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Whitepaper

Hours Worked

Summary:

Employees covered by the Fair Labor Standards Act (FLSA) must be paid for all "hours worked" in the workweek unless exempted. It has generally been held that "hours worked" includes all the time during which an employee is required to be on the employer's premises, on duty, or at any other prescribed place of work. This document discusses how to determine hours worked under the FLSA for nonexempt employees in the following circumstances: on-duty and off-duty time, rest and mealtime, on-call time, sleeping time, preliminary and postliminary work, unauthorized work, and other miscellaneous considerations.

For additional resources, please see page 7.

Important Notice:

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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I. Hours Worked or Working Time

- A. To compute the wages and overtime due to an employee under the Fair Labor Standards Act (FLSA), the employer must determine the number of hours the employee worked in that workweek.
1. The FLSA workweek is a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods. The employer's defined workweek need not coincide with the calendar week; it may start on any day and at any hour the employer finds convenient. For instance, the workweek may begin on Wednesday at 12:00 a.m. and run through the following Tuesday, ending at 11:59 p.m.
 2. The pay period need not coincide with the workweek, and federal law places no restrictions on the duration of the payroll period. State laws, however, may place a limit on the length of the payroll period. For example, Colorado employers are required to pay wages at least once a month. Regardless of the timing of the payroll period, the FLSA requires the employer to compute overtime on a workweek basis.
- B. Employment under the FLSA is defined broadly to include all hours 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 workplace.
- C. The broad definition of hours worked may require that an employee be compensated for time the employer does not otherwise consider working time, such as training, travel time, waiting time, certain meal, rest, and sleep periods, loading of vehicles, attending meetings, first aid training, fire drills, and required physical exams.

Some examples are as follows:

1. Employee’s time spent in union management meetings serving the employer’s interest is considered hours worked, but time spent in contract negotiations is not.
2. Janitorial cleaners who are instructed not to work overtime but for security reasons were locked up during the hours the store was closed must be paid for all hours in the store.
3. Employee’s time participating in a walk-around inspection by the Occupational Safety and Health Act (OSHA) is not considered working time because walk-around participation is voluntary, not for the employer's benefit, and not under the employer's control.

II. On Duty and Off Duty

- A. All time spent by employees waiting or in periods of inactivity while on duty must be counted as hours worked. This is particularly true when waiting periods are of such a short duration that employees cannot use them for their own benefit.
- B. Waiting time by an employee who has been relieved from duty need not be counted as hours of work if:
 - 1. The employee is completely relieved from duty and allowed to leave the job.OR
 - 2. The employee is relieved until a definite, specified time, and the relief period is long enough for the employee to use the time as they see fit.
- C. If longer waiting periods are unpredictable, the waiting period may be compensable as hours worked because employees cannot use the time for their own benefit.
- D. Employees who wait before starting their duties because they arrived at their worksite earlier than the required time (often due to carpooling or other commuting arrangements) are not entitled to be paid for the waiting time. However, the supervisor must ensure the employee is not engaging in work unbeknownst to the employer. In addition, if the transportation arrangements are made by the employer, *e.g.*, an employer-sponsored shuttle service, such time may be considered “hours worked” and therefore compensable. In this scenario, consult with legal counsel.
- E. If the employee has time off in the middle of a workday that is long enough to effectively use as they wish and understands that they do not have to return to work until a particular time, the employee would not be considered to be working during the time off.

III. Meal and Rest Periods

- A. The FLSA does not require employers to provide meals or rest periods, but state laws may dictate such periods. If an employer does provide meal and rest periods, however, the FLSA addresses compensability of such periods.
- B. Meal periods of 30 or more minutes need not be counted as hours worked as long as the employee is relieved of all duties.
 - 1. Even if the employee is required to spend the meal period on company premises, the meal period is not hours worked as long as it is the employee's own time.
 - 2. All work that is performed by an employee during the meal period must be counted as hours of work, even if the employee is voluntarily performing this work during an “unpaid” meal period.
 - 3. An employee may choose to remain at their desk during the meal period and not work, but employers should manage this situation carefully. Under audit, the DOL has found numerous violations and assessed back pay liability because employees

reported engaging in work while eating at their desks. To avoid this, some employers have rules that employees must leave their work area during unpaid meal periods.

