for the first 30 hours but nothing for hours 30 to 40, then, under the majority rule, he is owed $0 for weeks when he works 40 hours, but $230 for working just 1 extra hour a week ($200 for 10 gap time hours, plus $30 for 1 overtime hour). Such a result is odd, inexplicable, and directly conflicts with the statutory text, which requires employers to pay only "one and one-half times the regular rate" for that single overtime hour. 29 U.S.C. § 207(a) (2).

In sum, I conclude that plaintiffs' claims for straight-time compensation for nonproductive work are not cognizable under the FLSA. Accordingly, defendants are entitled to summary judgment on those claims.

2. Statute of limitations

FLSA claims have a two-year statute of limitations unless the plaintiff can demonstrate that the defendant acted willfully, in which case the limitations period extends to three years. 29 U.S.C. § 255(a). The FLSA statute of limitations runs until an individual opts in to the collective action. 29 U.S.C. § 256(b).

Assuming for the purpose of this motion only that the three-year statute of limitations applies (defendants deny that any violation of the FLSA was willful), defendants contend that the FLSA claims of six individual plaintiffs are barred in full because they did not work for DirectSat at all during the three-year period prior to filing their consent forms. These individuals are Brian Thomas Barnhart; Ian Blanch; Reginald Brooks; Ronald Mikash; Davelle Nicholson; and Donald Bruce. The facts regarding these plaintiffs' employment dates are undisputed. Thus, these individuals are barred by the statute of limitations from asserting and FLSA claim. Defendants are entitled to judgment in their favor as to these six individuals.

Also, defendants contend that more than 100 individuals have asserted claims that are barred in substantial part because these individuals worked a portion of their employment as DirectSat technicians more than three years before filing their opt-in consent forms in this action. Defendants seek summary judgment as to those periods outside the

three-year statute of limitations period and have provided a spread sheet calculating the number of days that should be excluded from each individual's claim. Dkt. #369-2. Plaintiffs have presented no evidence to dispute the accuracy of defendants' calculations; rather, plaintiffs contend that summary judgment on this issue is inappropriate because it relates solely to damages calculations.

The statute of limitations is relevant both to defendants' potential liability under the FLSA and to possible damages calculations. Although the parties could have waited until the damages phase of this case to calculate the number of days for which individual plaintiffs have a claim, if there is such a phase, I see no problem with resolving a dispute affecting such a large group of individuals at this stage. Because plaintiffs have not disputed the data defendants use in support of their motion, I will grant defendants' motion as to those individuals and the days barred by the statute of limitations as identified in dkt. #369-2, the far right column ("Days Barred by the SOL").

3. Time spent in training

Defendants contend that because technicians receive hourly pay while they are in training, plaintiffs cannot assert that defendants' piece-rate system violated the FLSA with respect to the time they spent in training. Thus, defendants seek summary judgment as to the claims of plaintiffs who never completed training and also as to the periods of time for

which all other plaintiffs spent as trainees. They have submitted a list of plaintiffs who purportedly never completed training, dkt. #369-6, and a list of plaintiffs who were trainees and the number of weeks spent in training, dkt. #369-7.

For their part, plaintiffs agree that they are not asserting a claim for time spent in training because technicians in training who are paid only on an hourly basis would not be included in the classes certified by the court. However, they dispute the accuracy of the data submitted by defendants calculating the time period for which plaintiffs spent in training. In particular, it appears that several of the individuals on the list worked substantially longer than the average four or five weeks of training, allowing an inference that these technicians finished training and received piece-rate pay at some point during their employment. There is no way to determine from the list, which consists of names, pay dates and wages, whether the individual was being paid an hourly wage for training or whether the individual was working as a technician under the piece-rate system.

Thus, I will grant defendants' motion as to the general proposition that plaintiffs may not assert an FLSA claim for time they spent in training and that any plaintiffs who spent all of their employment as trainees and received only hourly wages do not possess a claim in this lawsuit. However, I will deny defendants' motion as to individual plaintiffs and time periods. I agree with plaintiffs that the details of this issue are disputed. This issue is something that the parties should be able to resolve without the need for a court ruling on

the matter.

4. Time spent working in non-technician capacities, on light duty or workers' compensation

Many opt-in plaintiffs worked as salaried supervisors or warehouse personnel during their employment with DirectSat and were paid on an hourly rate or other payment system that was not the piece-rate system. Others were placed on light-duty or received workers' compensation for periods of time, meaning they did not receive piece-rate pay. Defendants seek summary judgment as to the portions of time that these individuals worked in non-technician capacities or otherwise were not paid under the piece-rate system.

Defendants' motion regarding employees who worked as supervisors or in other non-technician positions is unnecessary, or moot, in light of the classes that have been certified in this case, which are defined as current or former employees in technician positions. However, I will grant defendants' motion with respect to the time periods for which plaintiffs may have worked on light duty and received an hourly wage or workers' compensation. Plaintiffs agree that the evidence in this case does not support wage and hour claims with respect to such time periods. Defendants have not submitted details regarding the times for which particular individuals worked on light duty or received workers' compensation. This is another issue the parties should be able to sort out before trial.

5. Plaintiffs working after October 4, 2009

Beginning on October 4, 2009, technicians were provided a new timesheet and instructed to record certain portions of time in separate columns labeled "meeting," "training" and "other." Since October 2009, technicians have been compensated at an hourly rate for all time recorded in the three new columns. Defendants contend that the new timesheet moots plaintiffs' claims for defendants' alleged failure to compensate plaintiffs properly for nonproductive work. Thus, defendants contend they are entitled to summary judgment in their favor as to all claims by plaintiffs who started employment with DirectSat after October 4, 2009. In addition, with respect to plaintiffs who worked before and after October 4, defendants seek summary judgment as to the days those plaintiffs worked post-October 4. Defendants have submitted spreadsheets with the names and dates of employment and number of days for which defendants seek summary judgment for individuals falling into the two groups. Dkt. ##369-3, 369-4.

I will deny defendants' motion as to these individuals. Plaintiffs have submitted evidence that they continued to underreport their hours after October 2009 and that they could not record all nonproductive time on the new timesheet, including time loading and unloading, completing paperwork at home, calling customers or driving. (It appears that defendants concede that there are disputed issues of fact in this regard because they do not address this claim in their reply brief.) Because there are genuine disputed issues of fact, I

will deny defendants' motion with respect to individuals working after October 4, 2009.

