STATE OF MINNESOTA

IN SUPREME COURT

A17-1821

Court of Appeals — Hudson, J.
Dissenting, Anderson, J., Gildea, C.J., Thissen, J.

In the Matter of
Minnesota Living Assistance, Inc.,
d/b/a Baywood Home Care.

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Office of Appellate Courts

Keith Ellison, Attorney General, Jonathan D. Moler, Assistant Attorney General, Saint Paul, Minnesota, for appellant Minnesota Department of Labor and Industry.

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S Y L L A B U S

1. All hours worked by an employee after the first 48 hours in a given workweek are hours worked "in excess of 48 hours," as that phrase is used in Minn. Stat. § 177.25, subd. 1 (2018), regardless of how the employee was compensated during the first 48 hours of employment in the workweek.

2. Time-and-a-half compensation is not excluded from an employee's remuneration to calculate the regular rate of pay under Minn. R. 5200.0130–.0140 (2017), when the compensation is for work that is neither in excess of the 48-hour limit of Minn. Stat. § 177.25, subd. 1, nor outside of the employee's regular working time.

3. Although we do not defer to an agency's interpretation of a rule when that interpretation is not promulgated, agencies may argue in favor of the interpretation as a litigation position—and we may adopt the interpretation—when our de novo consideration leads us to conclude that the interpretation is correct.

Reversed.

O P I N I O N

HUDSON, Justice.

From 2012 to 2014, respondent Minnesota Living Assistance, Inc., d/b/a Baywood Home Care (Baywood) paid its employees using a split-day plan, meaning that for the first 5.5 scheduled hours of each 16-hour workday employees were paid at one rate of pay and for the remaining 10.5 scheduled hours they were paid 1-1/2 times that rate. Baywood used this split-day plan even after an employee had worked 48 hours (the overtime threshold under Minnesota law) in a workweek.[1] Minn. Stat. § 177.25, subd. 1 (2018). In 2014, following complaints that Baywood was not paying its employees overtime, appellant Department of Labor and Industry (the Department) began investigating Baywood, and ultimately the Commissioner of the Department of Labor and Industry (the Commissioner) issued an order for Baywood to pay approximately $550,000 in unpaid overtime wages and an additional $550,000 in liquidated damages.

Baywood petitioned for a writ of certiorari, and the court of appeals reversed, concluding, inter alia, that the Commissioner's conclusion that split-day plans are not

[1] A workweek is "a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods." Minn. R. 5200.0170 (2017).

permitted under the Minnesota Fair Labor Standards Act (the Act), Minn. Stat. §§ 177.21−.35 (2018), was based on an unpromulgated rule. We conclude that (1) the Act requires employers to pay their employees at least time-and-a-half wages for all hours worked after the first 48 hours of a given workweek, regardless of whether the employee received time-and-a-half compensation during the first 48 hours of employment in that workweek, and (2) under Minn. R. 5200.0140 (2017), time-and-a-half payments for regularly scheduled work that occurs before an employee has worked 48 hours in a workweek may not be excluded from an employee's remuneration to calculate the employee's regular rate. We further conclude that, although the Commissioner's failure to promulgate interpretive rules to that effect means that we will not give deference to the Department's interpretation, the Department may nevertheless advocate in favor of its interpretation, and we may adopt the interpretation when our de novo consideration of the statute and rule leads us to conclude that the Department's interpretation is correct. We therefore reverse the court of appeals decision.

FACTS

This case comes before us following an order by the Commissioner granting summary disposition, which is the administrative equivalent of summary judgment. *In re Gillette Children's Specialty Healthcare*, 883 N.W.2d 778, 785 (Minn. 2016). Accordingly, "[w]e view the facts in the light most favorable to the party against whom

summary [disposition] was granted."[2] *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 415–16 (Minn. 2018).

Baywood employs home health aides to provide companionship services for individuals who are elderly or otherwise in need of assistance to stay in their homes. Its employees often reside in the homes of clients for a period of up to 24 hours per day, ranging from a single day to an entire week, but more typically 5 days out of 7.

Baywood advertises to recruit employees. According to Baywood's CEO, the customary practice in the industry is to "establish a compensation program that, although computed on an hourly-rate basis, yielded a daily rate." Baywood advertised the positions as paying "$165–$170/day" with no indication of how that pay was divided by hour or how Baywood structured its overtime payments. Once employees were hired, however, one of Baywood's administrative employees explained the daily compensation rate to new employees, including that employees were paid at one rate "for the first 5.5 hours of a shift and at 1.5 times that rate as a daily premium for the next 10.5 hours of the shift."[3]

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[2] The Department argues that even when the facts are viewed in the light most favorable to Baywood, the court of appeals erred in concluding that a genuine issue of material fact exists on one of the pivotal issues in this case—whether Baywood actually paid its employees using a split-day plan, as opposed to paying them a flat rate for all hours worked. We agree with the court of appeals that this "is a close case," *In re Minn. Living Assistance, Inc.*, 919 N.W.2d 87, 93 (Minn. App. 2018), but because we can resolve the case in favor of the Department on statutory grounds, we assume that Baywood in fact paid its employees using a split-day plan.

[3] The mathematically inclined reader may note that 5.5 + 10.5 = 16, which is 8 hours short of the 24 hours in a day that Baywood's employees typically work. Minnesota Statutes section 177.23, subdivision 11 (2018), authorizes paying live-in companions for only 16 of the 24 hours in their shift, provided certain criteria (most notably being free to

In 2014, the Department received a complaint alleging that Baywood was not paying its employees overtime after they had worked more than 48 hours in a workweek. Based on the complaint, the Department audited Baywood's pay records from March 21, 2012, to March 21, 2014. Following the audit, the Department concluded that Baywood did not pay its employees $557,713.44 in overtime wages that the employees were due. In May 2016, the Commissioner issued a compliance order, which ordered Baywood to cease and desist from failing to pay overtime and to pay $557,713.44 in unpaid overtime wages and an equal amount in liquidated damages to the affected employees.

Baywood timely challenged the compliance order, and a contested-case proceeding was initiated before the Minnesota Office of Administrative Hearings. *See* Minn. Stat. § 177.27, subd. 4 (2018). Following cross-motions for summary disposition, an administrative law judge recommended summary disposition in favor of the Department, concluding that: (1) there was no genuine issue of material fact that Baywood paid its employees the same rate for all hours worked (in other words, that Baywood did not pay its employees using a split-day plan); (2) even if Baywood paid its employees using a split-day plan, the premium payments for hours 5.5–16 of each day could not be excluded from the calculation of the employees' regular rate of pay, because such premium payments are not listed in the rules implementing the Act as excluded from the calculation; and (3) even if Baywood paid its employees using a split-day plan, Baywood was required to pay time-and-a-half for *every* hour worked after the first 48 hours, not just hours 5.5 to 16 of each

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sleep during the night) are met. The applicability of this provision is not contested in this case.

day. Baywood filed exceptions with the Commissioner, who affirmed the matters material to this appeal.

