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Compensable Time Under the Fair Labor Standards Act

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Working Time Generally

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FLSA Is a Minimum Wage/Maximum Hour Law

- 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).

What Constitutes Hours Worked

- 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).
- 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).
- 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.

Commute Time

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The Portal to Portal Act

- We have already established the general rule that 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. 29 U.S.C. § 254(a)(1)-(2).

Commute Time is Generally Not Counted As Hours Worked

- ***In normal situations***, commute time at the beginning or end of the workday is not compensable under the Portal-to-Portal Act.
- 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.

Unless It is Part of a Principal Activity of the Employee

- Generally, an employee is not at work until he or she reaches the work site.
- 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.

Use of Employer's Vehicle

- 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).
- Needs to be reduced to writing and signed by the employee, but be careful to avoid creating a contractual relationship.

Best Practices: Use of Employer's Vehicle

- 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.

Travel Time

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Travel During the Workday

- 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).

Continuous Workday Starts The Clock

- 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.
- Any walking or waiting time that occurs after the first "principal activity" and before the last "principal activity" of the workday is also compensable.
- Bona fide meal periods are excluded.

Travel on Non-Working Days

- 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.

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.

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.
- 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.

Overnight Travel

- 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, buts, or car. 29 C.F.R. § 785.39.
- It is advantageous to most employers to have their nonexempt employees travel after working hours. 29 C.F.R. § 785.41.

Employees Who Perform Work While Traveling

- Employees who perform work while traveling must be compensated.
- Remember, employees must be paid for all time that they are "suffered or permitted to work" for the employer. 29 U.S.C. § 203(g).
- Special problem presented by cell phones or remote access. Bring Your Own Device Policies.

Preliminary & Postliminary Activities

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Generally Time Spent Before & After Work is Non-Compensable

- 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) are not compensable.
- Preliminary or postliminary activities compensable "by contract, custom, or practice" are considered working time. 29 C.F.R. § 785.9(a).

Unless They Are Integral & Indispensable to the Employee's Work

- 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 before and after their scheduled working hours.

Integral and Indispensable Analysis

- The analysis of whether pre and post shift activities must be compensated turns on whether such activities are "integral and indispensable" to an employee's principal activities—the task the employee is employed to perform.
- If they are, then, they 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.

Examples of Pre and Post Shift Activities That Must Be Compensated

- 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.
- Can be avoided if employees are required to clock-in first.

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). Continuous Workday analysis.

Case Study: Donning & Doffing

- 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.

Steiner v. Mitchell (cont'd)

- 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."

Case Study: IBP, Inc. v. Alvarez

- 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.

Type of Clothing Requires Matter

- 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.

Donning & Doffing: Changing Clothes at Home

- 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.

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.

Case Study: Gorman v. Consolidated Edison Corp.

- 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).

Gorman (cont'd)

- 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.

Waiting Time

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The Waiting Time Problem

- Whether waiting time is compensable depends on the particular factual circumstances. Let's talk about a receptionist as an example.
- 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.
- "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).

If Required to Wait, Such Time is Compensable

- 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.
- It can be your job to wait to act until *something* happens.

The Inquiry of Whether Waiting Time is Compensable

- The determination of 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.

Examples of Compensable Waiting Time

- A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a 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.

- 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).

Why Such Waiting Time is Compensable: 2 Characteristics

- 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.

- 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."

Waiting While 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.
- While "on duty," the employee is unable to use the time for his or her own purpose. Accordingly, such time belongs to and is controlled by the employer. It is thus compensable working time.

For Waiting Time To Be Non-Compensable: Off-Duty Analysis

- 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.
  - The employee must be specifically told he is off duty.

Off Duty

- Employees do not need to be paid if they are off duty.
- 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.

Waiting Time That Occurs Before Work

- 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).

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).

On-Call Time

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On-Call

- 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.
- 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.

Whether On-Call Time is Compensable

- While no single fact determines the outcome, Courts look at a number of factors in determining whether on-call time is compensable, such as:
  - 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.

Comes Down to Control

- 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.
- The more restrictive the on-call policy is, the more likely that a court will conclude the on-call time is compensable working 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.

Break & Meal Periods

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Break or Meal Periods Not Required

- 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.

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.").

Extended Rest Breaks

- 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.