6. Individual FLSA claims

In addition to the arguments advanced regarding the plaintiff classes as a whole, defendants offer specific reasons for dismissal of the claims of individual plaintiffs. Part of defendants' motion can be denied with little discussion. In particular, defendant asks that judgment be granted with respect to very specific "claims," such as "unpaid meal time claims," "meeting time claims" or "loading and unloading claims." However, unless defendants can establish that an individual has no possible claim within one of the three subclasses certified in this action, summary judgment is inappropriate. Although an individual may admit that he never recorded a lunch break unless he actually took one, this does not automatically mean that the individual has no claim that he underreported the hours he worked during the official work window, and defendants have not shown that this is the case. Similarly, although an individual admits that he did not unload tools from his vehicle every day, this does not necessarily mean that he did not perform other nonproductive tasks outside the window for which he was not compensated. In other words, a technician need not have performed every single discrete task falling under a particular subclass to be a member of the respective subclass. Thus, I will deny defendants' motion with respect to the following individuals, for whom defendants sought summary judgment

as to specific activities: (1) Aaron Espenscheid; (2) Carlos Puebla; (3) Michael Terry; (4) Robert Lantzy; (5) Todd Witkowski; (6) Michael Jackson; (7) Robert Hammond; (8) Abraham Kawah; (9) Daniel Eckman; (10) Michael Clay; (11) Troy Gilbertson; and (12) Carl Davis.

Defendants also seek summary judgment as to certain portions of Michael Clay's, Troy Gilbertson's and Carl Davis's employment. Defendants point to testimony from these three plaintiffs to establish that for certain periods of time, these plaintiffs recorded and were paid for all of the time they worked. I will deny the motion for two reasons. First, because defendants are not seeking to dismiss these plaintiffs' claims completely but rather, are seeking to limit the amount of time for which the plaintiffs may recover unpaid overtime, these arguments are more appropriate if and when the parties have to calculate damages, rather than at this stage when the parties are seeking to narrow issues of liability that can be decided on a class-wide basis. Also, the deposition testimony on which defendants rely to conclude that these plaintiffs recorded and were paid for all of their work during certain portions of their employment is inconclusive and sometimes contradicted by later testimony in the same deposition. Therefore, I will deny defendants' motion for summary judgment as to specific portions of Michael Clay's, Troy Gilbertson's and Carl Davis's employment.

Also, I will deny defendants' motion for summary judgment as to named plaintiff Gary Idler's claims. Idler used a mathematical formula to determine the number of hours

he should record in any given week in order to achieve a particular efficiency rating. Thus, he admits to intentionally underreporting or misreporting the actual number of hours he worked each day. Defendants contend that because Idler intentionally misrepresented the hours he worked, he should not be allowed to benefit from his obvious misconduct. In addition, defendants contend that Idler has no basis for reconstructing his days in a way that will provide for any accuracy in hours worked and that he should not be allowed to prove his claim on mere speculation and conjecture.

However, like many of the other plaintiffs in this lawsuit who did not record all of their time worked and therefore have inaccurate timesheets, Idler testified that he did not record all of his time because he was encouraged or instructed by supervisors not to do so in order to achieve a specific efficiency rating and hourly pay. Thus, Idler's claim is actually similar to claims of many of the opt-in plaintiffs. Idler can use GPS data, Siebel reports and estimates of how long particular tasks took on average to determine the number of hours he actually worked in a week. With this data, it can be determined whether Idler in fact received a monetary benefit from misreporting his time. Defendants suggest no reason why Idler would be unable to use this data for this purpose.

7. Plaintiffs Ricardo Bolano, Carlos Piloto and Michael Allen Cruz

Finally, defendants move for summary judgment as to the claims of plaintiffs Ricardo

Bolano Carlos Piloto and Michael Allen Cruz. Defendants selected these three plaintiffs as members of the collective action from whom discovery would be taken. Defendants noticed them for depositions in September and October 2010 and none of them appeared or offered any explanation for their failure to appear. Although defendants seek summary judgment based on a lack of evidence to support these defendants' claims, defendants' request is more appropriately analyzed as a motion for dismissal as sanction under Fed. R. Civ. P. 37(d) for a party's failure to appear for a deposition after being served with proper notice. Collins v. Illinois, 554 F.3d 693, 696 (7th Cir. 2009). To dismiss a case as a sanction for a discovery abuse, the court must find only that the party's actions displayed willfulness, bad faith or fault. Id. Once the court makes such a finding, the sanction imposed must be proportionate to the circumstances. Id.

In this case, plaintiffs Bolano, Piloto and Cruz have offered no reason for their failure to appear for scheduled depositions or engage in discovery, despite having had months in which to do so. In their brief in opposition to defendants' motion for summary judgment, plaintiffs do not address this issue at all, thereby waiving any excuse these three plaintiffs may have had. Thus, I agree with defendants the conduct of these plaintiffs displays willfulness and bad faith and I will dismiss their claims with prejudice.

B. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment on the following five grounds:

(1) Defendant DirectSat and UniTek are joint employers or alternatively, a single enterprise under the FLSA;

(2) defendants violated federal and state wage and hour law by failing to compensate technicians for compensable nonproductive work tasks performed outside the official work window;

(3) defendants violated federal and state wage law by failing to compensate technicians for all hours worked during the window period having full knowledge that technicians were underreporting work hours during the window period;

(4) defendants violated federal and state wage law by using an unlawful method of calculation for compensating technicians for overtime hours for nonproductive work tasks; and

(5) defendants' violations of the FLSA were willful and, as a result, plaintiff class members are entitled to a three-year statute of limitations as well as liquidated damages.

1. DirectSat and UniTek as joint employers

Plaintiffs have moved for summary judgment on whether defendants are joint employers and each jointly and severally liable for FLSA violations. Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403, 409 (7th Cir. 2007) (joint employers may be held

liable for FLSA violations); 29 C.F.R. § 791.2 (same). Plaintiffs contend that UniTek and DirectSat are joint employers of plaintiffs, as evidenced by the amount of control that each exercise over the DirectSat's operations and policies. Defendants concede that DirectSat is plaintiffs' employer, but dispute that UniTek is a joint employer. (Originally, plaintiffs also sought to hold defendants liable under an "enterprise coverage" theory, Plts.' Br., dkt. #376, at 15-22, but they concede in their reply brief that this theory is not relevant to liability under the FLSA. Plts.' Reply Br., dkt. #412, at 5-6 n.1.)