Baywood petitioned for certiorari review in the court of appeals. In a published opinion, the court of appeals reversed and remanded on two grounds. *In re Minn. Living Assistance, Inc.*, 919 N.W.2d 87 (Minn. App. 2018). First, the court concluded that a genuine issue of material fact existed as to whether Baywood paid its employees using a split-day plan. *Id.* at 93. Second, the court concluded that the Department's position that premium payments for hours 5.5–16 could not be excluded from an employee's regular rate was an unpromulgated rule, and thus invalid. *Id.* at 96. The court of appeals did not address the Department's arguments regarding the meaning of the Act or its implementing regulations.

We granted the Department's petition for further review.

ANALYSIS

This case requires resolution of three issues. First, we must determine which hours of employment require time-and-a-half compensation by interpreting Minn. Stat. § 177.25, subd. 1. Second, because the amount of time-and-a-half compensation due depends on employees' regular rate of pay, we must determine how the regular rate of pay is calculated by interpreting the administrative rules implementing Minn. Stat. § 177.25, subd. 1. Third, because we conclude that the statute and rules prohibit split-day plans, we must address

Baywood's argument that it should still prevail because the Department did not promulgate additional rules that unambiguously resolve the first two issues.[4]

Before beginning our analysis, it is helpful to briefly mention the history of split-day plans. The concept of split-day plans stems from case law under the federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–19 (2018). In the early years after passage of the FLSA, some employers adopted split-day plans in an attempt to avoid increased wage costs. *See generally Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 38 (1944) (describing split-day plans). Under a split-day plan, the employer would arbitrarily divide the day into two parts for purposes of calculating and applying hourly wage rates; the employer would pay a "regular" lower rate for the first portion of the day and then an "overtime" rate for the balance of the day, with the resulting average hourly wage being no higher than before passage of the FLSA. *See id.* at 38–41.

With this background in mind, we begin with the first substantive issue: which hours of employment require time-and-a-half compensation under the Act.

I.

"No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is

[4] The dissent erroneously treats the first and second issue as one issue, first looking to see if the statute prohibits split-day plans and, after concluding that the statute is unclear, turning to the regulation to see if it provides any additional guidance. Although the two issues both relate to split-day plans, they are discrete issues: the statutory issue concerns which hours must receive pay at one-and-a-half times the regular rate, while the rule issue concerns what that regular rate is.

employed." Minn. Stat. § 177.25, subd. 1. The Commissioner's order interpreted this language as requiring Baywood to pay time-and-a-half wages for all hours worked in excess of 48, regardless of how Baywood's employees were compensated for the first 48 hours. This issue presents a question of statutory interpretation, which we review de novo. *Cruz-Guzman v. State*, 916 N.W.2d 1, 13 (Minn. 2018).

The Department argues that Minn. Stat. § 177.25, subd. 1, prohibits split-day plans, relying on the plain meaning of the phrase "in excess of." Baywood argues that nothing in the statute prohibits it from paying employees time-and-a-half *before* an employee has worked more than 48 hours and then crediting those payments toward the payments it would otherwise be required to pay. We agree with the Department.

Section 177.25, subdivision 1, requires time-and-a-half compensation for employment "in excess of" 48 hours. The phrase "in excess of" is not defined by statute, so we may look to dictionary definitions to determine the meaning of the phrase. *See Gilbertson v. Williams Dingmann, LLC*, 894 N.W.2d 148, 152 (Minn. 2017). Looking at dictionary definitions from the time of enactment, "in excess of" is defined as "to an amount or degree beyond." *Webster's Third New International Dictionary* 792 (1976). After inserting this definition into the statute, it reads, "No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment [to an amount or degree beyond] 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed." This definition supports the Department's interpretation. Hours worked after the first 48 hours are "beyond" the first 48 hours, regardless of the compensation an employee received for

the first 48 hours; hours worked before the first 48 hours are not. Put another way, the effect of Baywood's interpretation would be that employees would not receive time-and-a-half compensation for the first 5.5 hours of every shift worked after they have worked 48 hours. But by Baywood's own admission, the payments for hours 5.5–16 in a day are not compensation for work that occurs after the first 48 hours; they are payments for work that occurs *before* reaching 48 hours. This failure to pay time-and-a-half wages for every hour after the first 48 hours violates the plain language of the statute.

Finally, Baywood's "crediting" argument would require us to read words into the statute that are not present. Nothing in the statute appears to authorize crediting pre-48-hour payments—whether time-and-a-half or otherwise—towards post-48-hour payments. To do so, the statute would have to be amended to read "No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours [worked at a regular rate of pay] in a workweek at a rate of at least 1-1/2 times the regular rate . . . ." But the bracketed words do not appear in the statute as enacted by the Legislature, and "we will not read into a statute a provision that the legislature has omitted." *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). Accordingly, we conclude that once an employee has worked 48 hours in a workweek, the employer must pay that employee at a rate of at least 1-1/2 times the employee's regular rate for any additional hours worked, regardless of how the employee was compensated prior to working 48 hours.[5]

[5] The dissent asserts that our interpretation also reads words into the statute that are not present, specifically, "No employer may employ an employee for a workweek longer

II.

Having concluded that employers must compensate their employees at a rate of at least 1-1/2 times the employee's regular rate for all hours worked by an employee after the first 48 hours in a given workweek, we next turn to the calculation of that regular rate. The Department argues that, in calculating the regular rate under Minn. Stat. § 177.25, subd. 1, Baywood may not exclude the time-and-a-half payments that Baywood paid for hours 5.5−16 of each day,[6] because those payments were not for "overtime work." Baywood argues that they were.

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than 48 hours, unless the employee receives compensation for employment in excess of [the first] 48 hours in a workweek . . . ." The dissent is incorrect. To have an amount of something that is "in excess" (the language of the statute) of some other amount (call that amount *x*), you necessarily must first have at least *x*. Thus, to have worked hours "in excess" of 48 hours, you must "first" have worked at least 48 hours. Therefore, the words we are purportedly adding ("the first") are necessarily entailed by the existing statutory language of "in excess."

