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Wage and Hour 101 - Non-Exempt Employees

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Will the Final Rule be enforced?

FLSA Basic Principles

- Nonexempt employees must be paid for all hours worked in a workweek – but only for time worked
- Hours worked include all time an employee must be on duty, on the employer premises, or at any other prescribed place of work; as well as any additional time the employee is “suffered or permitted” to work.
- The failure to properly count and pay for all hours that an employee works may result in:
 - Minimum wage violation (if employee’s hourly rate falls below the required min wage total compensation is divided by all hours worked)
 - OT violation because employer has not fully accounted for hours worked in excess of 40 during the workweek

Compensable or not

- Meal and Rest Periods
- Donning and Doffing/Preliminary/Postliminary
- Lectures, Meetings & Training Programs
- Volunteer Work
- On-call Time
- Travel Time

Meal and Rest Periods

Bona fide meal periods, during which an employee is relieved from duty for the purposes of eating, do not have to be counted as time worked.

Short rest periods of twenty minutes or less are customarily paid for as working time, and should be counted as hours worked. For example, coffee and snack breaks lasting twenty minutes or less are considered rest periods.

Donning and Doffing

- Certain preliminary and postliminary activities performed before or after an employee's regular work day, and activities which are not part of the employee's principal work activities, are specifically excluded from hours worked, unless provided otherwise by contract, custom or practice.
- The Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities:
 - Employees changing clothes and taking showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials
 - Knifemen in a meatpacking plant sharpening their knives before and after their scheduled workday



Lectures, Meetings & Training Programs

Training time is **not** counted as hours worked if all of the following are met:

- 1) Held outside working hours;
- 2) Attendance by employee is truly voluntary;
- 3) Course, lecture, or meeting is not directly related to the employee's job; and
- 4) The employee does not perform any productive work during attendance at course, lecture, or meeting.

State-Required Training

- When the state requires individuals to **take training** as a condition of employment (for instance, continuing education) this time is considered voluntary as long as employer does not impose additional requirements.
- If the state requires employers to **provide training** as a condition of employment, the time is considered hours worked.

After Hours Training

- Time spent outside regular hours voluntarily attending courses established by an employer for the benefit of its employees, that corresponds to courses offered by an independent institution of learning, is not compensable, even if directly related to employee's job or is paid for by employer.
- If employees attend courses after hours, and of their own initiative, time spent is not hours worked even if directly related to their current jobs.

Volunteer Work?

Time spent working for public or charitable purposes at the employer's request, or under employer's direction or control, or while the employee is required to be on the premises, is working time.

Test For Unpaid Interns (for-profit sector)

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

On-call Time

- An employee required to remain on the employer's premises or who is highly restricted in activities while on call is referred to as being on "restricted on-call." (Compensated)
- An employee not required to remain on the employer's premises while on call and who is not unduly restricted in activities while on call is referred to as being on "off-premises" or "unrestricted" on-call. (Need not be compensated)

Travel Time

Whether travel time constitutes hours worked depends upon the nature of the:

- 1) travel
- 2) employee's work and
- 3) connection between the two.



Basic Travel Time Principles

1) “Ordinary” home-to-work travel includes time an employee travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel. This is not work time even if the employee does not work at a fixed location.

2) Travel time from a central location such as an office to an outlying work site before the beginning of work is not working time.

3) BUT travel from a central location to another work site may be compensable if the employee performs work at the central location before traveling to the other work site.

4) Travel at the beginning or end of a work day may constitute hours worked if the travel time benefits an employer, or when travel is combined with an indispensable activity such as transporting special equipment. Such activity must involve more than negligible amounts of time or effort to be compensable.

- 5) Time spent in travel as part of an employee's principal activity, such as travel between job sites, must be counted as hours worked because it is considered "travel all in a day's work."
- 6) In some instances, travel from home-to-work will be hours worked (i.e. an employee, after completing a day's work, is called out at night to travel a substantial distance to perform an emergency job for a customer of the employer).

7) Where an employee is required to travel some distance to perform a work assignment in a different location, (for the employer's benefit and at the employer's special request), travel time is not considered ordinary home-to-work travel. However, only travel in excess of ordinary home-to-work travel must be counted.

8) Travel away from employee's home city:

- Overnight Travel: Travel that keeps an employee away from home overnight is travel away from home and is work time when it “cuts across the employee's workday,” since the employee is substituting travel for other duties.
- Non-Work Days: Travel time is hours worked on regular workdays during normal working hours as well as during the corresponding hours of non-workdays.

- The Wage and Hour Division does not consider as work time any time spent outside of regular working hours as a passenger on a plane, train, boat, bus or automobile.