In determining whether a joint employer relationship exists, the key question is whether both employers exercise control over the employee. Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 536 F.3d 640, 644 (7th Cir. 2008) (applying FLSA definition of joint employer to claim under Family and Medical Leave Act). Factors relevant to the analysis include but are not limited to whether the alleged employer "(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payments, (3) determined the rate and method of payment, and (4) maintained employment records." Id.

I conclude that defendants UniTek and DirectSat are joint employers of plaintiffs. Although defendants contend that UniTek provides mostly administrative services to DirectSat and does not control the daily activities of employees, the facts simply do not support such a finding. UniTek provides all of DirectSat's human resources services,

maintains all of the human resource records and prepares nearly all of the employment policies, including the employee handbooks and policy booklets that govern day-to-day aspects of the technician's employment. UniTek implements all employee discipline, recruiting, hiring and termination decisions, coordinates and provides curriculum for the weekly and biweekly meetings, manages and implements the GPS and vehicle policies and provides training to DirectSat employees. In addition, UniTek tracks all inventory and tools used by technicians and provides additional services to DirectSat including finance, assets and information technology. These facts establish that UniTek is involved directly with the daily activities of DirectSat technicians and has substantial control over their employment. Moldenhauer, 536 F.3d at 644 (no joint employment relationship where city and county exercised no control over employee, such as determining working conditions, compensation or termination); Reyes, 495 F.3d at 408 (holding that both farm that employed migrant workers and recruiter who placed workers at farm were joint employers under FLSA because both controlled workers' daily activities and working conditions); Grace v. USCAR, 521 F.3d 655, 665-69 (6th Cir. 2008) (joint employment relationship existed because both employers maintained control over employee).

Because DirectSat and UniTek jointly control the working conditions of technicians, they are joint employers for purposes of FLSA liability.

2. Overtime pay for work performed outside the "window"

Under the FLSA, employers must pay overtime rates for hours worked in excess of 40 hours a week. 29 U.S.C. § 207. Although the FLSA does not define "work," the term has been defined broadly by the Supreme Court. In Tennessee Coal, Iron & Rail Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), the Supreme Court defined "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." However, "[w]hether time is spent predominantly for the employer's benefit or for the employee's" is more important than the actual amount of "physical or mental exertion" involved in the activity. Armour & Co. v. Wantock, 323 U.S. 126, 133-34 (1944). Even activity that would generally be considered "nonproductive" may be considered work when it is performed for the employer's sake. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691 (1946) (nonproductive activity performed "under the complete control of the employer" considered work); Tennessee Coal, Iron & Rail Co. , 321 U.S. at 599, (traveling on a railcar through a mine shaft considered work); Armour & Co., 323 U.S. at 133-34 (standing and waiting considered work).

In their motion for summary judgment, plaintiffs seek a determination that they engaged in compensable "work" for which they were not paid, that defendants knew plaintiffs were performing these tasks and that defendants' failure to pay compensation for

them violated state wage and hour law. This work fell into two categories (and subclasses): (1) work performed outside the window period that was unreported; and (2) work performed within the window that was underreported.

a. Did plaintiffs perform work outside the window and did defendants know such tasks were being performed?

I certified the following subclass with respect to claims for work falling outside the official work window:

> Plaintiffs who were denied overtime because they were not compensated for work performed before their first installation or service job of the day or after their last installation or service job of the day.

Plaintiffs identify several activities they performed outside the work window that they contend are unpaid "work" under the FLSA: (1) loading tools and equipment into the company vehicle with materials necessary for the job in the morning and unloading the equipment in the evening; (2) completing required paperwork, including reviewing and responding to emails from supervisors and managers; (3) attending required meetings and training; (4) performing vehicle inspections, maintenance and cleaning duties; (5) calling customers; (6) picking up equipment from the warehouse; (7) performing required inventory functions; and (7) driving to the first job and from the last job.

As an initial matter, defendants contend that plaintiffs did not actually perform many

of these tasks or did not perform them outside the official work period. In particular, defendants argue that some of their official policies were not enforced, such as the policy requiring technicians to unload tools and equipment from their vehicles and the policy requiring technicians to perform vehicle checks and maintenance. As evidence that the policies were not enforced, defendants point to testimony from technicians who admit that they did not actually load or unload their vehicles. Similarly, defendants argue that not all technicians completed paperwork or called customers from home. Defendants point to the testimony of a few technicians who called their customers while they were driving and other technicians who did not communicate with their supervisors through email or fax but instead picked up work orders from the field office and talked to supervisors on their cell phones.

However, defendants' evidence does not undermine the conclusion that plaintiffs falling within this subclass performed nonproductive tasks before their first customer job of the day and after their last. Plaintiffs do not have to show that every technician performed the same off-the-clock tasks, performed them every day or spent the same amount of time on these tasks, so long as they show that there are a significant number of plaintiffs who performed work outside the official work window. The fact that some technicians did not perform certain tasks outside the window or performed tasks only sporadically does not create a dispute as to whether other technicians who testified to performing regular nonproductive tasks actually performed them, particularly because most technicians who

testified stated that they knew little about the activities of others. In sum, none of the testimony offered by defendants undermines the credibility of others who testified about performing certain tasks.

Plaintiffs have adduced significant evidence that they performed nonproductive tasks outside the window and that defendants knew or should have known that technicians were performing these tasks. Numerous technicians testified that they performed these tasks. Additionally, nearly all of the nonproductive tasks at issue were required by written company policy or established company practice. It is undisputed that plaintiffs were required to attend weekly meetings, pick up equipment at the warehouse at least once a week and bring their vehicle to the warehouse for inventory on a monthly basis. In addition, defendants' official policy required technicians to remove tools and equipment from their vehicles. Although defendants dispute whether this policy was enforced, it is undisputed that some technicians complied with the policy. Defendants also concede that the related policy of charging employees for equipment stolen from vehicles was enforced.

Also, as part of their job responsibilities, technicians had to complete various types of paperwork on a daily or weekly basis, including receiving work orders from supervisors and managers and doing necessary tasks related to work orders, including mapping their routes and organizing work order documents, responding to emails from supervisors and managers and inventory-related paperwork. Although not every technician performed all of these

paperwork tasks or performed them at home, numerous plaintiffs testified that these tasks were performed outside the window period and at home. At least with respect to email and fax communications, defendants knew or should have known that plaintiffs were receiving and reviewing such paperwork at home.