Moreover, contrary to the dissent, "the Legislature's intent to provide time-and-a-half compensation for employees is vitiated if an employee receives overtime throughout the week," because there is no principled distinction to be had which would prevent an employer from paying a regular rate for only 1 hour and "overtime" from hour 2 to hour 168. As discussed *infra* note 12, such a scenario would effectively make the "overtime" rate the employee's regular rate, but the employee would never be able to earn bona fide overtime. Although this scenario is not precisely before us here, it is factually similar in that there is no apparent reason why Baywood (or other employers like it) would divide the day into 5.5 hour and 10.5 hour pieces, other than to avoid the application of overtime wage laws. *Cf. Walling*, 323 U.S. at 38 (concluding split-day plans that "arbitrarily divided" the day "into two parts for purpose of calculating and applying hourly wage rates" violated federal overtime laws).

[6] More specifically, the Department takes issue with excluding the time-and-a-half payments Baywood pays before an employee has worked 48 hours. There is no dispute that, once an employee has worked 48 hours in a workweek, the additional half of time-and-a-half payments may be excluded from the calculation of the employee's regular rate.

"Regular rate" is not defined by the Act. But pursuant to its rulemaking authority under Minn. Stat. § 177.28, subd. 1, the Department has adopted rules regarding the calculation of the regular rate. Those rules state that "the regular rate of pay is determined by dividing the employee's remuneration in any workweek by the total hours worked." Minn. R. 5200.0130 (2017). Payments "are not considered part of the employee's remuneration," however, if they are "premium payments for overtime work . . . if the premium rate is at least 1-1/2 times the normal rate." Minn. R. 5200.0140 (2017). Thus, the rules contemplate a three-step process to determine an employee's regular rate: (1) add up the employee's total remuneration; (2) subtract from that amount any premium payments for overtime work;[7] and (3) divide the remaining remuneration by the total hours worked. The parties' dispute concerns the second step, specifically what is "overtime work."

"When interpreting a statute or regulation, we first look to see whether the statute or regulation is clear or ambiguous on its face." *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007). "Overtime" is not defined by regulation or statute, so we may look to dictionary definitions of the word. *See Francis v. Minn. Bd. of Barber Exam'rs*, 256 N.W.2d 521, 523 (Minn. 1977) (looking to a dictionary definition to interpret a phrase used in a regulation).

[7] The rules also contemplate additional subtractions, but they are irrelevant to our discussion here. *See* Minn. R. 5200.0140 (listing all payments not considered part of an employee's remuneration to calculate the regular rate of pay).

Dictionaries from the time period when the rule was first promulgated[8] provide two definitions of "overtime." *Webster's* defined "overtime" as "in excess of a set time limit . . . or of the regular working time." *Webster's Third New International Dictionary* 1611 (1976). *Black's Law Dictionary* defined "overtime" as "[a]fter regular working hours; beyond the regular fixed hours." *Overtime, Black's Law Dictionary* (4th ed. 1968). Thus "overtime work" could reasonably refer to work "in excess of a set time limit," here the statutory time limit of 48 hours, or it could reasonably refer to work conducted "beyond the regular fixed hours" of employment—but still within the first 48 hours of the workweek.

Although the rule is ambiguous, we need not resolve the ambiguity in this case; under either dictionary definition of "overtime," the hours at issue do not meet the definition. Obviously, under the Department's preferred definition of "in excess of a set time limit," the hours in question were not overtime hours, because they were worked before the employee reached the statutory limit of 48 hours. But even under the alternative definition, the hours in question are not overtime hours, because they are not hours worked "beyond the regular fixed hours." Rather, they were regularly scheduled hours; Baywood simply chose to pay its employees more for those hours as part of its split-pay plan.

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[8] The Minnesota Fair Labor Standards Act was enacted in May 1973. *See* Act of May 24, 1973, ch. 721, 1973 Minn. Laws 2066, 2066–75. The Department filed rules and regulations implementing the Act with the Minnesota Secretary of State in November 1973. *See* Minn. Stat. § 15.048, subd. 1 (1980) (currently codified at Minn. Stat. § 14.37, subd. 1 (2018)); Dep't of Labor & Indus., *The Fair Labor Standards Act and Related Rules and Regulations* (1973) (filed with the Minnesota Secretary of State and Commissioner of Administration in November 1973). Rule LS 13 of those rules is substantively identical to present day Minn. R. 5200.0130–.0160 (2017).

Baywood seeks to avoid this conclusion by advocating for a third definition of "overtime work," specifically, any work for which an employee receives compensation at 1-1/2 times the employee's "normal rate." But—unlike the two definitions of overtime work we considered above—this definition is unreasonable, both as applied to this case and as a general matter of employment law.[9] First, as applied to this case, Baywood concedes that the "normal rate" is "the rate of pay agreed upon between the employer and employee, expressed in terms of an hourly rate." But "the rate of pay agreed upon between [Baywood] and [its] employees" *included* the premium payments for hours 5.5–16.[10] Thus, by Baywood's own admission, the employees were not receiving compensation at 1-1/2

[9] We also note that this definition has no basis in the text of the *Minnesota* administrative rule. The federal Fair Labor Standards Act *does* exclude "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek" from an employee's remuneration for the purpose of calculating the employee's regular rate. 29 U.S.C. § 207(e)(5) (2018). But the federal definition is inapplicable to this case for two reasons. First, Baywood does not argue that only its premium payments for hours worked after hour eight of each day should be excluded; Baywood argues *all* of its premium payments (including the payment for hours 5.5–8 of each day) should be excluded. Second, the federal act did not apply to Baywood during the years at issue. *See* 29 U.S.C. § 213(a)(15) (2012) (excluding companionship-services employees).

It may be possible (indeed, the Department concedes) that "overtime work" also includes "[b]ona fide overtime premiums paid to employees in accordance with the FLSA." This would avoid the "pyramiding" overtime concerns the dissent raises. But we need not resolve the issue here because it is undisputed that the FLSA did not apply to Baywood during the relevant period, and thus there are no overtime premiums paid in accordance with the FLSA that could be excluded.

[10] More specifically, the premium payments were included as part of the wages for regularly scheduled hours. We do not foreclose the possibility that an employer and employee could agree upon an overtime rate by contract and have those premium payments excluded if the overtime payments were only for unscheduled (and therefore "beyond the regular fixed") hours.

times their normal rate; they were just receiving their normal rate. Therefore, the wages in question are not excludable from the calculation of the employee's regular rate.

