

# **COMPENSABLE TIME UNDER THE FAIR LABOR STANDARDS ACT<sup>1</sup>**

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<sup>1</sup> Nothing in this paper is to be construed as legal advice from Mr. Gilliam or the McNair Law Firm.

## I. Working Time Generally

- All employees covered by the Fair Labor Standards Act (“FLSA”) must be paid a minimum wage for all hours worked in a “workweek.” 29 U.S.C. § 206(a). Non-exempt employees must also receive overtime pay (at the rate time and one-half their “regular rate of pay”) for every hour worked in excess of forty (40) in a workweek. 29 U.S.C. § 207(a).
- The FLSA is best understood as a minimum wage/maximum hour law. Trejo v. Ryman Hospitality Props., 795 F.3d 442, 446 (4th Cir. 2015). The substantive sections of the FLSA, narrowly focusing on minimum wage rates and maximum working hours, bear out its limited purpose. Monahan v. County of Chesterfield, 95 F.3d 1263, 1266 (4th Cir. 1996).
- Employment, under the FLSA, is broadly defined to include all hours that an employee is “suffered or permitted to work” for the employer. 29 U.S.C. § 203(g).
  - The term “employee” does not distinguish between temporary or part-time workers and full-time employees.
  - Even undocumented workers fall within the definition of “employee” and are thus entitled to protection under the FLSA.
  - Independent contractors and certain other workers such as trainees and bona fide volunteers do not qualify as “employees” under the FLSA.
- This broad definition of hours worked may require that an employee be compensated for time the employer does not otherwise consider “working time,” such as travel time, waiting time, and certain meal, rest, and sleep periods.
- The first step for the employer to ensure that it is paying employees for all hours worked is to identify the “workweek.” The term “workweek” is a term of art under the FLSA.
- An FLSA workweek is a fixed, regularly-recurring period of 168 hours—that is, seven, consecutive, 24-hour periods—that the employer expressly adopts in order to maintain FLSA compliance. FLSA recordkeeping regulations require covered employers to select and document at least one such workweek. 29 C.F.R. § 516.2(5).
- The workweek can be set to begin on any calendar day and at any time of day, but thereafter the employer must apply that workweek in complying with the FLSA.
- The employer must identify the workweek to the employee in writing. See 29 C.F.R. § 516.2(5).

## II. Hours Worked

- Determining exactly what constitutes “hours worked” is essential in determining an employee’s compensation and compliance with both minimum wage and overtime requirements of the Act.
- According to the U.S. Supreme Court, an employee must be compensated for “all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business.” Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).
- The regulations do not define “work” but do define the workweek as including “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” 29 C.F.R. § 785.7.
- Hours worked includes all hours that an employee is “suffered or permitted” to work for the employer.
- Hours worked also include time during which an employee is “necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” 29 C.F.R. § 785.7.
- This broad definition of hours worked may require that an employee be compensated for time the employer does not otherwise consider “working time,” such as travel time, waiting time, and certain meal, rest, and sleep periods.
- Generally problems arise in calculating the number of hours worked when employees are engaged in incidental activities, such as make-ready work, travel, or waiting, that employers face potential payroll problems.

### III. Rounding Hours Worked

- Rounding work time on a fair and even basis, up and down, is permitted by U.S. Department of Labor regulations. 29 C.F.R. § 785.48(b).
- Rounding is permitted to the nearest quarter hour. However, the employer will violate the FLSA minimum wage and overtime pay requirements if the employer always rounds down. To be compliant, employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked, but employee time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time. 29 C.F.R. § 785.48(b).
- The key takeaway is that rounding should not always favor the employer.
- **Example of permissible rounding:** If under such a policy, an employee reports to work at 9:08 a.m. rather than at the expected 9:00 a.m. starting time, the employee need only

be compensated for work commencing at 9:15 a.m. However, if the same employee clocked in at 9:07 a.m., the worker would have to be paid as if he or she had commenced work at 9:00 a.m. Over the course of time, the hours worked under this arrangement would presumably even out in a manner fair to both the employer and the employee.

- If the employer has a policy where it rounds the employee's hours worked to the nearest quarter hour, the employer needs to have a policy to this effect, which has been communicated in writing to the employee.

#### IV. The Portal to Portal Act: Commute & Travel Time

- In general, all hours worked within the employee's regular working hours are compensable working time.
- The Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, is an amendment to the FLSA, and it eliminates from working time certain travel and walking time and other activities that are "preliminary" or "postliminary" to the workday—that is, they are performed before or after the principal work activity.
- The Portal-to-Portal Act excludes from "working time"
  - Traveling to or from the actual place of performance of the principal employment activities.
  - Activities which are "preliminary" and "postliminary" to a worker's principal activity.
- The Portal-to-Portal Act specifically excludes from compensable time all time that is spent "walking, riding, or traveling to and from the actual place of performance of the principal activity" of an employee and time spent in "activities which are preliminary or postliminary" to a worker's principal activity. 29 U.S.C. § 254(a)(1)-(2).