Finally, defendants' policy required technicians to call all customers in the morning to introduce themselves and provide an estimated time of arrival, as well as call supervisor or dispatch to acknowledge their routes. Although some technicians admitted to making such calls while driving or within the work window, many plaintiffs testified that they made these calls in the morning as directed by defendants' policies. Defendants knew or should have known that plaintiffs made such calls before the official work window began.

Accordingly, I conclude that those plaintiffs asserting a claim for overtime work outside the work window have established that they actually did perform work outside the work window and that defendants knew or should have known that plaintiffs were performing such tasks.

b. Are these tasks compensable under the FLSA?

Although I conclude that plaintiffs performed work outside the work window, it does not necessarily follow that the work is compensable. The general rule requiring employers to pay a wage for all work performed has exceptions, two of which defendants assert in this

case. First, defendants contend that the work is not compensable under the FLSA because it (1) is "preliminary to or postliminary to" the employee's "principal" activities and occurs "prior to" or "subsequent to" the employee's "workday," 29 U.S.C. § 254(a)(2); and (2) is "de minimis."

1) Preliminary and postliminary activities

Under the Portal-to-Portal Act, the FLSA does not require employers to compensate their employees for "walking, riding, or traveling" to a place to perform a "principal activity or activities" or engaging in other activities considered "preliminary to or postliminary to [a] principal activity or activities" if the activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). In other words, preliminary and postliminary activities are not compensable under the FLSA if they are performed before the employee first starts engaging in "principal activities" or after the employee stops engaging in "principal activities" for the day. However, any activities performed *within* this "workday" are generally compensable. IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005) (walking compensable when performed after commencing "principal activity"); see also 29 C.F.R. § 790.5 ("Workday" includes all time within period between commencement and completion of employee's principal activities,

regardless whether employee engages in work throughout entire period.)

The term "principal activity or activities" in the Portal-to-Portal Act "embraces all activities [that] are an 'integral and indispensable part of the principal' activities." IBP, 546 U.S. at 30; Steiner v. Mitchell, 350 U.S. 247, 252-53 (1956); see also 29 C.F.R. § 790.8(b), (c). "An activity is integral to a principal activity if the activity is made necessary by the nature of the work performed, it fulfills mutual obligations between the employer and the employees, the activity directly benefits the employer in the operation of the business, and the activity is closely related to other duties performed by the employees." Hiner v. Penn-Harris-Madison School Corp., 256 F. Supp. 2d 854, 859 (N.D. Ind. 2003) (citing Steiner, 350 U.S. at 252). Thus, activities such as putting on protective safety gear and walking from a locker room before performing shift work may be compensated activities if they are integral and indispensable to the individual's employment. IBP, 546 U.S. at 30; see also Steiner, 350 U.S. at 256 (battery manufacturer must compensate employees for thirty minutes spent putting on protective clothing and bathing because activities were indispensable to employees' health and safety). According to the Department of Labor's regulations, the words "principal activities" are to be "construed liberally" to "include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. § 790.8(a); see also Rutti v. Lojack Corp., 596 F.3d 1046, 1055 (9th Cir. 2010) ("[T]he term 'principal activities' is to be liberally construed 'to include any work of

consequence performed for an employer *no matter when the work is performed*.") (emphasis in original; citation omitted).

Plaintiffs' principal work activities are installing and upgrading cable services. Defendants argue that the activities plaintiffs performed before arriving at the first job site of the day or activities they performed after leaving their last job site are not "compensable" under the Portal-to-Portal Act because they are not integral to plaintiffs' principal activity of installing and servicing cable equipment and instead are commuting activities. (Defendants move for summary judgment with respect to the particular activities of receiving routes, mapping routes and maintaining work vehicles and argue generally in opposition to plaintiffs' own motion that the morning and evening activities are not compensable.) In response, plaintiffs contend that they performed "principal activities" every time they performed any of the activities they have identified as unpaid "work."

Defendants argument fails with respect to several of the nonproductive activities performed by plaintiffs, including calling customers, loading and unloading tools and equipment, attending meetings and training, picking up equipment from the warehouse and performing certain types of paperwork such as closing out jobs. These activities are not only required by defendants, but are related uniquely to plaintiffs' positions as installation technicians.

It is a closer question whether the time plaintiffs spent receiving and mapping routes

and performing vehicle maintenance and checks is barred by the Portal-to-Portal Act. In support of their argument that time spent receiving and mapping routes is not compensable, defendants rely on Rutti, 596 F.3d 1046, a recent case from the Court of Appeals for the Ninth Circuit involving a plaintiff who was employed to install car systems on a remote basis. The plaintiff sought compensation for time spent commuting to and from his job sites, as well as pre-commute activities including "receiving, mapping and prioritizing routes" for assignments. Id. at 1057-58. The court of appeals held that neither the commute nor preliminary activities were compensable because they were "related to his commute," were "clearly distinct from [his] principal activities" and were likely de minimis. Id.

Defendants also cite Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 915-16 (D. Minn. 2010), a case involving a private investigator who sought compensation for several preliminary work activities including mapping directions to subjects' residences, reviewing the investigation assignment sheet, conducting preliminary investigations online, uploading investigation reports and preparing his vehicle for surveillance by cleaning the interior, filling the gas tank and cleaning the windows. Of these activities, the court held that the mapping of directions and the cleaning, maintenance and fueling of vehicles before leaving for investigation were not principal activities integral to investigation. Id.; see also Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1291 (10th Cir. 2006) (digging a vehicle out of mud and snow, changing tires and putting chains on tires of work vehicle "merely incidental

to plaintiffs' travel to and from [job] sites, and therefore fall within the portal-to-portal exclusion.")

In each of these cases, the plaintiffs sought compensation for activities that were arguably necessary for them to complete their jobs, but which did not relate uniquely to the principal activities which they were hired to perform. Although plaintiffs try to distinguish these cases, their effort is not persuasive and they have cited no cases supporting their view that the tasks of mapping or maintaining vehicles are related inherently to the activity of installation. I see no difference between the car installations performed by the plaintiff in Rutti and the cable installations performed by plaintiffs in this case and I agree with the reasoning set forth in that case and in Ahle. Receiving and mapping routes and performing vehicle maintenance are tasks inherently related to plaintiffs' commute and not related uniquely to the activities of installing and upgrading cable services. Every employee who must drive in order to reach his or her work site must perform the same tasks. Thus, these tasks are the type of commuting, preliminary and postliminary tasks Congress intended to be precluded by the Portal-to-Portal Act. 29 C.F.R. § 254(a)(1), (2) (neither "traveling to and from" work nor "activities . . . incidental to . . . commuting" are compensable under FLSA).