Moreover, even without Baywood's concession, we would reject Baywood's third definition because it is contrary to the goals of the Act, as expressed by the Legislature. One of the purposes of the Act is "to establish . . . overtime compensation standards that maintain workers' health, efficiency, and general well-being." Minn. Stat. § 177.22 (2018). To achieve this goal, the Legislature requires that employees who work more than 48 hours must be paid at a higher rate than they were paid during the first 48 hours of their work. This result would be utterly frustrated were we to accept Baywood's definition of "overtime work." For example, suppose that to attract employees in an industry, an employer must advertise an hourly wage of at least $14.50 per hour. Under Baywood's proposed definition, the employer could (1) establish a regular rate of $9.86,[11] but then (2) advertise and pay its employees time-and-a-half ($14.79) for all hours worked, including hours worked before the 48-hour statutory threshold. Even after reaching that threshold, however, under Baywood's definition of "overtime work" the employer could (3) continue to pay its employee $14.79 for hours worked in excess of 48 hours. In short, employees would receive *no* additional compensation for working more than 48 hours. Regardless of how many hours they worked, employees would always receive $14.79 per

[11] Minnesota's minimum wage in 2019. Minn. Dep't of Labor & Indus., *Minimum-Wage Rate Adjusted for Inflation as of Jan. 1, 2019* (Aug. 23, 2018), https://www.dli.mn.gov/news/minimum-wage-rate-adjusted-inflation-jan-1-2019 (last visited September 13, 2019) [opinion attachment]; *see also* Minn. Stat. § 177.24, subd. 1(f) (requiring the Commissioner of the Department to determine the percentage increase in the rate of inflation, which in turn determines the state's minimum wage).

hour. This conclusion is clearly contrary to the goals of the Act, and therefore we reject the definition that leads to the conclusion as unreasonable.[12] Instead, we conclude that, although Minn. R. 5200.0140 is ambiguous, under either *reasonable* interpretation of the rule, Baywood may not exclude the time-and-a-half payments Baywood paid for hours 5.5–16 of each day for the calculation of the regular rate.[13]

III.

Despite our conclusions in Sections I and II, Baywood argues that we must nevertheless reject the Department's position because it is unpromulgated rulemaking. Because Baywood misconstrues our agency-rulemaking precedent, we disagree. We conclude that the Department's decision not to explicitly define "overtime work" by regulation does not preclude us from performing our constitutionally designated role of interpreting the law.

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[12] The dissent proposes a definition of overtime work along these lines, arguing that overtime work could be defined as "regularly scheduled work that exceeds a set number of daily hours contemplated in an employment agreement." Although, strictly speaking, the dissent's definition avoids the problem of employees *never* being paid at the regular rate, nothing in the dissent's definition would prevent employers from paying a regular rate for 1 hour and putative overtime for all subsequent hours, effectively paying the same rate for all hours (including those worked after the first 48 hours) except the first. Such a wage scheme would likewise be contrary to the goals of the Act, confirming our conclusion that the dissent's proposed definition of overtime work is unreasonable.

[13] We emphasize the limits of our holding on this issue, which addresses only *scheduled* hours that are worked during the *first 48 hours* of the workweek. The parties agree that time-and-a-half payments for hours worked after the first 48 hours of the workweek may be excluded from regular rate calculations. And Baywood has not contended that its employees were being called to work unscheduled shifts or asked to stay late beyond their scheduled shifts. Such hours might fall within at least one of the definitions of overtime work that we considered (work conducted "beyond the regular fixed hours"), but we leave that question for another day.

Baywood relies on a two-step argument to support its position that this enforcement action is unpromulgated rulemaking. First, Baywood argues that the Department's interpretation that overtime work includes only work after the first 48 hours is an interpretive "rule" under the Minnesota Administrative Procedure Act, because it is an "agency statement of general applicability and future effect." Minn. Stat. § 14.02, subd. 4 (2018). Second, Baywood argues that because that interpretation was not promulgated as an interpretive rule, the Department cannot enforce (or even advocate in court for) it. Because the parties focused the majority of their arguments on this second step (and the court of appeals also concluded that the Department's interpretation was a rule), we likewise assume without deciding that the Department's position is an interpretive rule and resolve Baywood's argument based on whether the failure to promulgate the Department's interpretations of the statute and rule precludes the Department from enforcing or advocating for it. *See Curtis v. Altria Grp., Inc.*, 813 N.W.2d 891, 901 n.6 (Minn. 2012) (assuming without deciding that one argument was meritorious because the case could nevertheless be resolved based on an alternative argument).

To support its position that any agency position not contained in a promulgated rule must be invalidated, Baywood relies on our holding in *St. Otto's Home v. Minnesota Department of Human Services* that "[a]ll rules, including interpretative rules, must be adopted in accordance with the Minnesota Administrative Procedure Act," and failing "to follow the procedures of the Minnesota Administrative Procedure Act invalidates the rule." 437 N.W.2d 35, 42–43 (Minn. 1989) (citation omitted). The Department counters that it may engage in case-by-case enforcement of the Act, and that it need not promulgate

interpretive rules every time a party claims that the statute (or an implementing rule) does not unambiguously resolve the case. This issue presents a question of agency authority, which we determine de novo. *In re Denial of the Variance Granted to Haslund*, 781 N.W.2d 349, 354 (Minn. 2010).

Baywood argues that the Department's position is an unpromulgated rule, and that under *St. Otto's Home*, the failure to follow the procedures of the Minnesota Administrative Procedure Act invalidates the rule.[14] Thus far, we agree with Baywood: the Department has not promulgated a rule defining "overtime work," and therefore the Department's position, insofar as it is a *rule*, is invalid and the Department cannot rely on its own declaration of what "overtime work" is as having the force and effect of law to which we would defer.

But Baywood takes the argument a step further, arguing that because the Department's position is not a valid *rule*, that likewise means we cannot independently interpret Minn. Stat. § 177.25 or Minn. R. 5200.0140 at all, and instead must simply hold in Baywood's favor. On this point we disagree. That an agency's interpretation of an ambiguous rule is recent does not preclude the agency from arguing for that interpretation; it merely means that the agency's position is a "litigation position" that "does not warrant

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[14] Agencies can avoid the application of this doctrine "if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a longstanding one," because in such situations the agency is not deemed to have promulgated a new rule. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667 (Minn. 1984). We have already determined, however, that the rule is ambiguous; and although the Department argues that its interpretation is a longstanding one, it concedes that it has never previously told employers not to use split-day plans.

deference." *Cf. J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 9 n.7 (Minn. 2016) ("[W]hen an agency's interpretation of an ambiguous rule is recent or has not been consistent but is instead tantamount to a litigation position, deference is not appropriate."). Like any other party, the Department may argue that its regulations should be interpreted in a particular way; that the agency did not choose to proceed with further rule-making under the Minnesota Administrative Procedure Act means only that we interpret the regulation de novo, without deference to the agency's interpretation.[15]