#### A. Commute Time

- In normal situations, commute time at the beginning or end of the workday is not compensable under the Portal-to-Portal Act.
  - **Note:** Under the Portal-to-Portal Act, an employer must compensate employees for such time if it is agreed to in a contract or collective bargaining agreement, or if it is customary to do so.
- This is the case even if the employee must travel to different work sites for the job. 29 C.F.R. § 785.35; see Wage and Hour Opinion Letter dated Aug. 18, 1986.

- For example, in Qualls v. United States, 678 F.2d 190 (Cl. Ct. 1982), the court found that an employee who had been assigned to a site location about 2 hours away from his home *was not* entitled to additional compensation for the four-hour round trip because it was his own choice that he incurred the additional costs and inconvenience of commuting.
- While this rule may appear harsh, it is well established that normal travel from home to work is not working time, no matter how long the commute.
- Generally, an employee is not at work until he or she reaches the work site. If a company organizes van or car pools for commuting, the driver does not have to be compensated for the time spent driving as long as the arrangement is voluntary. If the driver is ordered to pick up employees before proceeding to work, the time spent driving will be considered working time. Field Operations Handbook § 31c02; see Wage & Hour Opinion Letter dated Feb. 11, 1976. The issue of voluntariness will be an issue of fact, meaning one for the jury to decide. This practice should be avoided.
- However, employers are required to compensate employees for time spent traveling when it is part of a principal activity of the employee. 29 U.S.C. § 254(a). A principal activity refers to work which is “necessary to the business and is performed by the employees, primarily for the benefit of the employer.” Vega v. Casper, 36 F.3d 417 (5th Cir. 1994).
- “Where an employee is required to report at a meeting place to receive instructions or to perform work there, or to pick up and to carry tools, *the travel from the designated place to the work place is part of the day’s work, and must be counted as hours worked ....*” 29 C.F.R. § 785.38.
- An employee who drives a company car or vehicle need not be compensated for commute time simply because he or she is operating the employer’s vehicle, as long as it is for the employee’s convenience. Field Operations Handbook § 31c01; see Wage & Hour Opinion Letter dated April 3, 1995.
- The use of the employer’s vehicle must be by mutual agreement between the employer and the employee. 29 U.S.C. § 254(a); 29 C.F.R. § 785.50(a)(2).
- An employee driving a company vehicle to and from work does not have to be compensated if all of the following conditions are met:
  - Driving the employer’s vehicle between the employee’s home and the work site is strictly voluntary and not a condition of employment;
  - The vehicle involved is the type of vehicle that would normally be used for commuting;
  - The employee incurs no costs for driving the employer’s vehicle or parking it at home;

- The work sites are within the normal commuting area of the employer's establishment.

B. Travel Time

1. *Travel Time During the Workday*

- Travel time during the workday is generally compensable working time. The general rule of thumb is that time spent by an employee in travel as part of the *employer's* principal activity must be counted as hours worked. 29 C.F.R. § 785.38.
- For instance, if an employee travels from job site to job site during the day or reports to a meeting place to receive instructions or pick up assignments and then travels to the place of work, the employee must be compensated for all of the travel time.
- The key to identifying whether travel time during the work day is compensable is determining whether the employees are engaged in travel as part of the employer's principal activity.

2. *Travel for Emergency Calls*

- Department of Labor regulations provide that an employee must be compensated for home-to-work travel time in certain rare emergency situations.
- For example, if an employee, after completing a day's work, is called at home and must travel a "substantial distance" to perform an emergency job, the travel time is compensable. 29 C.F.R. § 785.36.
- Otherwise, the Department of Labor takes no position on the compensability of home-to-work travel for emergency calls.

3. *Out-of-Town Travel*

- The Department of Labor takes the position that out-of-town travel is not ordinary home-to-work travel. Instead, the travel was performed for the employer's benefit and at its request. Therefore, it is part of the "principal activity" of the employer, and the employee must be compensated for it.
- For instance, an employee who works in Washington D.C., with regular working hours from 9:00 a.m. to 5:00 p.m. is given a special assignment in New York City, with instructions to leave Washington D.C. at 8:00 a.m. The employee arrives in New York at Noon, ready for work. The special assignment is completed at 3:00 p.m., and the employee arrives back in Washington D.C. at 7:00 p.m.

- Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. 29 C.F.R. § 785.37.
  - All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible. 29 C.F.R. § 785.37.
- The Department of Labor specifically permits the employer to exclude the travel time between the employee's home and the airport or railroad station as "home-to-work" travel time, as well as usual meal time. 29 C.F.R. § 785.37.