In sum, I conclude that the time plaintiffs spent receiving and mapping routes and performing vehicle checks and maintenance are not compensable under the FLSA because

they are barred by the Portal-to-Portal Act. I will grant defendants' motion for summary judgment in this regard. None of the other tasks plaintiffs performed outside the official work window are barred by the Portal-to-Portal Act.

2) *De minimis* exception

Defendants contend that plaintiffs' preliminary and postliminary activities not barred by the Portal-to-Portal act are not compensable because they were sporadic and *de minimis*. In some situations, employers may escape FLSA liability if they can establish that the work for which their employees seek compensation qualifies as *de minimis*. To trigger the de minimis exception, an employer must show that the time involved is minimal and also that it would be difficult to measure the time in light of the realities of the industrial world. Spoerle, 527 F. Supp. 2d at 869 ("[W]hen providing compensation for a task imposes no additional burden on the employer, there is no justification for denying the employee compensation for that task, regardless how fast the task was performed.") (citing Anderson, 328 U.S. at 692 (in some instances compensating employees for "a few seconds or minutes of work" will not be feasible "in light of the realities of the industrial world.")); see also De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374-75 (3d Cir. 2007); Kasten v. Saint-Gobain Performance Plastics Corp., 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008) (4-5 minutes a day donning, doffing and walking not de minimis where defendant presented no proof that it

would have incurred administrative expense).

In support of their argument that plaintiffs' nonproductive activities were *de minimis*, defendants have analyzed each preliminary and postliminary activity separately. For example, defendants say that calling customers took no more than 5 minutes each morning and thus was *de minimis*. However, I agree with plaintiff that in applying the *de minimis* standard, the tasks must be evaluated in the aggregate, not separately for each discrete activity. After all, many jobs could be divided up into tasks that take only a few minutes each. By failing to apply the correct analysis to their *de minimis* argument, defendants have not shown that the rule should apply. In addition, defendants have not demonstrated that it would have been overly burdensome to compensate plaintiffs for the activities they performed outside the official work window. Finally, because there are genuine disputes about how long the plaintiffs spent performing the tasks at issue, I cannot determine whether time spent performing these tasks is *de minimis*.

c. Continuous workday doctrine

Plaintiffs seek to recover their time spent driving to their first job site of the day and home from their last job site of the day under the continuous workday doctrine. Under this rule, the "workday" is defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6.

Plaintiffs contend that they should be compensated from the time they engage in principal work activities in the morning, such as calling customers, to the time they complete their final principal activity of the day, which may be unloading their trucks. Thus, their commuting time to and from work would fall into their "workday."

It is unclear whether plaintiffs are seeking summary judgment on their continuous workday claim. Plaintiffs did not address their claim for commuting time in their initial brief in support of their motion for summary judgment. Nevertheless, defendants raised the issue in their brief in opposition to summary judgment and plaintiffs briefed the issue in their reply brief as if they were seeking judgment on that claim.

At any rate, I conclude that there are genuine disputes of material fact that preclude summary judgment on this claim. In particular, plaintiffs have not established that plaintiffs performed their nonproductive tasks immediately before and after their commutes. Rather, most of plaintiffs' evidence is that technicians performed these tasks sometime in the mornings and evenings. However, as the court of appeals pointed out in Rutti, the continuous workday rule should apply only where the employee is actually engaged continuously in work or is otherwise not free to use time for his own purposes. Rutti, 596 F.3d at 1060 (citing 29 C.F.R. § 785.16). In Rutti, the court concluded that the continuous workday rule did not apply because "from the moment a technician completes his last installation of the day, he is completely relieved from duty. His only restriction is that

sometime during the night he must [transmit certain information to his employer]." Id. (quotation omitted). Because the plaintiff had "hours, not minutes, in which to complete this task, the intervening time [was] long enough to enable him to use the time effectively for his own purpose." Id. (citation and quotation omitted).

In this case, plaintiffs have not established when technicians performed the tasks at issue so as to support a finding of continuity. Therefore, they have not established that the continuous workday doctrine is applicable in this case and are not entitled to summary judgment on that ground. However, plaintiffs may attempt to make such a showing at trial.

d. Remaining issues related to liability

Not all issues related to liability have been resolved. Although I have concluded that plaintiffs performed compensable work, I cannot conclude that plaintiffs were not compensated for this work. Plaintiffs have submitted testimony from several technicians who aver that they did not record their time for nonproductive work falling outside the official work window and that their supervisors and managers instructed technicians not to record these hours.

In response, defendants argue that it is likely that plaintiffs recorded their time for these tasks because defendants instructed plaintiffs to record "actual time worked." In addition, defendants point to the testimony of a few plaintiffs who say that they recorded

time spent on nonproductive tasks. These arguments do not go very far. As I stated earlier, the fact that some technicians recorded time does not undermine the conclusion that those asserting a claim in this subclass did not record their nonproductive time.

On the other hand, defendants have presented evidence that some plaintiffs, including some who testified to the contrary, were probably paid for at least some of these nonproductive tasks. For example, defendants have shown that many technicians may have included time spent at weekly meetings and equipment pick-up on their time sheets. Several technicians' timesheets have start times on one weekday every week that is one hour earlier than every other day, often at 7 a.m. when the meetings started. In addition, the equipment pickups often occurred on the same day as meetings, so if technicians recorded meetings, they may have recorded those warehouse pickups.

Also, the findings of defendants' expert are sufficient to create a genuine issue of fact as to whether technicians recorded and were paid for substantial time outside of the official work window. After comparing GPS records with payroll documents from the same period, defendants' expert found that technicians recorded far more time on their timesheets than what the GPS system recorded. In other words, technicians recorded a significant amount of time for work completed while they were not in their vehicle or performing installations. Although plaintiffs dispute the accuracy of the expert's findings and conclusions, this is a material dispute that cannot be resolved at summary judgment. Thus, I cannot conclude

that plaintiffs were not compensated for the tasks they performed outside the work window.