HOWEVER, whenever an employee is required to drive, even outside regular working hours, the driving time is compensable.



9) Special Rules

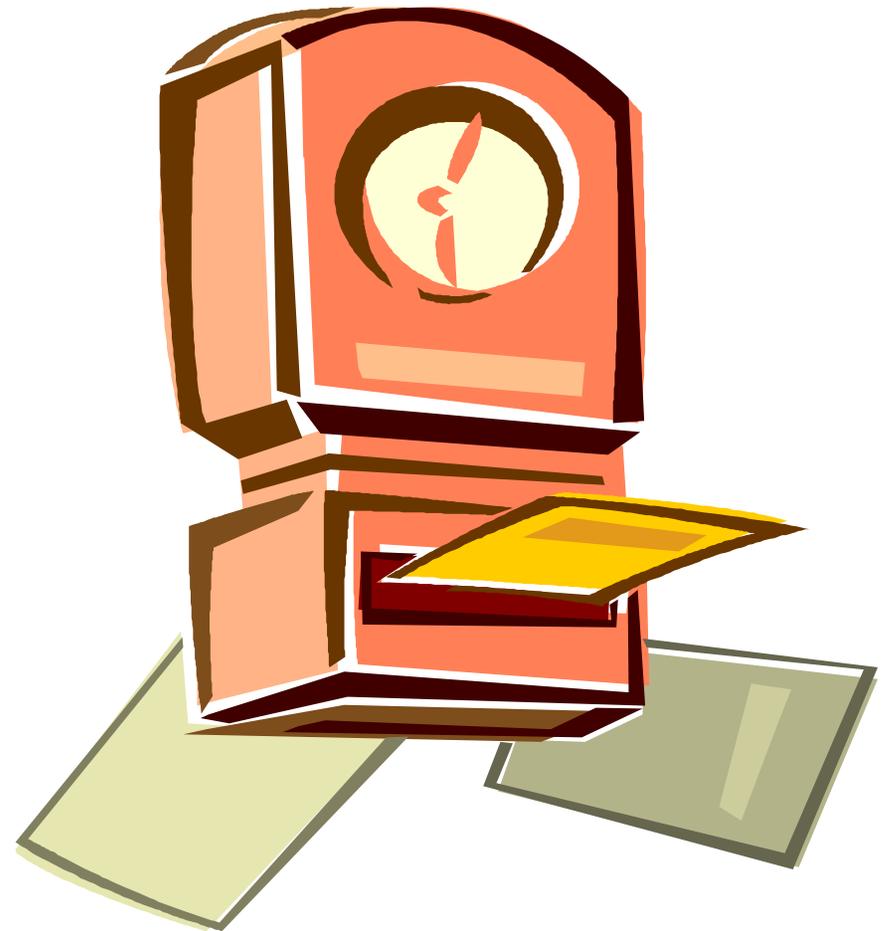
- Working While Traveling. Travel during which work is actually performed is compensable hours worked.
- Private Automobile Use. If an employee is given the opportunity to use public transportation but requests to drive his or her own car, an employee may count as hours worked only the time the employee would have had to count had public transportation been used instead.
- Use of a Company Car. The use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement between the employer and employee.

- Employer Provided Transportation. When an employer provides transportation solely for the convenience of the employees, the travel time is not compensable.
- Travel Time as a Passenger. An employee who is required to ride in a plane, train, or car, as a passenger is working while riding.

- Meal and Sleep Time. Employees who are entitled to compensation for travel time may have bona fide meal periods deducted as well as sleep time if “adequate facilities” are furnished by the employer.

Avoid “Off-the-Clock” Claims

- Employees allege that they perform work for which they are not paid, and that employer knew or should have known that such work was being performed without compensation



Off the Clock Traps

- After Hours Emails.
- Unreimbursed Expenses.
- Unpaid “re-work”.
- Working OT without permission/working OT but not reporting it (until employee is fired for something else).

What actions of employers cause violations of FLSA?

- Misconception regarding what constitutes compensable working time
- Inadequate or improper recordkeeping practices
- Supervisory misconduct

Preventing Off the Clock Lawsuits

- Establish an SOS mechanism
- Audit time records
- Review incentive plans to make sure they do not encourage supervisors to under-report work hours/require off the clock work
- Adopt policy, and educate employees and supervisors, that:
 - All work time must be accurately reported (and off the clock work is prohibited)
 - Outlines when OT may be worked (i.e. whether permission, and how permission, must be obtained)
 - Employees must review and sign off on time records each week

The information presented to you has been abridged from a variety of sources and is intended to report on legal developments. You should not act upon any information without professional counsel. If you have questions concerning the information provided, please feel free to contact Ron, Melinda, or Julie at 320-251-1414 or

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