#### 4. *Overnight Travel*

- Department of Labor regulations provide that travel time is compensable work time when it occurs during the employee's regular working hours. 29 C.F.R. § 785.39.
- This is true whether the employee actually performs work or not, since the employee is simply substituting travel for other work duties. Boll v. Federal Reserve Bank of St. Louis, 365 F.Supp. 637 (E.D. Mo. 1973).
- If travel occurs during normal working hours on non-working days (Saturday or Sunday for an employee who works Monday to Friday), the time is compensable.
- The Department of Labor does not count as working time overnight travel that occurs outside of regular working hours and is spent on airplane, train, boat, bus, or car. 29 C.F.R. § 785.39.
  - Therefore, it is advantageous to most employers to have their nonexempt employees travel after working hours. 29 C.F.R. § 785.41.
- Of course, employees who perform work while traveling must be compensated.

#### C. Preliminary & Postliminary Activities

- In terms of preliminary and postliminary activities, generally speaking, time spent in activities which are preliminary (before employees begin their principal work activities) and postliminary (after employees end their principal work activities) is not compensable.
- Preliminary or postliminary activities compensable "by contract, custom, or practice" are considered working time. 29 C.F.R. § 785.9(a).

- Similarly, job related activities that are “integral and indispensable” to an employee’s work are covered, even if they are performed before or after the employee’s work schedule.
  - There has been considerable litigation under the FLSA over the years regarding whether employers must pay employees for time spent engaged in preliminary and postliminary activities.
    - Many of these cases involve putting on and taking off (*i.e.* “donning and doffing”) various types of gear.
    - These cases are most often brought as collective actions.
  - Pre and post-shift activities that are “integral and indispensable” to an employee’s “principal activities”—the tasks the employee is employed to perform—are themselves “principal activities” and must be compensated.
  - An activity is “integral and indispensable” if necessary to the performance of the principal activity and done predominantly for the benefit of the employer.
    - Thus, where employees are required by law, by rules of the employer, or by the nature of the work, to change clothes on the employer’s premises, that activity is generally considered “integral and indispensable” to the principal activity and therefore compensable.
    - Preliminary activities such as filling out time, material sheets, checking job locations, removing trash, fueling cars, and picking up plans are compensable work if done at the employer’s behest and for the employer’s benefit.
  - Any walking or waiting time that occurs after the first “principal activity” and before the last “principal activity” of the workday is also compensable.
  - Under a U.S. Department of Labor regulation known as the “continuous workday” rule, everything between an employee’s first and last “principal activity” on a given day generally is considered part of the compensable workday. 29 C.F.R. § 790.6.
  - The continuous workday does not include time spent during a “bona fide meal period.”
1.     *Donning & Doffing*
- Much of the litigation over the compensability of preliminary and postliminary activities has involved donning and doffing or clothes changing.
  - Because the decisions are fact-specific, there are very few bright-line rules.



- Where employees are required by law, by rules of the employer or by the nature of the work, to change clothes on the employer's premises, that activity is generally considered "integral and indispensable" to the principal activity and therefore compensable.
- Importantly, when an employee's clothes-changing time is compensable under the FLSA, the employee's "travel time" from the locker room to the work station and vice versa is also compensable (as is time spent waiting to doff).
- In Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330 (1956), the Supreme Court first applied the "integral and indispensable" test to determine whether workers in a battery manufacturing plant should be compensated for time spent changing clothes at the beginning and end of work shifts, and taking showers at the end of the workday.
  - The evidence presented in Steiner showed that during the work shifts, employees at the manufacturing plant worked with toxic chemicals, which emitted dangerous fumes that permeated the plant and created a risk of serious injury to the employees. To protect the workers from continuing exposure to the chemicals, the custom and practice in the industry was to require employees to change clothes and to take showers at the end of their work shifts.
  - The employees changed into these "work clothes" when they arrived at work, and changed out of these "work clothes" and took showers at the end of their work shifts.
  - The Supreme Court held that the time spent by the employees in changing clothes and in taking showers was compensable under the FLSA as "work."
  - The Supreme Court held, "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees."
- In 2005, the United States Supreme Court decided IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).
  - The issue in that case was whether poultry and meat processing plant workers—who were required to change into protective clothing and gear before and after their work shifts—were entitled to compensation for walking to work after donning their protective gear.
  - The Supreme Court held that the time the plant employees spent walking from the locker room, after donning the required protective gear, to the production floor was compensable time.

- In Alvarez, the U.S. Supreme Court relied on the continuous workday rule. The Court found that donning and doffing were principal activities and established the respective beginning and end of each workday.
- The Department of Labor takes the position that time spent donning and doffing at home is not compensable.
- “Donning and doffing of required gear is within the continuous workday only when the employer or the nature of the job mandates that it take place on the employer’s premises. It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.” Wage and Hour Advisory Memorandum No. 2006-2, dated May 31, 2006.
- There are other areas of consensus among Courts in deciding donning and doffing cases.
- Courts look at the type of clothing at issue. When heavier, more “unique” protective gear is required, such as the mesh aprons, plastic belly guards and arm and shin guards worn by meat-packing employees, donning and doffing is more likely to be considered “integral and indispensable” to the employee’s work and therefore compensable.
- A different question is perhaps presented when employees are required to don and doff lightweight items, such as hair-nets and goggles, which takes less time.

## 2. *Time Spent Waiting in Line To Enter Workplace*

- In addition to donning and doffing, another preliminary activity that has been litigated is time spent waiting in line for security checks.
- In Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340 (11th Cir. 2007), the Court found that time spent by airport employees passing through security checkpoints and riding in an employer-provided vehicle to and from their work site was not compensable where the process was required by the federal government, not the employer.
- *Ingress and Egress Security Procedures:* In Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2d Cir. 2007), the Court discussed whether the process to enter and exit a nuclear facility was compensable.
  - The plain wording of subsection (1) of the Portal-to-Portal Act exempts from the FLSA: “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.” 29 U.S.C. § 254(a)(1).

- The Court found the measures at entry are required (to one degree or another) for everyone entering the plant, regardless of what an employee does (servicing fuel rods or making canteen sandwiches). These measures also applied to visitors.
- The Court says this is normal travel time, which is non-compensable under the Portal-to-Portal Act. Therefore, employees were not paid for waiting in line prior to entering the nuclear plant.

## V. Waiting Time

- Whether waiting time is compensable depends on the particular factual circumstances.
- Generally, the FLSA requires compensation for all time during which employees are required to wait while on duty or performing their principal activity. 29 C.F.R. § 785.15.
- The U.S. Supreme Court has defined “work” to include any time that is “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 12, 321 U.S. 590 (1944); see 29 C.F.R. § 785.15.
- **The inquiry:** The determination on whether waiting time is compensable turns on whether the employee was engaged to wait or whether the employee was waiting to be engaged. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Such questions “must be determined in accordance with common sense and the general concept of work or employment.” Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948); 29 C.F.R. § 785.14.
- Generally, if the waiting time “belongs to and is controlled by the employer,” then the employee is engaged to wait,” and the waiting time is an integral part of the job and compensable. 29 C.F.R. § 785.15.
- **The regulations provide the following example:** A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. **In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.** 29 C.F.R. § 785.15.

- On the other hand, if the employee may “use waiting time effectively for his own purpose then the employee is waiting to be engaged and the time is not compensable.”

#### A. On Duty v. Off Duty Generally

- The U.S. Department of Labor regulations state that an employee is “on duty” by virtue of being “engaged to wait” during times that are “usually of short duration” that are “controlled by the employer” and because “the employee is *unable* to use the time effectively for his own purposes.” 29 C.F.R. § 785.15.
- Thus, in the case of fire guards who often spend their on-call time for personal use such as sleeping or recreation, the U.S. Supreme Court found they were working in terms of the FLSA because, “of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.” Armour & Co. v. Wantock, 323 U.S. 126 (1944).
- On the other hand, an employee is off duty during times when he is “completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes.” 29 C.F.R. § 785.16(a).
- The regulations also state that the employee must be specifically told that he is off duty during these times. Id. The employee “is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that we will not have to commence work until a definitely specified hour has arrived. Armour, *supra*.

##### 1. *On duty*

- All time spent by employees in waiting or in periods of inactivity while on duty must be counted as hours worked. This is particularly true where waiting periods are of such short duration that the employees cannot use them for their own benefit. 29 C.F.R. § 785.15.
- Under the regulations (29 C.F.R. § 785.15), waiting time by an employee who has been relieved from duty need not be counted as hours worked if:
  - The employee is completely relieved from duty and allowed to leave the job;
  - The employee is relieved until a definite, specified time; and
  - The relief period is long enough for the employee to use the time as he or she sees fit.
- For example, a highway department employee who must wait for a vehicle to be removed from the road, a firefighter who watches television at the firehouse while waiting for

alarms, and a worker who talks to fellow employees while waiting for equipment to be repaired are all working during their periods of inactivity. In all these cases, waiting is an integral part of the job. DOL W.H. Publication 1459 (May 1985); see Donovan v. Kentwood Dev. Co., 549 F.Supp. 480 (D. Md. 1982).

- The time may be hours worked even though the employee is allowed to leave the premises or the job site during periods of inactivity *when such periods are unpredictable and of short duration*. In such a case, because the employee is unable to use the time for his or her own purpose, it belongs to and is controlled by the employer.
- Generally, the periods during which this waiting occurs are short, but even when they are not, they are unpredictable, so that the employee cannot use the time for his own benefit. In such cases, waiting is an integral part of the job. The following are examples of compensable waiting time:
  - Restaurant employees who were required to clock in at a certain time, but then waited to receive their assignments, must be compensated for waiting time. Chao v. Akron Insulation & Supply Inc., 184 Fed. App'x 508 (6th Cir. 2006).
  - Employees who transported mail must be compensated for time spent at a railroad station waiting for mail to arrive, even though they often slept while waiting. Wright v. Carrigg, 275 F.2d 448 (4th Cir. 1960).

## 2. *Off Duty*

- Employees who wait before starting their duties because they arrive at the place of employment earlier than the required time are not entitled to be paid for the waiting time.
- However, if an employee reports at the required time and then waits because there is no work to start on, the waiting time is compensable work time. Chao v. Akron Insulation & Supply Inc., 184 Fed. App'x 508 (6th Cir. 2006).
- The U.S. Department of Labor has defined the term “off duty” as “periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time for his or her own purposes.” DOL W.H. Publication 1459 (May 1985).
- In Alvarez, the Supreme Court held that, even if waiting time is necessary to other activities (such as donning safety gear before work) that are integral and indispensable to the employee’s principal activity, the waiting time is not considered work time, but instead preliminary or postliminary time. The Court explained, “Unlike the donning of certain types of protective gear, which is always essential if the worker is to do the job, the waiting time may or may not be necessary in particular situations or for every employee.”

### 3. *Split Shifts*

- According to the U.S. Department of Labor, if an employee has time off in the middle of a workday that is long enough to effectively use as he or she wishes, and the employee understands that he or she does not have to return to work until a definite specified time, the employee would not be considered working during the time-off period. DOL W.H. Publication 1459 (May 1985).
- For example, bus drivers who waited for more than an hour during a split shift—during which they could spend their time for their own purposes—were found to not be working during the waiting time, which was therefore not compensable. United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109 (10th Cir. 1999).

## VI. On-Call Time

- On-call time is time spent by employees, usually off the working premises, in their own pursuits where the employee must remain available to be called back in to work on short notice if the need arises.
- The FLSA requires employers to compensate their workers for on-call time when such time is spent “predominantly for the employer’s benefit.” The U.S. Department of Regulations state the rule as follows:
  - “An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while ‘on call.’ An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.”
- The determination of the compensability of on-call time involves a fact specific, case-by-case analysis. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
- While no single fact determines the outcome, Courts look at a number of factors in reviewing the employers’ on-call policies. Among them are:
  - The terms of the employment agreement, if any;
  - Physical restrictions placed on an employee while on call;
  - The maximum period allowed by the employer between the time the employee was called and the time he or she reports back to work (“response time”);
  - The percentage of calls expected to be returned by the on-call employee;
  - The frequency of actual calls during on-call periods;
  - The actual uses of the on-call time by the employee;
  - The ability to trade or swap on-call responsibilities;

- The amount of advance notice of assigned on-call time periods; and
  - The disciplinary action, if any, taken by the employer against employees who fail to answer calls.
- No one factor is determinative and the above list is not exhaustive.
- While there are a number of factors courts consider, the underlying inquiry in most on-call pay disputes concerns the amount of freedom enjoyed by the employee while on call, and whether this measure of freedom allows this on-call time to be effectively used for the employee's own purposes. Some minor restrictions on this freedom do not trigger compensation requirements.
- In one case, the Court determined that on-call pay was not required for a group of police officers assigned to a county airport. They were required to carry pagers, which operated on a statewide basis, at all times while off duty. Some of the officers also were required, as a condition of employment, to live within 30 minutes of the airport. The court said that because the officers were free to engage in their regular personal activities, and call outs were relatively infrequent (20 times in three years for the group with the most calls), the officers' off-duty time was not utilized predominately for their employer's benefit. Thus, no compensation was awarded.
- The more restrictive the on-call policy is, the more likely that a court will conclude the on-call time is compensable working time.
- Firefighters, police officers, forest service employees, and other workers who are prevented from engaging in social activities that would interfere with their ability to monitor the radio and respond within a short period of time must be paid for on-call time.
- Employees can be prohibited from drinking alcohol during on-call periods. Wage and Hour Opinion Letter dated Dec. 18, 2008.
- **Best Practices:** To minimize the risk of liability, you should provide employees as much advance notice of on-call schedules as possible and, if possible, provide an opportunity for employees to trade or swap assignments so that on-call schedules impede on personal activities as little as possible. Additionally, on-call employees should be issued a pager, cell phone, or personal digital assistant (*e.g.* Blackberry) during on-call periods to allow them to travel freely in the local area to run errands, eat meals, and attend school events.

The response time should be reasonable and take into consideration the average commute time and other unique factors. While it is permissible to prohibit employees from drinking during on-call time, restrictions on other activities during on-call time should be minimal.



## VII. Break Periods

- Nothing in the FLSA requires employers to offer meal breaks or rest breaks, but the laws of some states do. The FLSA does require certain employers to offer non-compensable breaks for breastfeeding mothers.
- However, for employers that offer meal breaks or rest breaks, several factors must be considered in determining whether an employee must be paid during such breaks.

### A. Meal Breaks

- An employee must be paid for a meal break unless three conditions are met:
  - (1) The meal break generally at least 30 minutes.
  - (2) The employee is free to leave his or duty post. (There is no requirement, however, that the employee be allowed to leave the premises or work site).
  - (3) The employee is completely relieved from all duties during the meal break. 29 C.F.R. § 785.19.
- If the employee is required to perform *any* duties—whether active or inactive—then, he is not completely relieved from duty.
  - For example, if an office worker is required to eat at her desk and answer the phone if anyone calls, she is working and must be paid for her time, even if no one actually calls during her meal break.
  - Similarly, a factory worker who must watch her machine during her lunch break is also not completely relieved from duty.
- Some courts have adopted a slightly more relaxed view of the “completely relieved from duty” standard, ruling that in certain circumstances, an employee *may* be asked to perform minimal work duties during the meal break and not be compensated for that time.
- This more relaxed standard has been referred to as the “predominant benefit” standard, referring to the courts’ inquiry into whether the worker’s meal time is spent primarily for the benefit of the employer or for the employee.
- Under this interpretation, courts generally rule that if the meal break is spent primarily for the employer’s benefit, it is compensable. If the period is spent primarily for the employee’s benefit, it not compensable. In applying this standard, courts usually look at whether the employee *primarily* is engaged in work-related duties during the meal periods.
- The United States Court of Appeals for the Fourth Circuit has adopted the more relaxed “predominant benefit” standard. In Roy v. County of Lexington, 141 F.3d 533 (4<sup>th</sup> Cir. 1998), the Court explained its reasons for doing so. The Court noted that although FLSA



rules can be read to require employers to pay workers for their breaks if they perform any duties of any kind, the Department of Labor “did not seemingly intend such a broad construction.”

- According to Roy, “the most appropriate standard for compensability is a flexible and realistic one where we determine whether, on balance, employees use mealtime for their own, or for their employer’s benefit.”
- Restrictions placed on employee’s meal periods may make the meal periods primarily for the employer’s benefits, and thus compensable.
  - For example in Reich v. S. New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997), a group of employees of a telephone company spent their days working on telephone lines, in trenches and in manholes. They were required to bring their lunches to work and to stay at the work site during their lunch breaks. When these meal breaks occurred at an outdoor site that was accessible to the public, the workers were required to remain on-site to ensure that company equipment was secure and to prevent harm to the public.
  - The Court found the employees were restricted to the work site for the purpose of performing valuable security services to the company. Thus, the Court found the workers’ lunch time was compensable time. The Court observed, “The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers’ lunch break. The workers’ on-site presence is solely for the benefit of the employer, and in their absence, the company would have to pay others to perform those same services.”
- The Regulations provide that employers may be able to avoid paying employees for meal periods of less than 30 minutes under certain “special conditions.” 29 C.F.R. § 785.19. The Regulations do not explain what these conditions are, but the agency’s Field Operations Handbook lists five (5) factors that will be considered. ***Employers should be aware that the Field Operations Handbook is not a regulation and thus is not binding on the Department of Labor itself, on a court hearing an FLSA case, on employers, or on employees.***

B. Rest Breaks

- Employees must be paid for rest breaks “of short duration,” running from 5 to 20 minutes. 29 C.F.R. § 785.19. So coffee breaks, smoke breaks, and other short breaks must be compensated.
- Employees *do not* need to be paid for longer rest breaks lasting more than 20 minutes as long as they satisfy all the requirements for off-duty waiting time (*i.e.* The employee is

completely relieved from duty during the rest break, and the rest break is long enough to enable the employee to use the time for his or her own purposes.”).

- The test is essentially whether the waiting time belongs to the employer or the employee. Waiting time belongs to the employer when the employee is “engaged to wait” and the waiting time is an integral part of the job.
  - Waiting time belongs to the employee when the employee may use it for his/her own purposes.
- Also, an employer does not have to pay its employees if they extend a short rest break without authorization—for example, stretching a smoke break from the allotted 5 to 10 minutes—as long as the employer has “expressly and unambiguously communicated” the following:
    - (1) The authorized break may only last for a specific length of time;
    - (2) Any extension of such break is contrary to the employer’s rules;
    - (3) Any extension of such a break will be punished. FOH § 31a01(c).
  - While there is no requirement that such communication be in writing, it will be easier for an employer to prove that it “expressly and unambiguously communicated” the information if it did so in writing—for example, by including it in an employee handbook.

#### C. Breastfeeding Breaks

- The Patient Protection and Affordable Care Act amended section 7 of the FLSA to require employers to provide “reasonable” unpaid breaks to nursing mothers to express milk for their infants for up to one year after the child’s birth. 29 U.S.C. § 207(r)(1).
- Nursing mothers must be allowed to take a break *every time* they need to express breast milk.
- Employers also must provide these employees a private location, other than a bathroom, where they may express milk.
- Employers of fewer than 50 employees are exempt if the breastfeeding requirements would impose an undue hardship by causing the employer significant difficulty or expense.

#### VIII. Sleeping Time

- The U.S. Department of Labor regulations set forth two general policies regarding sleeping time: one for employees on tours of duty of less than 24 hours and another for those who work around the clock. 29 C.F.R. §§ 785.20-.22

A. Sleeping Time for Less Than 24-Hour Tours of Duty

- If an employee's tour of duty is less than 24 hours, periods during which he or she is permitted to sleep are compensable working time as long as he or she is on duty and must work when required. Allowing employees to sleep when they are not busy does not render the time "sleep time"; nor does the furnishing of facilities to sleep, as long as an employee is still on duty. 29 C.F.R. § 785.21; FOH § 31b00.

B. Sleeping Time for Round-the Clock Duty

- If an employee's tour of duty is 24 hours or longer, up to 8 hours of sleeping time can be excluded from compensable working time if *all* of the following apply:
  - An expressed or implied agreement excluding sleeping time exists;
  - Adequate sleeping facilities for an uninterrupted night's sleep are provided;
  - At least 5 hours of sleep is possible during the scheduled sleeping periods; and
  - Interruptions to perform duties are considered hours worked.
- If the sleeping period is longer than 8 hours, only 8 hours will be credited. 29 C.F.R. § 785.22(a).
- The Department of Labor has said that the 5 hours of sleep need not be consecutive. Wage and Hour Opinion Letter, Aug. 20, 1985; FOH § 31b12(b).
- If the sleep period is interrupted by a call to duty, the interruption must be counted as hours worked. Wage and Hour Opinion Letter, Aug. 13, 2002.
- If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire sleep period must be counted as working time. 29 C.F.R. § 785.22(b).
- "Sleep time" does not necessarily have to be at night. The Sixth Circuit United States Court of Appeals ruled that a sleep time agreement was acceptable, where sleep time occurring between 2:00 p.m. and 10:00 p.m. was excluded and adequate facilities were provided. Ariens v. Olin Mathieson Chem. Corp., 382 F.2d 192 (6th Cir. 1967).
- There must be an agreement between the employer and employee excluding sleep time; without an agreement the sleep time will be counted as hours worked. General Elec. Co. v. Porter, 208 F.2d 805 (9th Cir. 1953).

C. Sleeping Time for Employees Residing on Employer's Premises

- Some employees reside on the premises at which they work. For example, an employee may both work and reside in a group home for foster children, handicapped individuals,

drug abusers, criminals on probation or problem youth. A parks and recreation employee may live at the park. A housekeeper may live with his or her employer.

- The regulations specifically provide that not all the time the employee is on the employer's premises is working time in these scenarios. 29 C.F.R. § 785.23.
- “An employee who resides on his employer's premises on a permanent basis or for extended periods of time *is not considered as working all the time he is on the premises*. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances, and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.” 29 C.F.R. § 785.23.
- The Field Operations Handbook notes that “precise recordkeeping regarding hours worked is not required” in this situation. FOH § 31b18. The employer can keep time records showing the schedule adopted and can simply indicate that the employee's work time generally coincided with the schedule.
- Since it is difficult to determine the exact hours worked under these circumstances, the Department of Labor accepts any reasonable agreement of the parties that takes into consideration all the pertinent facts. 29 C.F.R. § 785.23. Such a “reasonable agreement,” regarding what constitutes working time where an employee resides on an employer's premises, must be an employer-employee agreement and not a unilateral decision by the employer. Normally, such agreement should be in writing. FOH § 31b18(b).
- In a 2004 opinion letter, the Department of Labor listed conditions under which such an agreement would meet the requirements of the FLSA. These conditions are that the employees:
  - Reside permanently on the premises;
  - Are free to leave the premises for their own purposes and to engage in private pursuits during all non-duty time, not including sleep time;
  - Are paid for all time called to duty during their sleep time;
  - Are paid for all sleep time if that time is interrupted for calls to duty to the extent that the employee cannot get at least five hours of sleep during a 24-hour period;
  - Typically work some hours during non-sleep time such as during early morning hours or on weekends; and
  - Are paid for all work performed during non-sleep time, including during the mornings, afternoons, evening, and on weekends. Wage and Hour Opinion Letter, July 27, 2004.

## IX. Training & Meetings

- As a general rule, an employee must be paid for any time he or she spends attending training programs, meetings, and other similar activities unless four criteria are met:
  - Attendance occurs outside the employee's regular working hours;
  - Attendance is voluntary;
  - *The training or meeting is not directly related to the employee's job*; and
  - The employee does not perform productive work while attending the training or meeting. 29 C.F.R. § 785.27.
- This analysis often turns on whether the training or meeting was directly related to the employee's job (the third factor cited above).
- A training or program or meeting is "directly related to the employee's job" if it is "designed to make the employee handle his job more effectively." 29 C.F.R. § 785.29.
- For example, that time spent by technicians at home taking Web-based prerequisite classes for a training class was compensable even though the training class was voluntary, because the prerequisite classes were directly related to the employees' jobs and helped them do their work more effectively. Wage and Hour Opinion Letter dated Jan. 15, 2009.
- On the other hand, if the purpose of the training program or meeting is to train the employee for another job, or to teach her an additional skill, then it may not be directly related to the employee's job. 29 C.F.R. § 785.29.
- If the training provides benefits that extend beyond the employee's employment position—such as physical fitness training that helps police officers perform their job duties but also improves their health—then, the training may not be directly related to the employee's job.
- If the purpose of the training program is to help upgrade the employee's skills in preparation for a promotion or other advancement, and is not intended to make the employee more efficient in his present job, the training will not be considered directly related to the employees' job even if the training happens to improve the employee's skills in his current position. 29 C.F.R. § 785.29. For example, a federal appeals court held that an electric meterman was not entitled to compensation for time spent in training on new equipment that was not necessary for his current job and was intended to make him eligible for a higher salary. Price v. Tampa Elec. Co., 806 F.2d 15551 (11th Cir. 1987).

### A. Continuing Education

- Employers need not pay for training time that is directly related to an employee's job when they establish "for the benefit of ... employees a program of instruction which corresponds to courses offered by bona fide institutions of learning." 29 C.F.R. § 785.31.
- An employee who voluntarily attends such a course outside of his or her work hours would not be considered to be working during that time, "even if the courses are directly related to his job, or paid for by the employer." 29 C.F.R. § 785.31.
- For example, in a Wage and Hour Opinion Letter dated Oct. 23, 1980, the Department of Labor said that if a state requires training or continuing education as a condition of continuing in the profession for a non-state employer—for example, continuing certification for a nurse—and the training is not tailored to meet the needs of that employer, such training would not be considered working time. See Wage and Hour Opinion Letter, Jan. 7, 2009 (A child care center need not compensate its employees for time spent in state-mandated training programs, even though the training was directly related to their work).

B. Homework

- Generally speaking, homework is compensable if it is required.

X. Unauthorized Work

- Employees who choose to work after their shift is over are engaged in compensable working time. The reasons for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid. 29 C.F.R. § 785.11.
- Once an employer allows the employee to work, or knows that the employee is working, the employee must be compensated. This is true whether the work is being performed at the place of business or at home.
- A violation of the FLSA occurs when, as a result of unreported hours worked, an employee's hourly wage for a pay period falls below the minimum wage.
- A violation also occurs if, as a result of "off-the-clock" work, an employee is not paid for hours worked in excess of 40 hours in a workweek.
- Mere promulgation of a rule preventing unauthorized work is not sufficient to avoid compensation for additional hours worked. 29 C.F.R. § 785.13.
- Employers can take steps to reduce the likelihood of being sued by employees who are seeking back pay for unauthorized work by adopting a clear time and attendance policy, making sure managers understand the rules and are held accountable, requiring

managers to review weekly time entries, training all staff about timekeeping policies, and uniformly addressing any policy violations by employees or supervisors.

XI. Time Spent in Court

- Employees may have occasion to miss work to appear in court or at some other legal proceeding. This could involve an employee who is subpoenaed to serve on jury duty, or a worker who is subpoenaed to testify in a work-related or non work-related case.

A. Nonexempt Employees

- FLSA rules regarding compensability of time that a nonexempt worker spends serving on a jury or testifying in court vary depending on whether the court time is related to the principal duties of the worker's job.
- By appearing in court or another judicial proceeding, is the worker being 'suffer or permitted to work'? Is the time in court spend for the benefit of the employer?
- Basically, if the answer to these questions is yes, the time is compensable. If the answer is no, the time generally is not compensable.

B. Exempt Employees

- With respect to exempt white-collar employees paid on a salary basis, the FLSA regulations state: "While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week without loss of the exemption." 29 C.F.R. § 541.602(b). This provision covers employees who are subpoenaed to jury duty or to testify in court.
- Time that an employee spends in court *as a party in his or her own case would not be covered* and would be treated like personal leave. 29 C.F.R. § 541.602(b)(3).
- If an employer has a bona fide benefit plan, whereby personal leave is accrued and is used for vacation, holiday, illness, or injury, the employer can require an employee to use accrued vacation time for jury duty and witness attendance.
- However, employers cannot make deductions from the salary of an otherwise exempt employee for jury duty and witness attendance.