Even if I could conclude that plaintiffs were not compensated for these tasks, plaintiffs have failed to establish that defendants violated the FLSA. The statute requires only that an employer pay "minimum wage" and "overtime." 29 U.S.C. §§ 206 and 207. Plaintiffs have not asserted a minimum wage violation. Thus, defendants are liable only if the unpaid compensable work that plaintiffs identified caused plaintiffs to receive less than the overtime premium for any overtime worked. However, because plaintiffs have not established the number of hours any plaintiff spent performing the activities that I have concluded are compensable work, a jury must determine that issue before defendants' liability under the FLSA can be determined.

3. Overtime pay for work performed within the "window"

I certified the following subclass for both the FLSA and state law classes as they relate to underreporting time inside the window:

> "Plaintiffs who were denied overtime because they recorded a lunch break that they did not take or otherwise underreported hours they worked between their first and last installation or service job of the day."

Plaintiffs seek a determination from the court that they worked hours during the window period that they did not record and for which they were not compensated, that defendants knew that technicians were underreporting hours worked during the window

period and that defendants' failure to compensate technicians for these known but unreported hours violated federal and state wage and hour law.

I conclude that there are disputed issues of material fact that preclude summary judgment on this issue. In particular, plaintiffs have submitted evidence suggesting that their were several corporate policies that pressured them to underreport the hours they spent performing installation and services calls. For example, DirectSat discouraged overtime. If technicians with low efficiency ratings incurred overtime, they could be terminated. In addition, the efficiency rating system determined a technician's piece-rate and also whether a technician would be disciplined for being too inefficient. Thus, it is reasonable to infer that these policies encouraged plaintiffs to underreport their hours. However, when deciding plaintiffs' motion for summary judgment, I must draw all reasonable inferences in favor of defendants. Although these policies may have caused some technicians to underreport their hours, they may have caused other technicians to work harder or more efficiently. Thus, these policies alone are insufficient to warrant a finding in plaintiffs' favor on this issue.

Of course, plaintiffs do not rely solely on national policies. They have submitted testimony of several technicians who claim that they underreported their hours worked during the work window. Several technicians testified that they routinely did not take lunch hours, but recorded on their timesheet that they had done so. Other technicians testified that they complained to their supervisors and managers that they were not being paid for all

hours they worked or that lunch breaks were deducted from their paychecks when they never took a lunch break. Plaintiffs have submitted evidence that defendants' corporate officers suspected that underreporting was occurring.

Although plaintiffs have presented significant evidence that underreporting was occurring, defendants have adduced enough evidence to create a genuine factual dispute on the issue. First, defendants point out that DirectSat pays its technicians overtime on a regular basis. In fact, defendants have shown that some technicians who testified during their depositions that they underreported their hours to avoid too much overtime actually reported and were paid for substantial overtime on their timesheets. As plaintiffs argue, just because some technicians reported overtime on their timesheet, it does not necessarily follow that the technicians were reporting all of the time worked in the window or all of the overtime hours they worked. However, it does raise a question whether defendants enforced their "no overtime" policy so strictly that technicians felt pressured to underreport their hours because they were afraid to report overtime.

Additionally, defendants have produced timesheets showing that technicians do not record lunch breaks everyday. In fact, some technicians who testified that they had to record a lunch break even if they did not take one actually submitted timesheets with no lunch break recorded.

Finally, defendants' expert is of the opinion that technicians overreported the time

they worked on their time sheets by recording more time than was captured by their GPS. Although the expert's data and analysis may be flawed or this "overreporting" could be attributed to nonproductive hours worked outside the window, at the least the data creates a genuine dispute about whether plaintiffs underreported their hours.

In sum, there are disputed issues of fact that preclude summary judgment on plaintiffs' claim that they were not compensated for all hours they worked within the official work window. Therefore, plaintiffs' motion for summary judgment will be denied as to this issue.

4. Calculation of overtime compensation for nonproductive time

Plaintiffs seek judgment that defendants violated the FLSA by improperly calculating plaintiffs' overtime rate of pay for nonproductive tasks. In particular, plaintiffs contend that defendants should have paid time-and-a-half for all overtime hours, rather than the half-time wages that defendant paid for hours worked over 40 in a week. Plaintiffs contend that defendants' method of overtime calculation for nonproductive tasks is unlawful because there was no agreement between defendants and plaintiffs that piece-rate compensation for productive time included all hours worked performing both productive and nonproductive tasks, as required by federal regulations applying to piece-rate compensation systems.

As an initial matter, defendants deny that they pay installation technicians under the

piece-rate system in 29 C.F.R. § 778.111. Dfts.' Opp. Br., dkt. #403, at 78, 80-81. Instead, defendants argue, they pay technicians pursuant to the "job-rate-system" set out in 29 C.F.R. § 778.112. Under the job-rate regulation,

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

29 C.F.R. § 778.112 (emphasis added). Defendants contend that their system complied with this regulation, under which they were required to pay technicians only half-time pay for overtime hours.

This argument is unpersuasive. First, throughout their communications with technicians, defendants have repeatedly described the system as a piece-rate system. For example, on October 16, 2008, defendants' payroll manager sent a memorandum to technicians, field supervisors and managers titled "How Piece Rate is Calculated," instructing technicians to review numerous examples "on the piece rate calculation as they are designed to help you better understand your paycheck." Dkt. #372-5. The employee handbook states that technicians' pay "consist[s] of some type of productivity, quality or piecework component." Dkt. #377-1, at 26. Technicians enter their time on time sheets that include a column labeled "Piece Rate Techs Only." Dkt. #372-13. In addition, in their brief in

opposition to plaintiffs' summary judgment motion, defendants argued that they "employed a policy to compensate [their] employees pursuant to the calculation method set forth in Section 778.318(c)," and that "[p]laintiffs 'understood' their compensation was being paid on a piece rate system." Dfts.' Opp. Br., dkt. #403, at 83, 103.

Second, it is questionable whether defendants' system would satisfy the requirements of a job-rate system. The job rate regulation describes a system for calculating regular and overtime wages when an employee "receives no other form of compensation for services." 29 C.F.R. § 778.112. At least one court has interpreted this regulation as meaning that a compensation system may be categorized as a job-rate system only if the employee "receives no other form of compensation for services." Winget v. Corporate Green, LLC, 2010 WL 2985546, *4 (M.D. La. July 26, 2010) (finding that job-rate did not apply where employees were entitled to compensation "not just for the particular jobs performed, but also for travel time and for the weekly meeting"). In this case, plaintiffs receive several other forms of compensation in addition to the rate they receive for customer installations, including a set hourly rate for training time, commission for sales of certain products and, since 2009, hourly compensation for certain nonproductive tasks. Thus, I conclude that defendants utilize a piece-rate system to compensate plaintiffs.

