April 28, 2022

ATTORNEY GENERAL RAOUL, DEPARTMENT OF LABOR FILE BRIEF TO PROTECT WORKERS' RIGHTS TO RECOVER UNPAID OVERTIME WAGES AND PENALTIES

Brief Urges Illinois Appellate Court to Overturn Flawed Decision that Prevents Workers from Recovering Lost Overtime Wages and Penalties

Chicago — Attorney General Kwame Raoul and the Illinois Department of Labor (IDOL) are urging the Illinois Appellate Court to overturn a circuit court's order barring employees of a Chicago manufacturing company from recovering overtime wages and penalty fees they argue should have been paid. Raoul, along with the IDOL, filed an amicus brief in Mercado v. S&C Electric Company (S&C) to ensure that the Illinois Minimum Wage Law protects employees' right to earn fair compensation for overtime hours worked, as well as their right to recover lost wages and penalties in court.

"Employees have a right to be fairly compensated for all the hours they work. In the event that their employer violates Illinois' Minimum Wage Law, employees also have a right to recover penalties, in addition to lost overtime wages," Raoul said. "I am committed to protecting Illinois workers and ensuring that employers that violate the law are accountable to their employees."

"The Illinois Department of Labor is committed to protecting the rights of workers in Illinois to overtime pay and their ability to enforce that right," said IDOL Acting Director Jane Flanagan.

The lawsuit was filed by hourly factory assembly workers who state that S&C, a Chicago manufacturing company, pays workers in part by offering bonus payments tied to metrics, such as the quality and quantity of their work, in addition to hourly wages. In the lawsuit, the employees allege S&C did not include the bonus payments when calculating their baseline pay rate, meaning that the workers were paid less in overtime than they were owed. Although S&C ultimately paid the back wages, the lawsuit alleges the company did not pay any of the penalties required by the Minimum Wage Law for unlawful underpayments.

A trial judge dismissed the lawsuit on the grounds that because S&C did end up paying the employees' back wages, it was not required to pay any penalties. The circuit court also held that S&C likely would not have needed to include the bonus payments when calculating the baseline rate in the first place. The court reasoned that an IDOL regulation allows employers to exclude "gifts," to employees, and the bonuses in question qualified as such.

The amicus brief filed by Attorney General Raoul and the IDOL argues that both circuit court determinations are incorrect. Raoul's brief explains that employers are not permitted to adopt a "wait and see" approach to paying overtime, offering back wages only when employees threaten lawsuits. Rather, Raoul and the IDOL state that employers must pay all the overtime owed to employees in a timely manner, or pay the penalties required by law. The brief also argues that employers like S&C generally must include all employee compensation – not just hourly compensation – when calculating the baseline pay rate. According to Raoul and the IDOL, an employer cannot pay workers in non-hourly wages and then claim the payment is a gift.

Today's announcement builds on Attorney General Raoul's effort to fight unlawful employment practices. In January 2020, a law initiated by Raoul went into effect, formally establishing the Worker Protection Unit within the Attorney General's Office to better protect Illinois workers from wage theft and other unlawful employment practices.

Attorney General Raoul encourages workers who have concerns about wage and hour violations or potentially unsafe working conditions to call his Workplace Rights Hotline at 1-844-740-5076 or to file a complaint online.

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,	)	Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois
Plaintiffs-Appellants,	)	
v.	)	No. 2020CH7349
S&C ELECTRIC COMPANY,	)	The Honorable ALLEN P. WALKER,
Defendant-Appellee.	)	Judge Presiding.

BRIEF OF AMICUS CURIAE STATE OF ILLINOIS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5526
Primary e-service:
CivilAppeals@ilag.gov
Secondary e-service:
Alex.Hemmer@ilag.gov

POINTS AND AUTHORITIES

INTEREST OF AMICUS CURIAE

This appeal raises two important issues of first impression regarding the Illinois Minimum Wage Law ("IMWL") and its implementing regulations. Plaintiffs allege that they worked for defendant S&C Electric Company as hourly-paid factory assembly workers, and that S&C compensated them in part by making regular, non-discretionary incentive payments—"bonuses" tied to the quality or quantity of their work, their success at meeting various metrics, or their tenure at the company. S&C, however, did not include these payments in calculating plaintiffs' regular pay rate, and so when it paid plaintiffs overtime wages, it calculated those wages using a baseline rate that plaintiffs say was too low. When plaintiffs sought to remedy what they viewed as an underpayment, S&C ultimately paid them the back wages they were owed, but not the statutory damages that the IMWL requires as a remedy for wage-and-hour violations.