The dissent claims that our decision permits agencies to adopt and enforce unpromulgated rules through adjudication. The dissent misapprehends the holding of our opinion. As we previously explained, to the extent the Department's summary disposition order is a new rule (that is, an agency statement of general applicability and future effect) it is invalid. What *is* of general applicability and future effect is our de novo interpretation of the existing, properly promulgated, rules, just as our interpretations are applicable in every other type of case. Indeed, considering such other cases shows that the dissent's

[15] The dissent cites *St. Otto's Home* to argue that we have rejected the position that "the improper promulgation of a rule does not render a correct interpretation of that rule incorrect." 437 N.W.2d at 43. First, that statement is arguably dicta, because we immediately went on to note that the agency's interpretation in that case "was incorrect," so commenting on promulgation was irrelevant. Even if not dicta, however, the rule we are ultimately interpreting in this case is Minn. R. 5200.0140, which was properly promulgated.

concerns about regulated parties' "opportunity to conform one's behavior to the law" are overblown.[16]

For example, in *Lake v. Wal-Mart Stores, Inc.*, we first recognized three of what have come to be known as the "privacy torts," and reversed dismissal of claims for intrusion upon seclusion, appropriation, and publication of private facts. 582 N.W.2d 231, 236 (Minn. 1998). We did so even though before that case, no such causes of action existed in

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[16] The dissent also suggests that this position allows agencies to "enforce previously undisclosed rules" thus trivializing the rulemaking provisions of the Minnesota Administrative Procedure Act.

First, the rules in question are not "undisclosed." As we discussed in Sections I and II, the prohibition of split-day plans follows from the language of the existing, properly promulgated rules, as well as the statutory language.

Second, our holding here does not trivialize the rulemaking procedure. It applies only when the putative new rule is in fact an interpretation that necessarily follows from the language of existing rules. Thus, for example, if the Department wanted to require overtime payments for train conductors operating trains that travel northwest, it would be required to utilize the rulemaking process because such a requirement (unlike the prohibition of split-day plans) does not follow from the language of existing rules.

Third, it is worth noting that the opinion the dissent cites for the proposition that our holding would lead to such negative results is a dissenting opinion. *See Nat'l Labor Relations Bd. v. Wyman-Gordon Co.*, 394 U.S. 759, 780 (1969) (Harlan, J., dissenting). As a review of the majority opinions in those cases makes clear, the Supreme Court long ago adopted a position similar to the holding we reach today, and no great calamity has befallen those regulated by federal agencies. *See, e.g.*, *Nat'l Labor Relations Bd. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 290–94 (1974) (permitting agency to resolve ambiguity of "managerial employees" using adjudicatory, rather than rulemaking, procedures). Moreover, the holding we reach today is narrower than that reached by the Court in *Bell Aerospace*. That decision permitted the National Labor Relations Board to develop substantive law through adjudication even though the agency had not promulgated *any* rule resolving the ambiguity in question. *See* Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and the Proposed* Beck *Union Dues Regulation*, 8 Admin. L.J. Am. U. 125, 126 (1994) (noting that it was not until 1989 that the NLRB exercised its rulemaking powers in a significant way). Here, on the other hand, we are confronted with a scenario where the agency has promulgated a rule and we are addressing the rule's ambiguity *without deference to the agency*.

Minnesota, and therefore the defendants had no opportunity to conform their behavior to the law. *See id.* at 236 (Tomljanovich, J., dissenting) (" 'Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy.' *Hendry v. Conner*, 226 N.W.2d 921, 923 (Minn. 1975)."). Here, there is even less cause for concern, because (as the dissent agrees) at least one reasonable interpretation of Minn. R. 5100.0140 prohibits Baywood from deducting split-day plan overtime from regular rate calculations.

Finally, it would also be absurd to hold that the Department's failure to promulgate an interpretive rule precludes us from fulfilling our responsibility to interpret the law. In addition to giving the Department the power to issue compliance orders, the Act gives employees aggrieved by violations of the Act a private right of action. Minn. Stat. § 177.27, subd. 8. Such employees can obviously argue that the Act and its implementing rules should be interpreted to prohibit split-day plans, regardless of whether or not the Department has promulgated a rule expressly to that effect. And, as discussed in Sections I and II *supra*, those employees would be correct. Thus, to give effect to Baywood's argument, we would be required to either (1) give different meanings to Minn. Stat. § 177.25 and Minn. R. 5200.0140 depending on whether the case arose as an enforcement action by the Department or a private action by an aggrieved employee or (2) interpret Minn. Stat. § 177.25 and Minn. R. 5200.0140 in favor of employers in all cases—despite our earlier conclusion that such an interpretation is incorrect—unless the Department

promulgated a rule prohibiting split-day plans. Both of these resolutions are absurd, and the conclusion we reach today avoids these results.[17]

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

[17] The dissent argues this result is not absurd, alluding to a "fundamental difference between administrative agencies and private citizens." Certainly, agencies have the power to promulgate interpretive rules that private plaintiffs lack. But this distinction does not alter the fact that regulations should have the same meaning regardless of whether they are being interpreted in an enforcement action or a private suit, and the dissent fails to explain how this requirement would be satisfied under its view of administrative law.

Moreover, this result is not a "theoretical" absurd result. Having concluded in Sections I and II that the Act and its implementing regulations prohibit split-day plans, the only way we could conclude that Baywood's conduct did not violate the law is if we disregarded our interpretation of it and concluded that—because this case originated as an agency action as opposed to a private suit—Baywood's employees were not entitled to the unpaid overtime wages they will receive under the Commissioner's compliance order.

D I S S E N T

ANDERSON, Justice (dissenting).

The dispute in this case is whether respondent Minnesota Living Assistance, doing business as Baywood Home Care, paid its employees overtime after 48 hours. *See* Minn. Stat. § 177.25, subd. 1 (2018) (requiring an employer to pay an employee for work "in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate" of pay). Relying on a previously unannounced interpretation of the administrative rule that allows an employer to exclude "premium payments for overtime work" when calculating an employee's "regular rate of pay," appellant Department of Labor and Industry contends that Baywood did not do so. *See* Minn. R. 5200.0140 (2017). Because I conclude that the interpretation of Rule 5200.0140 advanced by the Department is an unpromulgated rule and that it does not have the legal authority to enforce this unpromulgated rule on a case-by-case basis, I respectfully dissent.

The Department imposed an obligation in excess of $1 million on Baywood because the Department determined that the daily overtime premiums paid to its employees did not satisfy Baywood's overtime obligation under statute. Baywood asserted that it paid its employees under a "split-day plan," a compensation structure where overtime is paid for the latter part of each day, rather than the latter part of each week. According to sworn affidavits, Baywood paid its employees a regular rate of pay for the first 5.5 hours of each day and 1-1/2 times that rate for the remaining hours worked in a day. *See, e.g.*, *Gonzalez v. Home Nurse Corp.*, No. 17-21802-CIV-MORENO, 2018 WL 318472, at *4 (S.D. Fla. Jan. 4, 2018) (noting, in a minimum wage action against an in-home nursing employer that

employed a daily rate, that federal law "allows employers to credit daily overtime premiums toward fulfillment of the weekly overtime requirement"). Four employees declared that this payment structure was what they had been promised before beginning their employment at Baywood. Baywood's president indicated that this payment structure was common in the industry and allowed potential employees to compare competing employers. The Department disagrees, contending that Baywood offered no documentary evidence to establish that it used a split-day plan. According to the Department, none of Baywood's payroll records or employment documents reference overtime wages.

On this record, the court of appeals correctly concluded that the Commissioner improperly weighed the evidence and made credibility determinations, and thus erred by granting summary disposition. *In re Minn. Living Assistance, Inc.*, 919 N.W.2d 87, 92–93 (Minn. App. 2018). Even though there is no question that Baywood would face credibility challenges at trial, the less-than-overwhelming nature of Baywood's argument does not entitle the Department to summary judgment. "We view the facts in the light most favorable to the party against whom summary judgment was granted." *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 415–16 (Minn. 2018). Under our historic summary judgment standard, with all reasonable inferences drawn in favor of Baywood and against the Department, Baywood is entitled to a trial on the merits. Our recent decisions that reversed summary judgment determinations only strengthen the conclusion that the Commissioner erred by granting summary disposition to the Department. *See, e.g.*, *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 205–06 (Minn. 2018) (concluding that summary judgment is improper when "view[ing] all of the evidence and the reasonable

inferences from it in favor of the non-moving party," a "close call" on the disputed issue is presented); *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 633 (Minn. 2017) (concluding that summary judgment is improper when facts must be weighed or credibility assessed). We are not free to disregard the sworn affidavits of Baywood's employees. Thus, the remaining question is whether split-day plans or daily overtime are prohibited by Minnesota law. On this question, existing Minnesota law provides little guidance.

Under Minnesota law, "[n]o employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed." Minn. Stat. § 177.25, subd. 1.

Nothing in the plain language of the statute prohibits split-day plans. The court's resolution—isolating the words "in excess of 48 hours" and superimposing a dictionary definition to conclude that overtime is owed only "after *the first* 48 hours," (emphasis added)—is defeated by its own logic. Just like Baywood's crediting argument, the court "read[s] words into the statute that are not present"—under the court's interpretation, the statute now reads: "No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of [the first] 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed." The added words required by the court's interpretation alter *which* 48 hour period must be exceeded.

Under Baywood's crediting argument, the plain language of the statute requires overtime compensation for work in excess of 48 regular rate hours, not "the first 48 hours."

Baywood's interpretation is no less unreasonable than the court's interpretation. In fact, as discussed next, there is good reason to conclude that crediting is allowed and thus it is the more reasonable interpretation. At a minimum, it is unclear why, solely as a matter of statutory text, the Legislature's intent to provide time-and-a-half compensation for employees is vitiated if an employee receives overtime throughout the week (Baywood's interpretation), but vindicated if the employee receives overtime later in the week exclusively (the court's interpretation)—notwithstanding the policy concerns of the court. The text of the statute is simply unhelpful here.

The Department's regulations add no clarity. In fact, the Department admits that it has not properly promulgated a rule that prohibits a split-day compensation arrangement like the plan Baywood insists that it had in place. Further, Baywood persuasively argues that, under the only relevant rule the Department did promulgate, an employer *is* entitled to credit daily overtime payments. Specifically, Rule 5200.0140(B) carves out from the calculation of an employee's "regular rate" any "premium payments for *overtime work* . . . if the premium rate is at least 1-1/2 times the normal rate." (Emphasis added.)

The court concludes that the phrase "overtime work" in the Rule is ambiguous. I agree. But I disagree that the court has provided the only reasonable interpretation. The most obvious flaw in the court's interpretation is that it is essential that overtime work be *unscheduled*. The court reasons that, because the employees' daily overtime here was "regularly scheduled," it therefore was not overtime work.

It is questionable whether work, to qualify as overtime, must come as a surprise. Nothing in the phrase "overtime work" in Rule 5200.0140(B) is inconsistent with regularly

scheduled work that exceeds a set number of daily hours contemplated in an employment agreement. *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 450 n.3 (1948) (defining "overtime premium" as "[e]xtra pay for work because of previous work for a specified number of hours in the workweek *or workday* whether the hours are specified by contract or statute" (emphasis added)). Under the *Bay Ridge* definition, Baywood and its employees may "specif[y] by contract" an amount of "extra pay for work because of previous work for a specified number of hours in the . . . workday," and this extra pay is an "overtime premium" for overtime work. That is precisely what happened here.[1]

The *Bay Ridge* definition arguably is more reasonable than the court's definition because it does not require that employers pay statutory time-and-a-half on top of contractual time-and-a-half. As the Supreme Court of the United States described, "[t]o permit [contractual] overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended." *Id.* at 464. It would not be unreasonable for an employer like Baywood, in the absence of a Department regulation to the contrary, to conclude that "[i]n order to avoid a similar double payment . . . any overtime premium paid, even if for work

[1] In reply, the court imagines a "wage scheme" where the employer pays a "regular rate for 1 hour and putative overtime for all subsequent hours." The remedy for this "scheme" is not to ignore the Department's failure to follow proper rulemaking procedure, but to require the Department to adopt a formal rule and give those to be governed by the rule both notice and an opportunity to comment on the rule. This the Department did not do, and the court declines to require the Department to fulfill its duty.

during the first [48] hours of the workweek, may be credited against any obligation to pay statutory excess compensation." *Id.* at 464–65.[2]

Ultimately, however, the reasonableness of any interpretation is less critical than the Department's failure to resolve the ambiguity in the rule before imposing a $1 million obligation on Baywood. The Department never told employers not to utilize split-day plans, never publicly announced before imposing a substantial fine that it interpreted "overtime work" to mean work outside of "regularly scheduled" hours, and never promulgated a rule to that effect. The Department's sole legal basis for its action against Baywood is an unpromulgated interpretation of an ambiguous rule; in other words, a rule. *See* Minn. Stat. § 14.02, subd. 4 (2018) (defining a "rule" as an "agency statement of general applicability and future effect" that implements "or make[s] specific the law enforced or administered by that agency");[3] *see also St. Otto's Home v. Minn. Dep't of*

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[2] The concern over the likelihood of pyramiding may be particularly acute in the assisted living, long-term care industry. The record shows that, unlike many industries, it is the practice for employees to work 16-hour shifts in a single day to provide for stability in the setting and to cover overnight hours. Employment opportunities are often advertised as 16-hour shifts and the rate offered to prospective hires is the rate for working an entire "day" as opposed to a per-hour rate. If the law is as the Department suggests, then it is impossible for an employer to advertise a competitive day-shift rate. Rather, the employer would have to advertise one "day rate" for the first three days per week and a different rate for the fourth and subsequent days. Alternatively, the employer must offer a higher day rate for each day of a week with the result that the rate for the fourth and subsequent days would be 150 percent of the higher daily rate—precisely the type of pyramiding that is a concern. And it should not be overlooked that some employees may work only one or two 16-hour shifts per week—as a second job—in which case the Department position means *less* pay for those employees.

[3] The definition of a rule excludes several specific agency activities not relevant here. *See* Minn. Stat. § 14.03, subd. 3 (2018). But between the general definition of a rule and the exclusions, "it is obvious that the legislative scheme . . . was to include agency activities

Human Servs., 437 N.W.2d 35, 42 (Minn. 1989) (concluding that the agency's "definitions" used in a contested-case proceeding and advanced on appeal "are interpretive rules because they make the rule in issue more specific" and thus "must be adopted in accordance with the Minnesota Administrative Procedure Act").

Minnesota's Administrative Procedure Act requires "the formal adoption of rules" when the proposed agency action has "the force and effect of law." *Wacha v. Kandiyohi Cty. Welfare Bd.*, 242 N.W.2d 837, 839 (Minn. 1976). The court does not dispute that enforcement of an unpromulgated interpretation entails unauthorized rulemaking; that "a regulation cannot be construed to mean what an agency intended, but did not adequately express," *St. Otto's Home*, 437 N.W.2d at 42 (citation omitted); or that "[w]e normally invalidate an agency's action when the agency fails to follow proper rulemaking procedures," *id.* at 43; *see also White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) ("Rules must be adopted in accordance with specific notice and comment procedures established by statute, and the failure to comply with necessary procedures results in invalidity of the rule." (citation omitted)); *cf. Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241–42 (Minn. 1980) (declining to consider public hearings on a possible rule repeal as in effect the adoption of a different rule because "[t]here has been no compliance with statutory rulemaking procedures,

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within the general definition of 'rule' and then to exclude . . . specific activity . . . deemed beneficial to the concerns of efficient government and public participation." *McKee v. Likins*, 261 N.W.2d 566, 577 (Minn. 1977).

substantial or otherwise"). These longstanding principles should be enough to affirm the court of appeals.

The court declines to follow *St. Otto's Home* because it recasts the Department's unpromulgated rule as a "litigation position." Then, the court concludes, we may construe a regulation to mean "what an agency intended, but did not adequately express," *St. Otto's Home*, 437 N.W.2d at 42, as long as we agree with the agency's litigation position. In effect, the court endorses a process that allows an agency to adopt and enforce an unpromulgated rule without public notice or comment, so long as the agency persuasively advocates for the unpromulgated rule against a party in litigation. According to the court, any problems caused by "the Department's failure to promulgate an interpretive rule" are rectified by "our responsibility to interpret the law."

This analysis is misguided. First, our decision in *St. Otto's Home* rejected this position. There, the agency's "sudden departure from its past interpretation" of the rule, *see* 437 N.W.2d at 39, led us to conclude that it would be "unfair and unreasonable" to allow the agency to effectively amend the rule without public notice or warning, *see id.* at 39–41. We acknowledged that the relevant language of the rule was ambiguous and that, in advancing a proposed interpretation of the rule, the agency relied "on recognized principles of statutory construction." *Id.* at 41. But we declined to "supply language that [the agency] purposely omitted or inadvertently overlooked." *Id.* at 42. Specifically, we rejected the agency's argument that "the improper promulgation of a rule does not render a correct interpretation of that rule incorrect." *Id.* at 43. When an agency's new interpretation of a rule, even when advanced in a contested-case proceeding, has "the effect

of law" but is made without "express warning or notice," *id.* at 44, we concluded that the agency's *action*—not just the rule, as the court contends—was invalid, *see id.* at 43 ("We normally invalidate an agency's action when the agency fails to follow proper rulemaking procedures."). Recasting an interpretive rule as a litigation position does not justify sidestepping *St. Otto's Home*. To be sure, we have the responsibility to interpret the law. But that responsibility here requires that we invalidate the Department's action because the Department failed to follow proper rulemaking procedures. *Id.*; *see also* Minn. Stat. § 14.69(c) (2018) (recognizing our authority to reverse agency decisions "made upon unlawful procedure").

Second, Minnesota law expressly contemplates notice-and-comment rulemaking procedures. *See, e.g.*, Minn. Stat. §§ 14.101, .22 (2018). The public procedures that surround rule promulgation ensure advance public notice of the conduct that will be deemed to violate the agency's rule. *See, e.g.*, *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 701–02 (Minn. 1985). Indeed, Baywood admits that the Department could adopt a rule implementing its interpretation of "overtime work" and that Baywood would be bound by the properly adopted rule. But the Department has failed to do so. If, as the court suggests, an agency may enforce previously undisclosed rules as litigation positions, "the rule-making provisions of the Administrative Procedure Act are completely trivialized," and "the agency may evade the commands of the Act whenever it desires and yet coerce

the regulated industry into compliance." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 783 (1969) (Harlan, J., dissenting).[4]

Unlike the federal courts, we have never held that administrative agencies are entitled to impose rules and regulations using a case-by-case adjudication model, as opposed to public notice and comment. The Department relies on *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981), the only decision of our court to specifically refer to case-by-case analysis in the administrative law context, where we stated that "[a]dministrative policy may be formulated by promulgating rules or on a case-by-case determination." This statement was dicta. The parties in *Bunge* expressly conceded the agency's authority to engage in case-by-case adjudication. *Id.* at 784 ("It is conceded, however, that the commissioner has the power to proceed in tax matters on a case-by-case basis."). Moreover, the opinion contained only a perfunctory reference to federal law, without explaining any differences between state and federal administrative