4. Time spent at meals while on business trips generally is not compensable time; however, if the employee works during this meal (e.g., entertaining customers), such time is compensable.
- C. According to the DOL, rest periods of short duration — from five minutes to 20 minutes — must be counted as hours of work. Hence, coffee breaks, smoke breaks, and other short breaks typically must be compensated. Some employees want to hold their rest period to the end of the day so that they may leave work early. Such a practice is not governed by the FLSA, and the employer may decide whether such a practice is workable for its operational needs. Under the FLSA, if an employee does not take a break, the employer is not required to pay extra for the time (e.g., 10 minutes), nor is the employer required to allow the employee to leave work early.

Note: Some states may require that rest breaks be taken at certain intervals. For example, the Colorado Overtime and Minimum Pay Standards (COMPS) Order requires that, to the extent practical, rest periods should be in the middle of each four-hour shift, and meal breaks should not be within the first or last hour of an employee's shift. Certain agreements between the employer and the employee permit additional compliant scheduling of paid rest periods. Additionally, Colorado's enforcement guidelines suggest that if an employee skips an otherwise paid rest period, through the employee's fault or that of the employer, the additional 10 minutes of paid time must be added to the employee's compensation, strongly encouraging employers to enforce mandatory rest periods during applicable shifts.

IV. On-call Time

- A. Employees who are required to remain on call on the employer's premises or so close that they are not able to use their time effectively for their own purposes are working while "on call." Such time is hours worked and compensable.
- B. The courts typically focus on two broad issues to determine whether on-call time is compensable: (i) whether the parties had an agreement regarding the compensability of the on-call time, and (ii) whether the employees had sufficient freedom while on call to pursue personal activities.
- C. The freedom to pursue personal interests includes everyday activities such as shopping, going to dinner, entertaining guests, and exercising. The employer is not required to have a policy so loose that it allows the on-call employee to travel out of town indiscriminately. Further, reasonable restrictions on on-call time are appropriate, e.g., requiring an employee to refrain from consuming alcohol or other intoxicating substances.
- D. The time an employee is required to wear a pager, even with a restriction on the pager's range (e.g., 30 miles), generally is not found to be so restricted to make the time compensable.

- E. To support a finding of non-compensable on-call time, employers should give consideration to the following:
1. Provide on-call employees with radios, beepers, or cell phones.
 2. Permit on-call employees to handle calls over the phone, if possible, as opposed to requiring their physical return to work. Note that the employee's work-related phone call, however, is compensable hours worked.
 3. If on-call employees are required to return to work, give them a reasonable period of time to respond. Not doing so could result in the on-call time being too restrictive and, therefore, compensable.
 4. Allow on-call employees the opportunity to decline a certain number of calls or to swap or trade calls with colleagues.
 5. On-call employees should be disciplined only for relatively serious abuses of the policy.
 6. Provide employees with as much advance notice of their on-call duty as possible.
 7. Publish the terms and conditions of the on-call policy in a written and widely distributed document.

V. Sleeping Time

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

If an employee's regular work schedule is less than 24 hours, periods during which they are permitted to sleep are compensable working time, as long as they are on duty and must work when required.

B. Sleeping Time for Round-the-Clock Duty

The general rule is that, where an employee's regular work schedule is 24 hours or longer, up to eight hours of sleeping time can be excluded from compensable working time if:

1. An expressed or implied agreement excluding sleeping times exists.
2. Adequate sleeping facilities are furnished by the employer.
3. The employee can usually enjoy an "uninterrupted night's sleep" of at least five consecutive hours during the scheduled sleeping periods.
4. Interruptions to perform duties are considered hours worked.

There must be a voluntary agreement between the employer and employee to exclude sleep time; without an agreement, the sleep time will be counted as hours worked.

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

Some employees reside at the premises at which they work. For example, an employee may both work and reside in a group home for foster children, drug abusers, or criminals on probation. A park and recreation employee may live at the park, or a housekeeper may live with their employer. Such employees typically are on duty 24 hours a day to handle emergencies. The regulations specifically provide that not all the time the employee is on the employer's premises is working time. When the demands of the job have seriously interfered with the employee's ability to sleep, or the sleeping facilities have been minimal, sleep time is usually compensable.