Extended Rest Breaks

- It is not wise for employers to deduct an employee's pay if he/she extends a rest break without authorization.
- Conduct and pay issues should be dealt with separately.
- Reducing an employee's pay for a conduct violation is a Draconian method of dealing with employees. It is one that could expose the employer to liability.

Meal Breaks

- An employee must be paid for a meal break unless three conditions are met:
  1) The meal break generally must last 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. **This is what the regulations say**.

Examples of Work Performed During Meal Breaks

- 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.

Relaxed Standard May Be Emerging

- 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.

More Relaxed Standard

- 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 (4th 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."

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.

Training & Meetings

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Training & Meeting Time Is Generally Compensable

- 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.

"Directly Related to Employee's Job"

- This analysis often turns on whether the training or meeting was directly related to the employee's job (the third factor cited in previous slide).
- 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, 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 perquisite 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.

Examples of Situations Where Training Time May Be Non-Compensable

- 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.

Continuing Education

- Employers need not pay for training time that is directly related to an employee's job if the program of instruction corresponds to courses offered by bona fide institutions of learning and is for the employee's benefit. 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.

Continuing Education 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).

Homework

- Is homework compensable?

  YES

Unauthorized Work

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Is Unauthorized Work Compensable?

- 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.

How to Eliminate Unauthorized Work

- 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.

Nature of Potential Claims for Unauthorized Work

- 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.

Sleeping Time

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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
- If the tour of duty is less than 24 hours, the employee must be paid for sleep time. If more than 24 hours, up to 8 hours can be excluded from compensable time, if certain conditions are met.

Rules for Less Than 24-Hour Tour 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.

Tours of Duty for 24-Hours or Longer

- 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.

Frequently Arising Issues

- 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).

Must Have An Agreement To Exclude Sleeping Time

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).

Special Rules for Employees Residing On Premises

- Some employees reside on the premises at which they work.
- 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*." 29 C.F.R. § 785.23.

Must Have Reasonable Agreement with Employees Residing On-Site

- Need to have an agreement with an employee who resides on premises, regarding compensable time.
- 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).

Recordkeeping

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Identify a Workweek

- 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 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 employer must identify the workweek to the employee in writing. See 29 C.F.R. § 516.2(5).

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).

Example of Permissible Rounding

- 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, is 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.
- This practice is permissible so long as the employer has a written policy to this effect.

We're Here to Help

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Henrietta Golding has primarily a business related practice in which she practices preventive law as well as being involved in the defense of claims relating to commercial disputes.

Henrietta joined McNair as a Shareholder in the Myrtle Beach, South Carolina office in May 2000. Previously, she was a Stockholder and Officer in the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.

Since 2009, Henrietta has been a member of the Board of Directors of Coastal Carolina National Bank as well as its Treasurer. In 2014, she was elected to serve as a member of the Board of Directors of the Dunes Golf and Beach Club. In June 2013, she was elected by the South Carolina General Assembly to be a Trustee for the College of Charleston with her term to expire in 2018.

Henrietta was a member of the City Board for Wachovia Bank of South Carolina, N.A. (Wachovia is now Wells Fargo & Company) in Myrtle Beach, South Carolina. She served for eight years on the board of directors of the College of Charleston Foundation, is a member on the Wall School of Business, Board of Visitors at Coastal Carolina University, and is Vice-President, a member of the Board of Directors and Executive Committee for Partners Economic Development. She also served on the board for the Coastal Business Women's Association, and The Long Bay Symphonic Society, Ltd. A member of the Horry County, South Carolina and American Bar Associations, she is a participant in the Employment and Labor Law Sections on the state and national level and the Continuing Legal Education and Judicial Qualifications committees of the state bar association.

She served as Secretary-Treasurer of the Horry County Bar Association from 1980 to 1984. She is a member of the South Carolina Bar Review Committee, and in January, 2004, became a member of the Labor and Employment Law Specialization Advisory Board for the South Carolina Supreme Court. Her primary practice areas are labor and employment law as well as banking law and civil and commercial litigation matters.

Henrietta is also a member of the South Carolina Trial Lawyers Association, and a former member of the Board of Directors of the South Carolina Women Lawyers Association. Henrietta has been selected by her peers for inclusion since 2005 in the *The Best Lawyers in America*© 2008 (Copyright 2004 by Woodward/White, Inc., of Aiken, SC).

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