The general regulation addressing piece-rate pay provides as follows:

When an employee is employed on a piece-rate basis, his regular hourly rate

> of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions): This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For his overtime work the piece-worker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, *a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week*.

29 C.F.R. § 778.111(a) (emphasis added). However, an employer is permitted to pay overtime to pieceworkers at half-time rates only if the employer and the employees reach an agreement that the piece-rate will compensate the employees for all hours worked, including nonproductive hours. 29 C.F.R. § 778.318(c). In the absence of such an agreement, the employee is owed compensation "at a rate at least one and one-half times the [regular] rate for hours in excess of 40." 29 C.F.R. § 778.318(b); 29 U.S.C. § 201(a)(1).

Before October 2009, plaintiff technicians were not paid a specified hourly rate for nonproductive tasks, with the exception of certain training that was paid on an hourly basis. Defendants grouped nonproductive hours with productive hours and divided them into total weekly piece-rate compensation to arrive at a regular rate of pay for technicians. Overtime was then calculated by paying half time for hours worked over 40, regardless whether the overtime hours were productive or nonproductive time. In October 2009, defendants changed the manner of compensation for certain nonproductive tasks by paying technicians an hourly wage for certain tasks. It is not clear how overtime is calculated under the new

system.

Plaintiffs contend that because there was no agreement that their piece-rate compensation was intended to compensate them for all productive and nonproductive hours, either before or after October 2009, defendants should have paid plaintiffs time-and-a-half for all nonproductive hours over 40, as required by § 778.318(b).[1] The piece-rate regulations do not define "agreement" as it is used in § 778.318(b) or (c), beyond stating that it must be "understood by the parties that the other compensation received by the employee is intended to cover pay for such hours," and I have found no cases with any helpful discussion

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[1] The parties dispute how overtime would be calculated if § 778.318(b) applied. Under defendants' current calculation method, a technician who has a production value of $1,200 in a week for which he worked 50 hours of productive and nonproductive time will earn a total of $1,200 in regular wages and $120 in overtime wages. The overtime wages are calculated by dividing the $1,200 by 50 hours to determine the technician's effective hourly rate ($24.00), and then multiplying the overtime hours (10) by one-half the hourly rate ($12.00 x 10 = $120).

However, it is not clear whether defendants' approach accurately captures the overtime pay required by § 778.318. It may be that FLSA requires using a different overtime amount, arrived at by dividing the $1,200 by the 40 non-overtime hours to determine the effective hourly rate ($30.00) and multiplying the overtime hours by one and one-half the hourly rate ($45.00 x 10 = $450). Or, the hourly rate may have to be calculated by dividing the production value of the week by only productive hours, leaving out non-productive hours, or, even more complicated, by leaving out only those non-productive hours that are overtime hours. Without further input from the parties, I cannot decide at this stage how the hourly rate for nonproductive hours should be determined.

of the requirement. Plaintiffs point to 29 C.F.R. § 778.114, the regulation addressing compensation under the fluctuating workweek method. Under this regulation, an employer may pay a fixed weekly wage to compensate an employee only when there is a "clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." Id. As with the piece-rate system, employers who use a fluctuating workweek are entitled to utilize a compensation methodology that will ultimately result in decreased overtime payments to its employees. Id. (employer may pay overtime at half-time rates rather than at time-and-a-half). It makes sense that the requirement of "clear mutual understanding" under § 778.114(a) would be similar to the "agreement" requirement of § 778.318(c) because both insure that employees are made aware of methods of compensation that depart from the general rules of compensation under the FLSA and allow employers to compensate employees at overtime rates that are less than what would be otherwise required under the regulations.

In applying the "clear mutual understanding" requirement, courts have held that the requirement need not be in writing, but rather, may be inferred from the parties' conduct. Urnikis-Negro v. American Family Property Services, 616 F.3d 665, 681, n.8 (7th Cir. 2010). Thus, where a company's policies, practices and procedures provide a seemingly reasonable explanation of the flexible workweek plan to its employees, the requirement is

met. E.g., Griffin v. Wake County, 142 F.3d 712, 716 (4th Cir. 1998). Other probative evidence may include an employer's oral notification to employees of the plan, personnel forms, employee handbooks and memorandums containing information concerning the fluctuating workweek plan. Roy v. County of Lexington, 141 F.3d 533, 548 (4th Cir. 1998).

I conclude that there are disputed issues of fact whether defendants and plaintiffs agreed that the piece-rate system would compensate plaintiffs for both productive and nonproductive time. Several plaintiffs testified that they were not sure how their pay was calculated and that they complained to supervisors about not being paid for nonproductive tasks. Until some time in 2009, defendants had no written agreement or statement to be given to plaintiffs, explaining that the piece-rate system would compensate them for productive and nonproductive tasks. The employee handbook states that an employee's "pay plan will consist of some type of productivity, quality or piecework, component," suggesting that the piece-rate pay is only one component of technician pay. Even after 2009, technicians were not sure whether the piece-rate pay was intended to cover the nonproductive tasks that did not fit into the new timesheet columns.

On the other hand, some technicians testified that they understood that they were paid solely on a piece-rate basis. More significant is the fact that defendants used the same piece-rate system to compensate technicians for several years and technicians accepted paychecks month after month that were based on this calculation. It is reasonable to infer

from this fact that technicians understood that the piece-rate covered both productive and nonproductive work. Because a jury could draw inferences in favor of either party on this issue, summary judgment is not appropriate.

(Plaintiffs contend that defendants' method of calculating pay for nonproductive tasks also violates state law, but plaintiffs' initial brief provides no analysis of the applicable state law and relies solely on federal regulations. In their reply brief, they argue generally that the relevant state law is either patterned after the FLSA or identical to it. Plfs.' Reply Br., dkt. #412, at 6-7. However, plaintiffs do not point to any state statutes or regulations that are analogous to the federal regulations on which they rely for the thrust of their arguments regarding overtime pay for nonproductive work. Because plaintiffs fail to develop any argument under state law, they have not established that they are entitled to summary judgment on any state law claim. Thus, I consider only whether plaintiffs have established a violation of the FLSA.)