VI. Preliminary and Postliminary Activities

- A. Job-related activities required as a part of the employee's work are hours of work even if the activity is outside the normal work schedule. For example, preliminary activities such as "booting up" a computer, counting a cash drawer, filling out forms, checking job locations, removing trash, fueling cars, donning and doffing protective equipment, and picking up plans are all hours of work and must be paid if done for the employer's benefit.
- B. Whether clothes changing is compensable is determined by the facts of the situation. Changing into a uniform before the beginning of a shift is not compensable if the employee is given uniforms to take home but the employee prefers to change on the employer's premises. On the other hand, some employers, such as hotels, provide laundered uniforms and require employees to change into and out of the uniform on the premises. In such cases, the employer must include the time spent changing clothes as hours worked.
- C. An employer may designate a fixed amount of time (e.g., 10 minutes) to pay an employee for clothes changing and wash up as long as such time is reasonable in relation to the actual amount of time spent performing such functions. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

VII. Travel Time

- A. **Commuting:** Time spent commuting between home and work is not hours worked unless payment for this time is required by company policy, contract, custom, or practice.
- B. **Travel all in a day's work:** Time spent by an employee traveling as part of the employee's principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.
- C. **Travel overnight:** Travel that keeps an employee away from home overnight is hours worked when it cuts across the employee's workday. Time spent traveling during normal working hours is counted even on non-working days like Saturday and Sunday. Overnight travel time outside the normal daily work schedule is not considered compensable. Employees who travel overseas are not covered by the FLSA while working outside the USA.

Please see the Employers Council Wage and Hour FYI on *Travel Time Pay* for a more comprehensive review of travel time.

VIII. Unauthorized Work

- A. Employees who continue to work after their shifts are over, even if voluntarily, are engaged in hours of work and must be paid. This means that once an employer allows the employee to work or knows (or should have known) that the employee is working, the employee must be compensated. This requirement holds true even if the work is performed at home.
- B. The mere promulgation of a rule that employees are not allowed to work “off the clock” is not enough to absolve an employer from liability to pay employees for all hours worked. Management must ensure that employees do not work “off the clock.”
- C. Some employer practices or supervisory goals may heighten an employer’s risk for liability. For instance, employees have successfully argued that their employer knew their productivity goals could not be met without working “off the clock.” In another case, an employee claimed that a supervisor discouraged her from working overtime and told her, if she did work, not to let the supervisor know.
- D. Employers should publish policies that state an employee cannot work overtime without prior authorization. Nevertheless, supervisors must be aware of when employees are working and control the number of hours worked when necessary to meet payroll budgets. The employer may discipline employees for not following its policies but may not withhold pay for working unauthorized overtime.

IX. Other Working Time Considerations

- A. If an employee is required to wait 10 or 15 minutes before being advised that no work is available, this waiting time is compensable. An employee who is not required to remain on the employer’s premises but is required only to leave word with a supervisor where they can be reached is not on call and need not be paid.

Medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when the employee normally works constitutes hours worked and is compensable.
- B. Unworked holidays and time taken off for vacation, illness, or personal business are not counted as hours worked even if the employee is paid, unless there is a company policy to the contrary. Hence, such paid leave need not be counted as hours worked for the purposes of calculating overtime.
- C. Training programs, lectures, and meetings need not be counted as compensable time if:
(1) attendance is outside the employee's regular working hours, (2) attendance is, in fact, 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.
Some application of hours worked to training time include:

1. On-the-job training is considered hours worked by the FLSA.
 2. Voluntary attendance at an independent school, college, or independent trade school after hours is not working time, even if related to the employee's job.
 3. Attendance is not considered voluntary if required by the employer or if the employee believes that their job would be adversely affected by non-attendance. Training is directly related to the employee's job if the training is designated to make the employee handle their job more effectively as distinguished from training for another job.
 4. Time spent in attending classes at institutions of learning, often to attain a degree or occupational certification, need not be considered hours worked. This is true even if the employer provides tuition reimbursement for such programs.
- D. Civic and charitable work are considered hours worked if done at the employer's request, under its direction or control, or while the employee is required to be on the employer's premises. Such work, if voluntarily performed outside working hours, generally is not compensable, however.

X. Additional Resources on this Subject

A. SEMINARS

[Catalog](#)

Keywords: wage and hour

B. REFERENCE MATERIAL

Wage and Hour: Travel Time Pay