The circuit court granted S&C's motion to dismiss. It reasoned, first, that S&C's payment of back wages, but not statutory damages, satisfied any underpayment that might have existed—effectively mooting plaintiffs' IMWL claims. And, second, it reasoned that non-discretionary incentive payments of the kind plaintiffs allege were made likely should not have been included in the regular rate in the first place, because a regulation interpreting the IMWL allows employers to exclude from that rate "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on

hours worked," 56 Ill. Admin. Code § 210.410(a)—and incentive payments of this sort were, the court reasoned, "not measured by or dependent on hours worked." Plaintiffs appealed.

The State of Illinois, its agencies, and its officials have a substantial interest in the proper interpretation and application of the IMWL and its regulations. Specifically, the Illinois Department of Labor is a state agency charged by the legislature with the responsibility to "foster, promote, and develop the welfare of wage earners" within the State and to "[a]ct in relation to the payment of wages due employees from their employers." 20 ILCS 1505/1505-15, 1505/1505-120. The legislature has also tasked the Illinois Attorney General with "protecting the State's workforce," and specifically directed him "to ensure workers are paid properly, guarantee safe workplaces, and allow law-abiding business owners to thrive through healthy and fair competition." 15 ILCS 205/6.3(a).

Pursuant to these directives, the Department and the Attorney General each have authority to enforce Illinois' wage laws, including the IMWL. *See* 15 ILCS 205/6.3(b); 20 ILCS 1505/1505-120. The IMWL also confers additional authority on the Department's Director to "make and revise administrative regulations, including definitions of terms, as he deems appropriate to carry out the purposes of this Act." 820 ILCS 105/10. Pursuant to this authority, the Department has promulgated regulations interpreting and defining provisions of the IMWL, including regulations defining the statutory term

"regular rate" that help answer the question whether S&C appropriately withheld the incentive payments from plaintiffs' regular pay rate. *See* 56 Ill. Admin. Code §§ 210.410, 210.420, 210.430.

Given all this, the Department and the Attorney General have a substantial interest in this case. Both issues raised by this appeal concern the proper interpretation and application of the IMWL and its implementing regulations. To the State's knowledge, both issues are questions of first impression for the State's appellate courts, and both are consequential. As discussed further below, if the circuit court was correct that an employer can moot an accrued IMWL claim by providing back pay, but not statutory damages, employers will be able to evade their statutory obligations and "pick off" IMWL claims by offering a fraction of what employees are owed. And if the circuit court was correct that all payments "not measured by or dependent on hours worked" can be withheld from an employee's regular pay rate, employers will be able to shift substantial portions of their employees' compensation to a non-hourly format and, in doing so, reduce their obligations to make overtime payments. Both results would frustrate the Department and the Attorney General's ability to "protect[] the State's workforce," 15 ILCS 205/6.3(a); *see also* 20 ILCS 1505/1505-15, and so they have an interest in this appeal.

Finally, the Department also has an interest in interpreting and defending the regulations it has promulgated to implement the IMWL. As this

Court has noted, "an agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference given that agencies make informed judgments on the issues based upon their experience and expertise." *Cigna v. Illinois Hum. Rts. Comm'n*, 2020 IL App (1st) 190620, ¶ 31 (internal quotation marks omitted). Here, the Department has promulgated regulations that address whether the incentive payments were properly excluded. *Infra* pp. 16-21. It thus has an interest in the application of those regulations and ensuring that the circuit court's opinion, which would undermine the general approach taken by the Department, is not affirmed by this Court.

For these reasons, the State has a substantial interest in this case and can assist this Court by presenting its perspective on the important issues that it raises.

ARGUMENT

The circuit court misread the IMWL in two ways. First, the circuit court erred in holding that S&C had effectively mooted plaintiffs' IMWL claims by providing them with some, but not all, of the relief to which they were entitled under that statute. Second, the circuit court incorrectly interpreted the IMWL to allow employers to exclude non-discretionary incentive payments from employees' regular pay rates as long as those payments are not directly tied to employees' hours.

In applying the IMWL and its implementing regulations, the Court should place significant weight on the Department's interpretation of the law and the regulations. As noted, "an agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference" given the agency's "experience and expertise." *Cigna*, 2020 IL App (1st) 190620, ¶ 31 (internal quotation marks omitted). And this Court has often deferred to the Department's views in interpreting the IMWL. *See Kerbes v. Raceway Assocs., LLC*, 2011 IL App (1st) 110318, ¶ 23; *People ex rel. Dep't of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 21 (1st Dist. 2003). It should do so here, too. Although the plain language of both the IMWL and its implementing regulations establishes that the circuit court erred on both issues, even if the plain language did not command that result, principles of deference would require reversal. Either way, the Court should reverse the judgment below and remand for further proceedings.

I. The Circuit Court Erred In Holding That An Employer Can Moot An Accrued IMWL Claim By Providing Back Pay But Not Statutory Damages.

The circuit court's opinion rests primarily on its conclusion that the "adjustments" that S&C provided plaintiffs months and, in some instances, years after the pay periods in question "satisfied [any] underpayment," such that plaintiffs' IMWL claims failed as a matter of law. A7.[1] That reasoning is flawed, and would allow employers to "pick off" IMWL claims by providing employees back pay but not the statutory damages they are owed—and would disincentivize employers from properly calculating overtime in the first place. The judgment below should be reversed.

A. An IMWL claim, once accrued, cannot be mooted by a payment only of back pay and not statutory damages.

Under Illinois law, if an employee is not paid the wages that he or she is owed, he or she is entitled to bring suit under the IMWL—that is, the underpayment gives rise to an IMWL claim. Once that claim has accrued, it cannot be mooted by an employer's payment of some (but not all) of what the employee is owed. These straightforward principles resolve the primary question presented by this appeal.

1. The IMWL requires an employer to pay its employees "at a rate not less than [one and one-half] times the regular rate" at which they are paid for every hour worked over forty in the employee's workweek. 820 ILCS 105/4a(1). An employee who is not paid "the wage to which he is entitled . . .

[1] Citations to "A__" are to the appendix.

may recover in a civil action treble the amount of any such underpayments," costs, attorney's fees, and additional damages equivalent to five percent of the underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* 105/12(a).[2] Such an employee, that is, has an IMWL claim against his or her employer for back pay and damages.

Generally, an IMWL claim accrues on the relevant payday—i.e., the day the employee should have been, but was not, paid the wages that he or she was owed. A separate Illinois law, the Illinois Wage Payment and Collection Act (IWPCA), requires an employer to "pay every [covered] employee" "at least semi-monthly . . . all wages earned during the semi-monthly pay period." 820 ILCS 115/3. Specifically, the employer must pay such wages "not later than 13 days after the end of the pay period in which such wages were earned," or, in the case of an employee paid weekly, "not later than 7 days after the end of the weekly period." *Id.* 115/4. An employee who is not paid "timely" wages under this Act is "entitled to recover . . . in a civil action . . . the amount of any such underpayments," costs, attorney's fees, and statutory damages in the same amount as the IMWL—that is, five percent of the underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* 115/14(a).

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[2] This brief uses "damages" or "statutory damages" to refer to both the treble damages and the five percent monthly damages awarded by the IMWL. *See id.* Because plaintiffs pursued their IMWL remedies in court, they may also now be entitled to costs and attorney's fees, *id.*; S&C's tender of back pay also does not moot any claim plaintiffs have as to costs and fees.

The natural reading of these provisions is that claims for violating the IMWL and the IWPCA accrue on "the date of payment," 820 ILCS 105/12(a), 115/14(a)—that is, the day on which an employee should have been paid the wages to which he or she was entitled, but was not. On that date, an employee may bring a "civil action" to recover the underpayment and any damages to which he or she is entitled. *Id.* That conclusion accords with this court's own caselaw, which has referred to the payment date as the date on which wage-and-hour claims generally accrue. In *Sommese v. American Bank & Trust Co., N.A.*, 2017 IL App (1st) 160530, for instance, this court considered whether an employee whose last payment date was before an amendment to the IWPCA could take advantage of that amendment. *Id.* ¶ 16. The court concluded that the employee could not, explaining that because his "last date of payment" was before the amendment's effective date, his wage-and-hour claim "accrued prior to the amendment," and so would require the amendment to be applied retroactively, contrary to the legislature's intent. *Id.*

This commonsense rule accords with the rule under the federal Fair Labor Standards Act (FLSA). As this court has explained, "in light of the[] substantial similarities" between the FLSA and the IMWL, "provisions of the FLSA and interpretations of that legislation can be considered in applying the [IMWL]." *Kerbes*, 2011 IL App (1st) 110318, ¶ 25; *see also Samano v. Temple of Kriya*, 2020 IL App (1st) 190699, ¶ 46 (similar). Indeed, the Department's regulations provide that federal guidance as to the meaning of the FLSA is

probative of the meaning of the IMWL. *See* 56 Ill. Admin. Code § 210.120. And federal courts have long held that a FLSA claim accrues on the date of payment (or, in a case in which no payment was made, the date on which it was owed). *See, e.g.*, *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946) (employee's "cause of action for overtime compensation accrued on each payday"); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) (similar). Federal regulations today likewise establish that a FLSA claim accrues "when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. § 790.21(b). For the reasons discussed, *supra* pp. 6-9, the same is true of an IMWL claim.

2. Once an IMWL claim has accrued, it cannot be mooted by an employer's payment of only some, but not all, of the amount the employee is owed. A claim is moot "if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Joiner v. SVM Mgmt., LLC*, 2020 IL 124671, ¶ 24. But where an employer provides an employee only with part of what he or she is owed under the IMWL, it is still possible for a court to grant relief—specifically, the rest of what the employee is owed. If an employee is entitled to $100 in back pay under the IMWL, that is, an employer cannot moot the employee's IMWL claim by giving him or her $10. Doing so would not provide the employee everything to which the law entitles her, and so a court could still "grant effectual relief" (i.e., by awarding

$90 in back pay), and the case would not be moot. *Id.*; *accord Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

That principle applies with equal force where, as here, an employer provides an employee with an accrued IMWL claim with the back pay to which he or she is entitled, but not the statutory damages. Such an employee has not been made whole, for the same reason—the employee is entitled by law to damages, not merely back pay. Many courts have reached this conclusion in the FLSA context. *See, e.g.*, *Atlantic Co.*, 146 F.2d at 482 (employer's payment of "the balance due as wages, even though made prior to suit, does not release the accrued liability for liquidated damages," in part because such damages are intended "as compensation for detention of a workman's pay"); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (employer's failure to pay overtime when due yields "a single and entire liability[,] . . . not discharged in toto by paying one-half of it"); *see also Berger v. Perry's Steakhouse of Illinois, LLC*, 430 F. Supp. 3d 397, 407 (N.D. Ill. 2019) (rejecting argument that payment of back pay, but not "attorney's fees, costs, or liquidated damages" mooted wage-and-hour claim under FLSA and IMWL (footnote omitted)). The same is true here.

To hold otherwise would create perverse incentives for employers. If an employer could moot an accrued IMWL claim by paying an employee the back

pay, but not the statutory damages, to which he or she was entitled, employers would in effect never have to pay statutory damages, as long as they were willing to tender back pay—allowing employers to moot individual IMWL claims at will, and to "pick off" uncertified class actions by mooting the named plaintiffs' claims, by paying only a fraction of what they owe. Indeed, if an employer could moot an accrued IMWL claim simply by tendering back pay, employers would have little reason to calculate overtime correctly in the first instance, because they would face no consequences from simply withholding it until threatened with liability. All that would circumvent the regime established by the General Assembly, under which employers are required to pay not just what their employees should have been given in the first instance but additional "compensation for detention of [the employees'] pay," *Atlantic Co.*, 146 F.2d at 482.

B. The circuit court erred in dismissing plaintiffs' claims.

The circuit court erred in reaching a contrary conclusion. The court held that S&C's payment of back pay, but not statutory damages, months or years after the pay periods in question "satisfied the underpayment" to which plaintiffs were subjected. A7.[3] The court's decision appears to rest primarily on its view that "there is no 'payment' deadline in the IMWL," and thus S&C

[3] The circuit court also expressed uncertainty over "whether there was an original underpayment" at all, i.e., whether S&C had erred in excluding the bonuses from plaintiffs' regular pay rates. A6-7. But it assumed for the purpose of this analysis that the bonuses should have been included in the regular pay rates.

was under no obligation to pay plaintiffs any earlier than it did. *Id.* That conclusion is flawed on multiple levels.

To start, Illinois law does impose a "payment deadline." As noted, *supra* p. 7, the IWPCA establishes specific deadlines on which employers must pay employees their wages, including earned overtime wages. *See* 820 ILCS 115/4. And both the IWPCA and the IMWL tie statutory damages to these deadlines by providing that damages accrue based on the time elapsed from "the date of payment," 820 ILCS 105/12(a), 115/14(a)—i.e., the date on which an employer is required to pay its employees. In an ordinary case, then, an employer's failure to pay overtime wages (or sufficient overtime wages) on "the date of payment," *id.*, gives rise to an IMWL claim, entitling the employee to damages. *Supra* pp. 7-8. The circuit court's basic premise was therefore mistaken. An employer cannot indefinitely withhold overtime payments, only to turn around and offer "adjustment" payments when threatened with suit, as S&C did here.

To the extent the circuit court meant to suggest that Illinois law does not impose a deadline for overtime tied to incentive payments not paid on the same timetable as ordinary wages, that, too, is incorrect. An employer making such an incentive payment must generally determine whether the payment is properly considered part of the regular pay rate, and, if so, whether additional overtime payments are owed to the employee. *Infra* pp. 17-19. For instance, if an employee is paid $15 in hourly wages, and works, on average, 50 hours each

week, his or her regular paychecks must include overtime wages for the extra 10 hours (i.e., the 10 hours worked over 40), and calculated on a regular pay rate of $15 per hour. But if the employee is later given a $300 incentive payment for his or her work that quarter, and that payment is properly included in the regular rate (as it generally will be, *infra* pp. 17-18), the employer is required to include the $300 alongside the hourly wages in calculating the employee's regular rate for the relevant time period and, if necessary, make new overtime payments to the employee based on the newly calculated regular rate. *See, e.g.*, 56 Ill. Adm. Code § 210.430 (outlining this process for various forms of compensation). And an employer is also required to make those new overtime payments in a timely manner—generally on "the date of payment," 820 ILCS 105/12(a), 115/14(a), i.e., the date of the incentive payment itself.