5. Willfulness of defendants' possible FLSA violations

The concept of willfulness under the FLSA is relevant to determining the applicable statute of limitations and the potential award of liquidated damages. 29 U.S.C. § 255(a) (two-year statute of limitations for FLSA claims unless plaintiffs prove willfulness, in which case limitation period is extended to three years); 29 U.S.C. § 260 (court may not award

liquidated damages if defendant shows that it acted in good faith and had reasonable grounds for believing that its act or omission was not violation of FLSA). Resolution of this issue is premature because there has been no finding that defendants violated the FLSA. Accordingly, plaintiffs' motion for summary judgment will be denied on this issue.

C. Defendants' Motion to Strike Plaintiffs' Expert Report

Under the scheduling order, dkt. #20, plaintiffs were required to disclose their damages expert on March 4, 2011, along with a report containing the information mandated by Rule 26(a)(2)(B). The scheduling order stated that "[f]ailure to comply with these deadlines and procedures could result in the court striking the testimony of a party's experts pursuant to Rule 37." Id. at 2. Under Rule 26(a)(2)(B), an expert disclosure "must be accompanied by a written report" containing several components, including the basis for the expert's opinions, the expert's qualifications, cases in which the expert has provided testimony and a statement of the compensation the expert will receive for the study and testimony in the case.

Defendants contend that plaintiffs' damages expert report fails to comply with Rule 26(a)(2)(B) because the expert, Dr. Lewin, (1) fails to identify the technicians whose data he analyzed; (2) fails to identify specifically what facts and data he used in reaching his conclusions; (3) fails to identify what declarations he used, what information he used from

them and how he "randomly" selected those declarations; (4) fails to include any information about his qualifications; (5) fails to identify the cases in which he has testified as an expert; and (6) fails to contain a statement of the compensation to be paid for his involvement in the case.

After reviewing Dr. Lewin's report, I agree with defendants that the report may be lacking information required by Rule 26, particularly the specific facts on which Lewin relied in forming his opinions and information about Lewin's previous experiences as an expert witness. However, striking the report is a drastic and unnecessary remedy. Plaintiffs may have until April 21, 2011, in which to advise defendants and the court about Lewin's previous work as an expert and his compensation in this case. If defendants believe that some of the opinions in the report lack foundation, they may challenge those opinions at trial or through a Daubert motion made before trial. Plaintiffs should be aware that piecemeal attempts to remedy deficiencies in the expert report by sending defendants separate bits of information as plaintiffs discover it are unacceptable. All of the information necessary to support Lewin's opinions should be identified specifically in the report. If plaintiffs wish to supplement the report, they must ask for leave of the court to do so.

D. Trial Plan

This case is scheduled for trial on June 6, 2011 and the parties have predicted that

the trial will be lengthy and complex. At present, the court has two weeks, at most, open for this trial (June 6 through June 17). With cooperation and careful planning by both sides, this should be sufficient time to try the case. (If necessary, the damages phase of the trial could take place the week of August 8, 2011, with the same jury.) In order to manage the trial in an efficient manner, I am directing the parties to confer and submit a proposed trial plan by April 21, 2011. The plan should address (1) the claims and issues remaining in the case that must be proven by plaintiffs; (2) the type of evidence plaintiffs will present to prove their claims, including the number of representative witnesses necessary for each claim; (3) the types of evidence defendants will present in support of their defenses, including the number of witnesses they will call; (4) the proposed length of trial; and (5) any other trial management issues.

ORDER

IT IS ORDERED that

1. The motion for partial summary judgment filed by defendants DirectSat USA, LLC and Unitek USA, LLC, dkt. #368, is GRANTED in part and DENIED in part. I conclude as a matter of law that

a. Plaintiffs may not bring their "straight time" and "gap time" claims under the FLSA;

b. Plaintiffs' claims for damages arising from receipt of routes, mapping of routes and maintenance of vehicles are precluded by the Portal-to-Portal Act;

c. The claims of plaintiffs Brian Thomas Barnhart, Ian Blanch, Reginald Brooks, Ronald Mikash, Davelle Nicholson and Donald Bruce are barred by the statute of limitations;

d. Portions of the claims brought by the plaintiffs identified in dkt. #369-2 are barred by the statute of limitations;

e. Plaintiffs may not assert a claim in this lawsuit for time they spent in training; any plaintiffs who spent all of their employment as trainees and received only hourly wages do not possess a claim in this lawsuit;

f. Plaintiffs who were compensated through workers' compensation or light duty during some portion of the relevant limitations period do not have a claim in this lawsuit for that portion of their employment.

2. The claims of plaintiffs Ricardo Bolano, Carlos Piloto and Michael Allen Cruz are DISMISSED with prejudice under Fed. R. Civ. P. 37(d) for their failure to participate in discovery.

3. Defendants' motion for summary judgment, dkt. #368, is DENIED in part:

a. Defendants' motion for summary judgment as to employees who worked in non-technician capacities is DENIED as moot;

b. Defendants' motion for summary judgment against plaintiffs working after October 2009 is DENIED;

c. Defendants' motion for summary judgment against plaintiffs Aaron Espenscheid; Carlos Puebla; Michael Terry; Robert Lantzy; Todd Witkowski; Michael Jackson; Robert Hammond; Abraham Kawah; Daniel Eckman; Michael Clay; Troy Gilbertson; Carl Davis; and Gary Idler is DENIED;

d. Defendants' motion for summary judgment is DENIED in all other respects.

4. The motion for partial summary judgment filed by plaintiffs Aaron L. Espenscheid, Gary Idler and Michael Clay, dkt. #374, is GRANTED in part and DENIED in part. I conclude as a matter of law that:

a. Defendants DirectSat and UniTek are joint employers for purpose of liability under the FLSA;

b. Plaintiffs asserting a subclaim for overtime work outside the official work window performed nonproductive work outside the work window that defendants knew or should have known plaintiffs were performing;

c. Plaintiffs' nonproductive tasks of calling customers and their supervisor, unloading and loading tools and equipment into their work vehicles, attending training and meetings,

picking up equipment from the warehouse are not precluded by the Portal-to-Portal Act.

4. Plaintiffs' motion for summary judgment is DENIED in all other respects.

5. Defendants' motion to strike the damages expert report of Dr. Lewin, dkt. #452, is DENIED. Plaintiffs may have until April 21, 2011 to provide defendants and the court updated information regarding Lewin's previous work as an expert and his compensation in this case.

6. The parties are directed to confer and submit a proposed trial plan by April 21, 2011.

Entered this 11th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge