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Living with the FLSA: Paid Working Time

For many employers, the FLSA remains their single biggest source of day-to-day legal compliance headaches. One particular problem area is understanding which hours count as paid working time for nonexempt employees.

The Fair Labor Standards Act (FLSA), originally enacted in 1938, is the grandfather of employment law legislation. Most HR experts feel it is badly in need of comprehensive revision to reflect modern working conditions. However, meaningful legislative change has been mired down for years in partisan maneuvering between traditional labor and business interests. Regardless, employers must take mundane wage and hour law compliance seriously, as can be seen by a growing list of expensive Department of Labor (DOL) and employee plaintiff settlements. Fortunately, regulations issued by the DOL, found in 29 C.F.R. section 785, provide detailed (albeit a bit antiquated) guidance for determining what are hours worked that must be compensated. Below, we review the legal definition of working time and provide examples of when a nonexempt employee should be paid for that time.

The Basic Definition of Working Hours

The Supreme Court provided the definition for working hours adopted by the FLSA regulations in its long-standing decision *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944). In that case, the Court determined that working hours include all time during which an employee is engaged in physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and its business. (See 29 C.F.R. §785.7.) In addition, the time an employee spends after punching in, getting to his job, and preparing for it generally is compensable. However, the time which the employee merely spends waiting because he arrived early is not. (See 29 C.F.R. §785.7.)

As a general rule, employers do not have to pay for any time before and after the employee's "principal activity," unless there is a contract, custom, or practice requiring pay for these preliminary and concluding activities. However, time spent by employees in activities before or after the regular workday must be counted as time worked if the activities are an integral and indispensable part of the employee's principal activities. (See 29 C.F.R. §785.9. See also "Employees Permitted to Work," below.) Working hours also may include time when the employee does not actually perform any work but is engaged to wait. (See "Waiting Time," below.)

Employees Permitted to Work

According to the FLSA regulations, an employer that allows or permits employees to work must count this time for compensation and overtime

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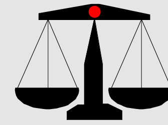

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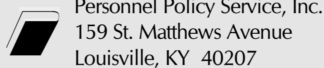

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Phone 1-800-437-3735
Fax 1-800-755-7011
E-mail .... info@ppspublishers.com
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.... www.instanthrpolicies.com

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Publisher .... John C. Norman, Jr.
Managing Editor .. Robin Thomas, JD
HR Answerline
Coordinator ..... Karen Snyder, PHR
Contributing Editor
.... Maureen Minehan
Consulting Editors
HR .... Orlando E. Blake, Jr., PhD
Legal .... Vedder Price

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purposes even if the work was not requested or scheduled by the employer. (See 29 C.F.R. §785.11.) Therefore, if you are aware that an employee is working more time than is required, you must compensate the employee, even if you did not specifically request the additional work.

For example, an employee may voluntarily continue to work at the end of a shift to finish an assigned task. If you know or have reason to believe that the employee is continuing to work, the time is considered working time that must be paid. It is management's duty to prohibit employees, through discipline or other means, from working additional time if it does not want to pay for the work time. Merely having a rule against extra work is not enough; you also must make every effort to enforce the restriction.

Waiting Time

Whether waiting time should be paid as time worked depends on the particular circumstances. According to the FLSA regulations, "facts may show that the employee was engaged to wait or they may show that he waited to be engaged. Such questions must be determined in accordance with common sense and the general concept of work or employment." (See 29 C.F.R. §785.14.) The regulations generally distinguish between on duty time, off duty time, and on call time.

- **On duty time.** Where waiting is an integral part of the job, the employee is engaged to wait, and the time spent waiting is compensable work time. Typically, the periods of inactivity are of a short duration and unpredictable, and the employee cannot use the time effectively for his own purposes. "The time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity ... It belongs to and is controlled by the employer." (See 29 C.F.R. §785.15.) Examples provided by the regulations include:

  — A secretary who reads a book while waiting for dictation is working.

  — A messenger who works a crossword puzzle while awaiting assignments is working.

  — A repairperson is working while he waits for his employer's customer to get the premises ready. (See 29 C.F.R. §785.15.) (Note that if these examples seem a little out-of-date, it is because the regulations were last amended in 1970.)

- **Off duty time.** An employee is considered to be off duty during periods when he is "completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." An employee is not completely relieved from duty unless he is told in advance he may leave the job and that he will not have to begin work until a specified hour has arrived. (See 29 C.F.R. §785.16(a).)

- **On call time.** An employee who is required to remain on call on the employer's premises is working while on call and must be paid for that time. In addition, an employee who must remain on call so close

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to the employer's premises that he cannot use the time effectively for his own purposes is working while on call. However, if the employee is not required to remain on the employer's premises but only is required to leave word at home or with his employer where he may be reached, he is not working while on call and does not have to be paid. (See 29 C.F.R. §785.17.) In determining whether on call time should be paid, courts typically examine how much control the employer has over the employee and whether the employee can effectively use the on call time for personal purposes.

Meal and Rest Periods

Meal and rest break pay requirements are fairly straightforward. Federal law does not require employers to give breaks; it only regulates how the breaks should be paid if they are provided.

- **Meal breaks.** An employer may treat meal breaks as unpaid personal time if they meet the conditions set out in the DOL regulations for bona fide meal periods. For the meal period to qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating a meal and for a period of at least 30 minutes. A shorter period may qualify under special conditions. Employees do not have to be permitted to leave the premises as long as they are freed from duties during the meal period. The regulations emphasize that an employee is not relieved, however, if he is required to perform any duties while eating. (See 29 C.F.R. §785.19.) Note, too, that many states have statutes that require meal periods of 30 minutes or more.
- **Rest breaks.** Unlike most meal breaks, coffee breaks and rest periods of short duration (5 to 20 minutes) must be counted as paid hours worked. (See 29 C.F.R. §785.18.) States also often require specific breaks.

Training Time

Questions about compensation often arise when nonexempt employees go to seminars and meetings. According to the FLSA regulations, attendance at lectures, meetings, training programs, and similar activities should be counted as paid working time unless *all* of the following four criteria are met:

1. Attendance is outside of the employee's regular working hours;
2. Attendance is voluntary;
3. The course, lecture, or meeting is not directly related to the employee's job; and
4. The employee does not perform any productive work during such attendance. (See 29 C.F.R. §785.27.)

Attendance is not considered to be voluntary, and therefore must be compensated, if you require an employee to attend the sessions or if you lead the employee to believe that his position would be adversely affected by nonattendance. (See 29 C.F.R. §785.28.)

Travel Time

The principles which apply for nonexempt employees in determining whether time spent in travel is working time depend on the kind of travel involved.

- **Home to work, ordinary situations.** An employee who travels from home before his regular workday and returns home at the end of the workday is engaged in ordinary home to work travel. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time and does not have to be paid. (See 29 C.F.R. §785.35.)
- **Home to work, emergency situations.** During instances involving emergency situations, travel from home to work generally is work time. If an employee who has gone home after completing work is subsequently called out at night to travel a substantial distance to perform an emergency job for a customer, all time spent on that travel is working time. Note, however, that the DOL regulations do not address whether the time spent traveling from an employee's home to his regular place of business in response to an emergency call is considered paid working time. (See 29 C.F.R. §785.36.)
- **Home to work, special assignments.** Employees who regularly work at a fixed location, but are given special one day assignments to work in another city are entitled to be paid for the extra time spent traveling to that site. Employers can, however, deduct the employee's normal travel time from the travel time to the special

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work site when calculating the hours worked. (See 29 C.F.R. §785.37.)

- **Travel as part of the regular job.** For employees for whom travel is an integral part of their job, all travel hours are considered to be work time. In cases where employees are required to report to a meeting place to receive instructions or to perform other work, or to pick up certain items for work, the travel from the designated place to the workplace is part of the day's work, and must be counted as hours worked. (See 29 C.F.R. §785.38.)
- **Overnight travel away from home.** Travel away from home for an overnight trip is clearly work time when it cuts across the employee's regular workday. The employee is simply substituting travel for other duties. Travel time on nonworking days is also considered work time if conducted during normal work hours. For example, an employee who normally works 9 a.m. to 5 p.m. Monday through Friday must be paid for time spent traveling on a Sunday only for travel between the hours of 9 a.m. and 5 p.m. Regular meal period time is not counted as working time. Travel during nonwork hours is not considered work time unless the employee is actually performing work while traveling. (See 29 C.F.R. §785.39.)
- **Transportation choice.** If an employee who travels away from home is offered public transportation (such as transportation by airplane) but chooses to drive instead, the employer may count as hours worked either the actual time spent driving the car or the time the employer would have had to count as hours worked if the employee had taken the public transportation. (See 29 C.F.R. §785.40.) However, it is less clear what happens when the employer requires the employee to drive to the overnight destination. Presumably, this time spent driving in that circumstance should be paid since driving arguably becomes a job duty for the nonexempt employee required to do the driving.
- **Work while traveling**. Of course, any work which an employee is required to perform while traveling must be counted as hours worked. (See 29 C.F.R. §785.41.)

Take Wage and Hour Issues Seriously

Wage claims can come up at any time, but usually start with disgruntled employee complaints. Given the success of the DOL and plaintiffs' attorneys in pursuing wage and hour cases, you cannot afford to be complacent even if you think the basic foundations of the FLSA are badly out of date. Recent cases have resulted in large adverse dollar judgments where nonexempt employees were not being properly paid for all their working time. So, take care and do not let one of the oldest employment laws on the books sneak up on you. ◆

FOR MORE INFORMATION

Paid working time, Hours of Work, Chapter 207, Appendix A.

COURT TRENDS

Transfers and the ADA

Under the ADA, a reasonable accommodation includes transfer to a vacant position. Recent case law and EEOC guidances help shed some light on how far you must go to meet this obligation.

Most employers are aware that the Americans with Disabilities Act (ADA) requires them to accommodate disabled employees. As a general rule, accommodations should be made to allow the disabled employee to perform the essential functions of his current job. What you may not know is that if you are unable to accommodate the employee in his current position, you may still need to consider whether you can do so by transferring him to a vacant position. Below, we examine the trend in recent court decisions and the Equal Employment Opportunity Commission's (EEOC) guidances to help you understand when there may be a transfer obligation.

Courts Support Transfer Requirement

The duty to consider a transfer as an accommodation is spelled out in the ADA and its supporting regulations. The ADA, in 42 U.S.C. §12111(9), defines a reasonable accommodation

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to include reassignment to a vacant position. The EEOC regulations further clarify the issue (in 29 C.F.R. §1630.2(o)(2) and its Appendix) and indicate that a transfer should be considered if accommodation in the employee's current position would cause the employer undue hardship.

Most courts have agreed that a transfer or reassignment may be an appropriate accommodation. For example, in *Feliciano v. Rhode Island*, 160 F.3d 780 (1st Cir. 1998), the First Circuit Court of Appeals found that the determination that the employee cannot perform the essential functions of her job does not end the ADA analysis. In addition, the duty to accommodate may include reassignment to a vacant position. Similarly, in *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), the Seventh Circuit determined that the employer's duty to accommodate under the ADA includes reassignment of the employee to a vacant position for which the employee is qualified.

Transfer Guidelines

Questions often arise as to what type of position the disabled employee should be transferred to in order to meet the ADA's accommodation requirements. Here are some basic guidelines that can be distilled from the EEOC's regulations, its *Enforcement Guidance on Reasonable Accommodation*, its *Technical Assistance Manual*, and court decisions:

- **The employee must be qualified for the position.** He must have the necessary skills, educational background, and experience to perform the job.
- **The position must be vacant.** Or, it should become open within "a reasonable period of time."
- **The position should be an equivalent one (in terms of pay, status), if possible.** If there are no comparable positions vacant, you may reassign the employee to a lower graded position and may pay the employee at the lower salary, as long as you do the same for other employees who are reassigned to lower graded positions. (Note, however, that an exception to this general rule may arise if the disabled employee also qualifies for intermittent or reduced schedule leave under the Family and Medical Leave Act (FMLA). In this case, the employer may be required to continue the employee's regular rate of pay during the FMLA period if it transfers the employee to a lower paying position to better accommodate the employee's leave schedule.)
- **You are not required to create a new job.** In addition, you do not have to remove or bump another employee from a job in order to provide the accommodation.
- **You do not have to promote a disabled employee as an accommodation.**
- **You may apply legitimate, nondiscriminatory policies to transfers.** Several courts have determined that policies that define job qualifications, prerequisites, and entitlements may be applied to transfers even if these criteria have the effect of excluding a disabled employee from transfer.

  For example, in *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001), the Fourth Circuit found that the ADA does not require an employer to deviate from its nondiscriminatory seniority policy in order to accommodate a disabled employee. Similarly, in *Burns v. Coca-Cola Enters. Inc.*, 222 F.3d 247 (6th Cir. 2000), the Sixth Circuit determined that an employer did not have to consider a disabled employee for transfer since he did not follow the employer's transfer request procedures. And, in *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), the Seventh Circuit found that reassignment is not required if the transfer would violate a legitimate, nondiscriminatory policy of the employer.

EEOC Favors Transfer Even if Employee Is Not Most Qualified

The EEOC also has indicated, in its *Enforcement Guidance on Reasonable Accommodation,* that if a disabled employee is qualified for a position, he is entitled to it even if he is *not* the most qualified candidate for the position. Not all courts agree with this presumption. For example, in *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), the Seventh Circuit determined that the ADA does not require employers

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to reassign a disabled employee to job where there is a more qualified applicant if it is the employer's "consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." Similarly, in *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), the Fifth Circuit found that disabled employees do not have to be given priority in reassignment.

Bottom Line: Consider Transfers as Possible Accommodations

Identifying the appropriate accommodation for a disabled employee can be challenging. You should begin your analysis by determining what can be done to allow the employee to perform his current job. Then, if you cannot accommodate him in his current position, you should take the additional step of considering whether the employee is qualified for any vacant positions. But, as the court decisions and the EEOC guidances show, your duty to transfer is not unlimited. You do not have to create a position or bump a current employee from a position as an accommodation, and you can apply legitimate nondiscriminatory criteria to determine who is eligible for transfers. By studying the EEOC's guidances and the court decisions, you can make better judgments about when a transfer is an appropriate accommodation. ◆

FOR MORE INFORMATION

Transfers as accommodation, TRANSFER, Chapter 205, note 14.

HR NEWS BRIEFS

IRS Backs Off Taxing Frequent Flyer Awards

A recent announcement by the Internal Revenue Service (IRS) may be closing the door on whether frequent flyer awards earned during business travel, and converted to personal use, should be counted as taxable income. In the past, the IRS's official position has been unclear. The agency created an uproar in 1995 when it issued a technical advice memorandum (TAM 9547001) indicating that the value of awards obtained by frequent flyer points earned during business travel and then used for personal purposes should be included in the employee's taxable income. (A TAM is a formal opinion provided in response to a particular company's request for clarification on tax issues and applicable only to that company.)

Businesses and tax professionals cried foul and expressed concern not only about future tax years but also about having to recalculate tax returns for previous years. In addition, they pointed out that it is unclear how frequent flyer awards kept for personal use should be valued for tax purposes. The IRS responded by issuing a statement reiterating that the TAM applied only to the individual company audited and by agreeing to reconsider the TAM's conclusions. Although the agency seemed to back away from the position that the awards should be taxable, since it did not provide any further formal guidance, businesses were left without a clear answer. As a result, many tax experts advised employers not to address the personal use of frequent flyer awards in their policies to prevent raising a red flag in the event of an IRS audit. Some even advised against allowing employees to convert their business awards for personal use at all.

Now, almost seven years later, the IRS has announced (in classically unclear "government-speak") that it "will not assert that any taxpayer has understated his federal tax liability by reason of the receipt of personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel." In plain English, this declaration would appear to mean that the IRS does not currently treat frequent flyer awards earned through business travel, and converted to personal use, as taxable income.

Unfortunately, this announcement may not be the last word on the matter. In the same paragraph, the IRS also stated that "any future guidance on the taxability of these benefits will be applied prospectively," an indication that the agency may still be open to taxing the benefit in the future. At least for now, the awards are not being considered as taxable income. As always,

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you should consult your tax expert for further guidance on this topic.

The IRS's position is found in Announcement 2002-18 and was published in Internal Revenue Bulletin Number 2002-10. You can access a copy of the announcement on the IRS Web site at www.irs.treas.gov/pub/irs-irbs/irb02-10.pdf. ◆

COMPENSATION

HR Salaries Surveyed: How Do Yours Compare?

Geographic location, years of experience, industry, and size of organization influence HR compensation. Compare your HR department's salaries with these survey figures.

HR professionals who work for large companies in big urban areas make the most money, according to a recent survey by Abbott, Langer & Associates. The survey, *Compensation in the Human Resources Field*, 23rd Edition, shows that the highest paid human resources directors make over $200,000 per year. These top salaries are in contrast to the median annual income of almost $80,000 for corporate HR directors. The survey polled 650 organizations and asked about current salaries, salary ranges, additional compensation, and demographic variables for approximately 3,000 managerial, supervisory, and non-supervisory HR professionals and support staff.

Highest Paid Work in Metro Areas for Big Organizations

The composite profile of the HR professional at the high end of the salary scale (which includes salary plus cash bonus or cash profit sharing) is a human resources director with industrial relations responsibilities located in a larger metropolitan area such as Boston, Detroit, Newark/Jersey City, New York City, San Francisco, or San Jose. This person usually has a graduate degree, has 10 plus years of experience, and supervises an HR staff of 10 or more. The typical employer of this person has 1,000 or more employees and is a research organization or laboratory; a manufacturer of chemical, pharmaceutical, plastic, or rubber products; a merchandising firm; or a financial organization.

HR Records Clerks Fall at the Lowest End of the Scale

HR records clerks are at the other end of the salary scale. The median income for this group is $29,660, although some records clerks earn less than $19,000 a year. These individuals typically work for health care organizations, nonprofits, and state or local governments. Their employers typically have fewer than 1,000 employees and are located in smaller cities such as Milwaukee, Phoenix, and Sacramento. These clerks generally have little or no college education and limited prior experience.

In addition to the salaries discussed above, the median total cash compensation of some of the other jobs covered in the survey are shown below. ◆

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When FMLA Leave Is Exhausted

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We have an employee on medical leave who will use up her 12 weeks of FMLA coverage next month. Can we terminate her when the FMLA leave expires if she cannot return because of her continuing medical condition, or do we have to extend her leave?

Under the FMLA, an eligible employee is entitled to up to 12 workweeks of leave within a 12-month period for certain family and medical reasons, including the employee's own serious health condition. At the end of the 12 weeks, the employee is no longer protected by the FMLA. Therefore, if she does not return to work, you may terminate her without violating the FMLA, provided the termination is consistent with the treatment of similarly-situated employees who have taken FMLA or other extended leave. However, depending on the nature of the employee's medical condition, you may have an obligation to extend the leave because of other laws (such as the Americans with Disabilities Act (ADA), the Pregnancy Discrimination Act (PDA), or state leave or workers' compensation laws) or because of your own policies.

If the employee's medical condition qualifies as a disability under the ADA, you may have to allow her to take additional leave beyond the 12 weeks required by the FMLA if the extension would constitute a reasonable accommodation. Not all serious health conditions meet the disability definition. Under the ADA, a disability is defined as a mental or physical impairment that substantially limits a major life activity, and it has been interpreted to cover longer term, chronic medical conditions. A reasonable accommodation is one that allows the employee to perform the essential functions of the job without imposing an undue hardship on the employer. The ADA does not place any specific time limit on the amount of leave a disabled employee can take. As a general rule, however, these leaves cannot be indefinite.

If your employee was on FMLA leave because of a serious health condition caused by pregnancy, she also may be covered by the PDA. The PDA does not require employers to provide a certain amount of leave to pregnant employees. Rather, the law requires you to treat women affected by pregnancy, childbirth, or related medical conditions the same as employees who are on leave for other temporary medical disabilities. Therefore, an employee on a pregnancy leave of absence who does not immediately return to work may not be lawfully terminated if the employer maintains a policy of leniency towards other employees on temporary medical leaves. For example, in *Maddox v. Grandview Care Center*, 780 F.2d 987 (11th Cir. 1986), the Eleventh Circuit Court of Appeals found that the employer's policy of limiting maternity leave to three months violated the PDA since it allowed indefinite leaves for other illnesses. Thus, if you normally extend medical leaves for other temporary medical conditions, you should do the same for any pregnancy-related leaves.

If the employee's medical leave is caused by a work-related illness or injury, state workers' compensation laws may provide additional rights. Although most states do not require a specific amount of workers' compensation leave, a few (such as West Virginia and Oregon) do require reinstatement at the end of the leave. In addition, some state family and medical leave laws provide for more than the FMLA's 12 weeks of job-protected leave. Therefore, you should check state law requirements as well. ◆

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Termination after FMLA leave, LEAVES OF ABSENCE, Chapter 703, note 44.

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