[4] The Department does not contend that its interpretation is longstanding. To the contrary, the Department insists that it relied on a litigation position because "this is the first time" it "has encountered such a payment plan," and there was no "past precedent" to guide it. This defense rings hollow in light of the Department's extensive arguments regarding the "plain language" of section 177.25, the "striking similarities" between the language in the state and federal laws, the guidance provided by Supreme Court of the United States decisions, and the Department's assumption that the Legislature relied on federal law in drafting section 177.25. In addition, the Legislature charged the Department with adopting rules to "carry out the purposes" of section 177.25 "to prevent the circumvention or evasion of" that law and to "safeguard the minimum wage and overtime rates established by sections 177.24 and 177.25." Minn. Stat. § 177.28, subd. 1 (2018). We take the Legislature at its word that it expects the Department to abide by this express direction, rather than adopting a case-by-case stance that fails to provide adequate advance notice to those who must abide by the rules, while also undermining the purpose of the Minnesota Administrative Procedure Act. *See id.*, subd. 6 (requiring the Department to comply with the Act in adopting the rules to carry out the purpose of section 177.25).

law. *See id.* at 785. But those differences are significant. *See* Arthur Earl Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 BYU J. Pub. L. 161, 168–80 (1988) (outlining reasons why state agencies should engage in lawmaking by rule rather than lawmaking by adjudication). For example, "[p]ersons involved in the federal administrative process are, in general, more likely to be represented by lawyers than those involved in the similar state processes," *id.* at 175, and "[s]tate agency case law . . . is almost never published and is usually only available in the files of the agency," *id.* at 171; *see also* 21 William J. Keppel, *Minnesota Practice Series—Administrative Practice and Procedure* § 6.56 (2d ed. 2018) (stating that although case-by-case rulemaking has been upheld, it "has also been strongly criticized").

Notice should precede enforcement, adjudication, and "litigation positions." "Fair notice . . . goes to the very heart of the principle of the rule of law—that individuals should be treated in accordance with articulated legal standards." Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 Baylor L. Rev. 991, 996 (2003). "It is difficult to dispute the proposition that the opportunity to conform one's behavior to the law is at least as fundamental an entitlement as the opportunity to defend one's behavior after the fact." Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 Fordham L. Rev. 255, 265 (1982); *cf. Qwest Corp. v. Minn. Pub. Utilities Comm'n*, 427 F.3d 1061, 1068 (8th Cir. 2005) ("[A]pplication of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." (citation omitted) (internal quotation marks omitted)); *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) ("In the absence of notice—for

example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

The court dismisses fair notice as an "overblown" concern. The court is more concerned that it avoid the "absurd" result that a private plaintiff, in theory, could take a litigation position that the Department could not. I am not at all troubled by this implication. There is a fundamental difference between an agency and a private plaintiff: the agency drafts the rules that it enforces. The private plaintiff has no similar rulemaking power and no similar promulgation responsibility. While I agree with the court that, ideally, "regulations should have the same meaning regardless of whether they are being interpreted in an enforcement action or a private suit," I do not agree that we should therefore relieve an agency of its responsibility to use the rulemaking procedures intended by the Legislature, or its failure to request that the Legislature amend the statute. I see no reason to engage in the necessary gymnastics to salvage the agency's action from its historically straightforward fate—invalidation. *See St. Otto's Home*, 437 N.W.2d at 43.

Put another way, the court is more concerned about a theoretical "absurd" result than it is by what has already occurred—an agency determination of wrongdoing by an employer and the imposition of a significant penalty with no apparent notice to the employer of the agency's private interpretation. Whether we conclude that the employer here is subject to an unpromulgated rule or a statutory interpretation that requires the court to add words to the statute to achieve the desired result, the result is the same—an employer will search in vain for any prohibition against split-day plans in Minnesota law.

Here, the court acknowledges that the Department did not promulgate its interpretation of Rule 5200.0140(B). It is therefore unclear how Baywood had notice of the Department's private interpretation and could conform its payroll practices to an unknown Department requirement before enforcement. Under these circumstances, I would affirm the invalidation by the court of appeals of the agency's action and remand to the district court for trial so that Baywood could at least attempt to make the argument that it did indeed employ a split-day plan. *See Minn. Living Assistance*, 919 N.W.2d at 97.

"Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for sustaining the [agency's] action." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting). "This administrative authoritarianism, this power to decide without law . . . seems to me to undervalue and to belittle the place of law, even in the system of administrative justice." *Id.* at 216–17. Nothing in the statute or regulations prohibited Baywood's use of a split-day plan except the Department's private interpretation of its ambiguous rule. Because the Department lacked authority to engage in rulemaking by adjudication, I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.

THISSEN, Justice (dissenting).

I join in the dissent of Justice Anderson.

MINIMUM-WAGE RATE ADJUSTED FOR INFLATION AS OF JAN. 1, 2019

August 23, 2018

Minnesota's minimum-wage rates will be adjusted for inflation beginning Jan. 1, 2019, to $9.86 an hour for large employers and $8.04 an hour for other state minimum wages.

As of Jan. 1, 2019, an estimated 219,000 jobs (not including jobs in Minneapolis) will pay the $9.86 or $8.04 state minimum-wage rates.

"This is great news for Minnesota's lowest-wage workers and will help them keep up with inflation to better provide for themselves and their families," said Ken Peterson, commissioner, Minnesota Department of Labor and Industry. "But more needs to be done so all Minnesotans can earn their way to economic security."

The current large-employer minimum wage, $9.65, will increase by 21 cents to $9.86. Other state minimum wages, including the small-employer, youth and training wages, as well as the summer work travel exchange visitor program wage, which are all currently $7.87, will increase by 17 cents to $8.04.

As of Jan. 1, 2019:

- Large employers must pay at least $9.86 an hour when the employer's annual gross revenues are $500,000 or more.
- Small employers must pay at least $8.04 an hour when the employer's annual gross revenues are less than $500,000.
- The training wage rate, $8.04 an hour, may be paid to employees younger than 20 years of age for the first 90 consecutive days of employment.
- The youth wage rate, $8.04 an hour, may be paid to employees younger than 18 years of age.

These state minimum-wage rates will not apply to work performed in the city of Minneapolis, which has higher minimum-wage rates.

Projected numbers of minimum-wage jobs, 2019

State of Minnesota jobs (not including Minneapolis)

- Total jobs: 2,619,000
- Minimum-wage jobs ($9.86 and $8.04): 219,000 (8.4 percent)

Note: All figures are projections. Jobs include hourly and salaried jobs. Workers are counted once for each job they hold. Projections by Minnesota Department of Labor and Industry using Minnesota Department of Employment and Economic Development wage detail data.

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