Indeed, in the federal context, the U.S. Supreme Court has rejected the argument that there is no "deadline" for overtime tied to incentive payments. The employees in *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), were (like plaintiffs here) paid both an hourly wage and incentive payments based on production targets. *Id.* at 428-29. Their employer calculated their overtime rates based only on the hourly wages, a practice the Supreme Court explained could not be squared with the FLSA. *Id.* at 431-32. In so holding, the Court also rejected the employer's argument that the fact that the incentive payments were not paid on biweekly paydays made compliance impossible.

That such payments may not be "determined or paid until weeks or even months after . . . paydays," the Court explained, and so may require retroactive overtime calculation, does not "excuse[]" an employer "from making the proper computation and payment." *Id.* at 432. Rather, the law "requires only that the employees receive [the payments] as soon as convenient or practicable under the circumstances." *Id.* at 433. The same is true here: As explained, Illinois law generally requires employers to pay any required overtime on "the date of payment," 820 ILCS 105/12(a), 115/14(a)—that is, the date the incentive payments are paid—even where such overtime is based on an incentive payment rather than on payday wages.

The record reflects no reason why S&C should not be required to adhere to this basic rule. The incentive payments at issue were made to plaintiffs and their fellow employees regularly (either quarterly or annually). *See* A10-11 (¶¶ 12-16). If those payments were properly considered part of the regular pay rate for a given quarter or year (as they likely were, *see infra* pp. 25-26), S&C was required to recalculate that rate and pay its employees additional overtime based on the hours worked during the relevant period—just as it eventually did. *See* A30 (¶ 3) (S&C took the "total incentive payment for each period [and] divided by the total hours worked in the period[] to arrive at the change in the hourly rate," then made additional overtime payments based on that rate). Absent some reason doing so would be impractical, S&C was required to make those payments at the same time as the incentive payments themselves.

But S&C did not make additional overtime payments at that time, or at some reasonable time thereafter. Instead, S&C waited until plaintiffs told it they would sue. Nothing in the IMWL entitles S&C, or any other employer, to adopt this kind of "wait-and-see" approach to overtime payments.

The circuit court thus erred in concluding that S&C's adjustment payments "satisfied" plaintiffs, in the sense of providing them all that they were entitled to. A7. To the contrary, because S&C was required to pay plaintiffs overtime in a timely manner (rather than only after suit), but did not, plaintiffs were entitled to statutory damages in addition to back pay. *Supra* pp. 10-11. Because the adjustment payments did not include statutory damages, plaintiffs are not "satisfied," A7, and their claims are not moot.

The circuit court's decision cannot be justified on any other ground. The circuit court appeared to reason at points that plaintiffs' acceptance of the adjustment payments somehow mooted their claims. *See* A7 ("Plaintiffs are not claiming that . . . they returned the adjustment payments."). To the extent the circuit court's decision rests on that view, it is mistaken. Although the Illinois Supreme Court has held that a defendant can generally moot a case by "admit[ting] liability and provid[ing] the plaintiff with all relief requested" (i.e., by "tendering" complete relief), *Joiner*, 2020 IL 124671, ¶¶ 44-46, S&C did not tender complete relief or admit liability here. To the contrary, S&C has refused to provide plaintiffs statutory damages and insists it is not liable

for them. In such a case, the fact that plaintiffs accepted partial payment on their claims is irrelevant.[4]

In sum, the circuit court's decision that S&C's payment of back pay but not statutory damages satisfied plaintiffs' claims, thus mooting the case, is not correct. The judgment below should be reversed on that basis alone.

II. The Circuit Court Erred In Holding That Incentive Payments Can Be Excluded From Computation Of The Regular Rate.

The circuit court also held that incentive payments can be excluded from the computation of the regular pay rate as long as they are not tied to hours worked. A5-6. Although the court went on to deny defendants relief on this issue, reasoning that the record did not show whether the payments at issue were tied to the hours the plaintiffs worked or not, A6, its decision nonetheless rests on an incorrect view of the applicable legal principles. This court should clarify those principles so that the circuit court can apply them correctly on remand.

A. Non-discretionary incentive payments generally cannot be excluded from the computation of the regular rate.

As discussed, Illinois law requires an employer to pay its employees "at a rate not less than [one and one-half] times the regular rate" for every hour worked over forty in an employee's workweek. 820 ILCS 105/4a(1). Although the IMWL does not define "regular rate," the Department has promulgated

[4] S&C has not argued that plaintiffs entered into any kind of formal settlement agreement under which they expressly released their claims in exchange for partial payment.

regulations that define the term expansively "to include all remuneration for employment paid to . . . the employee," subject to only a handful of exceptions. 56 Ill. Admin. Code § 210.410. The Department's regulations make clear that non-discretionary incentive payments must generally be included in the "regular rate," even if they are not tied to hours worked.

To start, the regulations establish a baseline rule under which "*all* remuneration" must be included in calculating the regular rate. 56 Ill. Admin. Code § 210.410 (emphasis added). The regulations then underscore that the regular rate is the "rate at which the employee is *actually* employed," *id.* § 210.420(a) (emphasis added), taking all forms of compensation into account. A separate regulation lays out multiple ways in which non-hourly compensation must be included in calculating the regular pay rate. *Id.* § 210.430. As one example, compensation paid out "on a piece-rate basis," i.e., per item manufactured or completed, must be included in the regular rate in the manner described above, *supra* pp. 12-13—that is, by adding "the total earnings for the workweek from piece rates and all other earnings" and then dividing the total by the number of hours worked that week. *Id.* § 210.430(b). Employers must also (and using essentially the same method) include compensation paid on a per-day or per-job basis, *id.* § 210.430(c); salaried compensation, *id.* § 210.430(d); and more in the regular pay rate. The regulations require, in other words, an employer to include all forms of "remuneration" in calculating the regular pay rate.

As a general matter, non-discretionary incentive payments are "remuneration" of this sort, and so must also be included in calculating an employee's regular pay rate. An employer that pays its employees in part by offering them regular incentive payments—whether tied to production targets, seniority, or any other metric—has simply chosen to tie its compensation, in part, to a factor other than hours worked. Indeed, an incentive payment tied to performance metrics (of the kind plaintiffs allege is at issue here, *see* A10-11 (¶¶ 13, 16)) is functionally indistinguishable from piece-rate compensation: Both compensate employees not for the time they invest in their employment, but for the output of their work. The Department's regulations expressly provide that piece-rate compensation must be included in the regular rate, *see* 56 Ill. Admin. Code § 210.430(b), and the same is true of most incentive payments.[5] Indeed, the regulations expressly link the two, providing that a piece-rate employee's regular pay rate "is computed by adding together the total earnings for the workweek from piece rates and *all other earnings (such as bonuses)*," alongside "other hours worked." *Id.* (emphasis added).

Illinois courts have applied the IMWL to "hybrid" payment systems of the kind of at issue here before. In *Tomeo v. W&E Communications, Inc.*, No.

[5] The Department's regulations provide that "[s]ums paid in recognition of services performed" can be excluded from computation of the regular rate if they are paid at the employer's "sole discretion." *Id.* § 210.410(c)(1). So an incentive payment that is not tied to specific metrics, but instead is awarded on a purely discretionary basis, need not be included in the calculation of the regular rate.

14-cv-2431, 2016 WL 8711483 (N.D. Ill. Sept. 30, 2016), a federal district court applied the IMWL to a comparable payment system, in which employees were paid both an hourly wage and a "bonus" based on a production target. *Id.* at *3-4. The court explained that the IMWL required the employer to "pa[y] its employees an overtime premium for both their base pay and their bonus pay." *Id.* at *9. Any other arrangement, the court reasoned, would result in "carving [up]" employees' total compensation into "slice[s]," one of which would earn overtime and one of which would not. *Id.* at *11.

Indeed, as the *Tomeo* court observed, the rule is the same in the federal context. As discussed, *supra* p. 8, Illinois courts frequently "look[] to federal law" for guidance on the IMWL and its implementing regulations. *Samano*, 2020 IL App (1st) 190699, ¶ 46; *see also Kerbes*, 2011 IL App (1st) 110318, ¶ 25; 56 Ill. Admin. Code § 210.120. And federal courts for decades have read FLSA to require employers to pay overtime even on forms of compensation not tied to hours worked, such as piecework wages and other incentive payments. *See Harnischfeger Corp.*, 325 U.S. at 432 ("When employees do earn more than the basic hourly rates because of the operation of [an] incentive bonus plan," the regular rate must incorporate the incentive payments, not just the hourly rates); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425-26 (1945) (similar). Given "the[] substantial similarities" between the FLSA and the IMWL, this longstanding federal caselaw strongly suggests that the same rule should apply here. *Kerbes*, 2011 IL App (1st) 110318, ¶ 25.

Below, S&C argued (and the circuit court appeared to agree, A5-6) that incentive payments can be excluded from the regular rate as long as they are not tied to hours worked. It did so based on a Department regulation that allows employers to exempt "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked" from the regular wage. 56 Ill. Admin. Code. § 210.410(a). But this regulation cannot be stretched to encompass incentive payments like those at issue here.

For one, the plain text of the regulation does not permit that reading. The regulation's purpose is, as it says, to allow employers to exclude "gifts" and similar payments. A non-discretionary incentive payment is not a "gift"; it is simply an alternative form of compensation for labor, in the same way that piece-rate pay is. *See Provena Covenant Med. Ctr. v. Dep't of Revenue of State*, 384 Ill. App. 3d 734, 751 (4th Dist. 2008) ("[A] gift is, by definition, free goods or services: 'something voluntarily transferred by one person to another without compensation.'" (quoting Merriam-Webster's Collegiate Dictionary 491 (10th ed. 2000)). The relevant federal regulation, 29 C.F.R. § 778.212(b), says as much explicitly, explaining that "[t]o qualify for exclusion under [the FLSA's gift exception], the bonus must be actually a gift or in the nature of a

gift." The same rule should apply here. *See Samano*, 2020 IL App (1st) 190699, ¶ 46.[6]

To be sure, such a payment may not be "measured by or dependent on hours worked." But the IMWL and its implementing regulations do not allow employers to exclude all payments not tied to hours worked. If that were so, an employer could exclude all manner of non-hourly compensation, including piece-rate pay and monthly or salaried compensation—none of which is "measured by or dependent on hours worked." But the regulations expressly provide that such payments—indeed, that "all remuneration," 56 Ill. Admin. Code. § 210.410, subject to a small handful of exceptions—must be included in calculating the wage rate. *Id.* § 210.430. An expansive reading of the "gifts" exception of the kind S&C has suggested would thus swallow the regulations' specific and detailed treatment of non-hourly compensation and conflict with the regulations' broader command to consider all compensation in calculating the regular rate. It cannot be correct.

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[6] To be sure, as S&C observed below, the text of the relevant FLSA provision differs from the text of § 210.410(a), insofar as it states that employers cannot exclude payments "dependent on hours worked, production, or efficiency." *See* 29 U.S.C. § 207(e)(1). But federal courts reached the same result with respect to incentive payments before the relevant provision was added to the FLSA in 1949. *See Harnischfeger Corp.*, 325 U.S. at 432; *Youngerman-Reynolds*, 325 U.S. at 425-26. Those courts' pre-amendment reading of FLSA is entitled to persuasive weight here.

B. The circuit court erred in applying the wrong standard to the incentive payments at issue here.

The circuit court nonetheless appeared to adopt that reading of the IMWL and its regulations, reasoning that the exclusion for "gifts" set out in § 210.410 encompassed all payments made to employees "not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a). *See* A5-6. The circuit court ultimately denied S&C relief on this issue, holding that the record did not show whether the incentive payments at issue here were tied to hours worked. A7. But the court's underlying interpretation of the IMWL and its rules was incorrect, and this court should correct that interpretation so that the proper interpretation may be applied on remand.

1. The circuit court justified its decision on the ground that the "plain meaning" of the gifts provision allows employers to exclude payments that are "'not measured by or dependent on hours worked.'" A5 (quoting 56 Ill. Admin. Code § 210.410(a)). That is not correct. As discussed, *supra* pp. 20-21, the plain language of the regulation allows employers to exclude "gifts," not all non-hourly compensation. Specifically, the regulation states that employers may exclude from the regular rate "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a). The purpose of the regulation is to allow employers to exclude "gifts"—the term at the start of the regulation—and other payments that are not meant as "remuneration," *id.* § 210.410. The remaining text in the rule, including the phrase on which the

circuit court relied, simply helps illustrate the kinds of "gifts" that can be excluded. It explains that a "gift" can include a sum paid "at holidays," but can also include an "amount[]" that is "not measured by or dependent on hours worked." *Id.* § 210.410(a).

Thus, the regulation does not allow employers to exclude *all* payments "not measured by or dependent on hours worked." To read the regulation in this manner is to overlook the key term—"gift"—around which the regulation revolves. *Cf. Bullman v. City of Chicago*, 367 Ill. 217, 226 (1937) ("It has been repeatedly held by this and other courts that, where general words follow particular and specific words in a statute, the general words must be construed to include only things of the same kind as those indicated by the particular and specific words . . . ."). And it would put the regulation in conflict with the rest of the Department's regulatory regime, which directs employers to include "all remuneration" in the regular pay rate as a general matter, 56 Ill. Admin. Code § 210.410, and instructs them specifically to *include* compensation not tied to hours worked, including piece-rate pay, in that rate, *id.* § 210.430. In reading a regulation, as with a statute, a court "must view each phrase or part . . . in the context of the [regulation] as a whole." *Grady v. Illinois Dep't of Healthcare & Fam. Servs.*, 2016 IL App (1st) 152402, ¶ 23. Here, doing so requires reading the "hours worked" language, on which the circuit court relied, in light of the inclusive approach taken by the Department's regulations more generally. The circuit court failed to do so.

The circuit court acknowledged the tension between its reading of the regulations and § 210.430(b)'s treatment of piece-work compensation. A5. But the court dismissed the relevance of that regulation, describing it as an "exception to the exception," speculating that it "may have been put in place because of the nature of [piece-work]," and concluding that it would not be "absurd" to exclude incentive payments of the kind at issue here. *Id.* This reasoning is flawed on multiple levels. For one, the court erred in analyzing this question under the guise of the absurdity doctrine, under which a court may deviate from the "literal reading of a statute" if it produces "absurd" results, *see People v. Hanna*, 207 Ill. 2d 486, 498 (2003). The question is not whether to deviate from the plain language of the gifts provision, but rather how to interpret that provision in the first instance. As discussed, *supra* pp. 20-21, the best reading of the provision, when viewed in the context of the Department's regulatory regime "as a whole," *Grady*, 2016 IL App (1st) 152402, ¶ 23, is that it permits an employer to exclude "gifts" and payments not intended as compensation, not all payments not tied to hours worked.

For another, the circuit court misunderstood the nature and scope of the incongruity created by its reading of the gifts provision. The court appeared to view its reading of the gifts provision as in tension only with § 210.430(b)'s treatment of piece-work compensation—an arrangement it posited might have been "put in place because of the nature" of piece-work. A5. But the court's interpretation creates far broader issues than that. The

court's reading of the gifts provision puts that provision in tension with the Department's treatment of *all* non-hourly compensation—piece-work compensation, salaries, monthly and semi-monthly pay, and more. *See* 56 Ill. Admin. Code § 210.430. Indeed, the court's reading of the gifts provision wholly inverts the default rule set out in the regulations: Instead of including "*all* remuneration" in the regular pay rate, *id.* § 210.410 (emphasis added), an employer must include *only* hourly remuneration (as well as those categories of compensation separately enumerated in § 210.430) in that rate. The circuit court identified no reason to give the gift provision a meaning so incongruous with the rest of the Department's regulations.

2. The circuit court thus applied the wrong legal standard to the incentive payments at issue here. Because the court resolved the case on S&C's threshold motions, however, it is not possible to determine on the present record whether the incentive payments plaintiffs have alleged were made should have been excluded. The case should be remanded for further proceedings so that the correct legal standard can be applied to plaintiffs' claims.

Nonetheless, the complaint's allegations, taken as true, *see Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (on section 2-615 motion, court must accept all well-pleaded facts), suggest that at least some of the payments at issue should have been included in the regular rate. Plaintiffs allege that the "KPI Incentive" payments that both plaintiffs received were given to them

"for achieving certain previously announced performance and safety metrics on [their] production line[s]." A10-11 (¶¶ 13, 20). Plaintiffs likewise allege that they were given an "MIS" bonus "designed to reward [them] for the number of hours that [they] worked during the previous year." A10 (¶ 13) (Mercado); *see also* A11 (¶ 20) (Lopez). If these incentive payments, at least, were made for the reasons set out in the complaint, they are just an alternative form of compensation for labor, and if they are not otherwise excludable they should have been included in plaintiffs' regular pay rate.

Indeed, S&C's conduct since the filing of this lawsuit reflects its tacit agreement that the incentive payments at issue should have been reflected in the regular pay rate. S&C did not just make adjustment payments to plaintiffs; it "changed the way that it calculates the regular rate for purposes of calculating overtime and now includes incentive payments" of the kind at issue here "in the regular rate for purposes of calculating overtime." A31 (¶ 9). That decision presumably reflects S&C's determination that it is required by the IMWL to include such payments in the regular rate.

Nonetheless, because the circuit court has not had the opportunity to apply the appropriate legal standard to plaintiffs' claims, this court should remand to permit it to do so in the first instance.

CONCLUSION

For these reasons, the court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 725-3834
Primary e-service:
CivilAppeals@ilag.gov
Secondary e-service:
Alex.Hemmer@ilag.gov

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 27 pages.

/s/ Alex Hemmer
ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5526
Primary e-service:
CivilAppeals@ilag.gov
Secondary e-service:
Alex.Hemmer@ilag.gov

CERTIFICATE OF FILING AND SERVICE

I certify that on April 20, 2022, I electronically filed the foregoing Brief of Amicus Curiae State of Illinois with the Clerk of the Court for the Illinois Appellate Court, First District, using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and that on April 20, 2022, I served them by transmitting a copy from my e-mail address to the following e-mail addresses for those participants.

Counsel for Plaintiffs-Appellants
Christopher Wilmes (cwilmes@hsplegal.com)
Margaret Truesdale (mtruesdale@hsplegal.com)

Counsel for Defendant-Appellee
John Roache (john.roache@akerman.com)
Megan Kokontis (megan.kokontis@akerman.com)

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Alex Hemmer
ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5526
Primary e-service:
CivilAppeals@ilag.gov
Secondary e-service:
Alex.Hemmer@ilag.gov