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The Power to Compete

HR COMPLIANCE OVERVIEW

Compensable Time Under the FLSA

The Fair Labor Standards Act (FLSA) requires employers to pay employees for all hours they are "suffered or permitted to work." These hours are known as work hours or compensable time.

Compensable time includes all hours during which an individual is actually performing productive work and all hours an employee is required by their employer to remain available for the next assignment. Compensable time does not include periods where an individual is relieved of all obligations and is free to pursue their own interests.

To determine how much of an employee's time is compensable time, employers must determine whether the employee is on duty or engaged in principal activities, as well as how rest periods or travel time affect an employee's hours of work. Failing to comply with the FLSA's compensable time requirements can have significant repercussions for employers.

This Compliance Overview provides an overview of the FLSA's compensable time.

Highlights

Under the FLSA, compensable time includes:

- Unauthorized work time if the employer knows or has a reason to believe work is being performed;
- Time an employee cannot effectively use for their own purposes;
- Time an employee is not completely relieved from duty;
- Time spent on preparatory and concluding activities;
- Certain travel time;
- Job-related training programs, lectures and meetings; and
- Time spent at the employer's request or direction.

LINKS AND RESOURCES

- DOL Fact Sheet #22: Hours Worked Under the FLSA
- DOL Work Hours website
- DOL Wages and the FLSA website

Overview of Compensable Time Under the FLSA

The FLSA requires covered employers to pay nonexempt employees at least the current federal minimum wage for all hours worked and overtime pay at 1.5 times their regular rate of pay for any hours worked over 40 during a workweek. To properly compensate employees, employers must determine the number of hours worked.

Time is compensable if the employee is **suffered or permitted to work**, even if the work is not requested, authorized or scheduled, where the employer knows or has reason to know the work is being performed. For example, if an employee voluntarily continues to work at the end of their shift to finish an assigned task or to correct hours, that time is considered work hours and is compensable.

Under the FLSA, the **workweek** ordinarily includes all time during which an employee is required to be on the employer's premises, on duty or at a prescribed workplace. In general, the **workday** means the period between the time on any particular day when an employee commences their principal activity and the time on that day at which the employee ceases such principal activity or activities. The workday may be longer than an employee's scheduled shift, hours, tour of duty or production line time.

The FLSA's work hour standards are enforced by the Department of Labor's (DOL) Wage and Hour Division.

On-duty Employees

To calculate an employee's compensable time, employers must determine whether an employee is "on duty." The hours an employee is on duty are compensable because the employer effectively controls the employee's time, even when waiting is part of the job or when the employee is allowed to use the time for their own purposes.

Waiting Time

Whether waiting time is considered hours worked under the FLSA depends on whether employees are **engaged to wait** or **waiting to be engaged**. The time an employee spends engaged to wait is considered work time, while time spent waiting to be engaged is not. For example, a secretary who reads a book while waiting for dictation or a firefighter who plays checkers while waiting for an alarm is considered to be engaged to wait, meaning this time is hours worked and compensable.

On-duty Waiting Time

When an employee is waiting to perform work while on duty, the employee is engaged to wait, and the time is hours worked. Examples of on-duty waiting time include:

- A receptionist who reads a book while waiting for customers or telephone calls;
- A messenger who works on a crossword puzzle while waiting for assignments;
- A fireman who plays checkers while waiting for alarms;
- A factory worker who talks to fellow employees while waiting for machinery to be repaired; and
- A waitperson in a restaurant who waits for customers to arrive.

This also applies to employees who work away from the employer's facility. For example, the time a repairperson must wait for their employer's customer to get the premises ready or the time spent by a truck driver who must wait at or near the jobsite for goods to be loaded or unloaded is, in most situations, hours worked. In these examples, waiting is an essential part of the job and, therefore, the employee is engaged to wait, and the time is hours worked.

On-duty waiting time may be considered hours worked even if employees are allowed to leave the premises or the jobsite during periods of inactivity. Additionally, if the period of employee inactivity is unpredictable and usually short, the on-duty waiting time is likely hours worked under the FLSA because the employee is unable to use the time effectively for their own purposes.

Off-duty Waiting Time

Off-duty waiting time (also known as "layover time") is a period during which the employee is waiting to be engaged and is not considered hours worked. Off-duty waiting time is not considered hours worked if all the following conditions are met:

- The employee is completely relieved from duty;
- The period of time is long enough to enable the employee to use the time effectively for their own purposes;
- The employee is definitely told in advance that they may leave the jobsite; and
- The employee is advised of the time they are required to return to work.

Whether the period of time is long enough to enable the employee to use it effectively for their own purposes depends on the facts and circumstances of the particular situation. For example, an employer sends a truck driver from the District of Columbia to New York City. The driver leaves at 6 a.m. and arrives at noon. If the driver is completely and specifically relieved from all duty until 6 p.m., when the driver goes on duty for the return trip, the driver is waiting to be engaged, and the time is not hours worked.

On-call Time

On-call time is compensable when the restrictions are so significant that the employee cannot use the time freely. Compensable time includes on-call time when an employee is required to remain on-call, either:

- At the employer's premises; or
- So close to the employer's premises that the employee cannot use the time for their own purposes while working on-call.

Whether hours spent on-call are hours worked is a question of fact that must be decided on a case-by-case basis.

All on-call time may not be considered hours worked. For example, on-call time is generally not compensable for employees who are required to remain on call at home or are merely required to inform their employer of where they can be reached while they are away. However, additional constraints on the employee's freedom could require an employer to compensate an employee for this time.

On-call situations generally vary. Some employees may be required to remain on the employer's premises or at a location controlled by the employer. An example of this is a hospital employee who must stay at the hospital in an on-call room. While on call, the employee can sleep, eat, watch television or read a book, but is not allowed to leave the hospital. Other employees can leave their employer's premises but are required to remain within so many minutes or miles of the facility and to be accessible by telephone or pager. An example of this type of employee is an apartment maintenance worker who must carry a pager while on call and must remain within a specified number of miles of the apartment complex.

Sleeping Time

Compensable time may include time during which an employee is allowed to sleep when not busy, if the employee is required to be on duty. An employee who is required to be on duty for **less than 24 hours** is considered to be working even if they are permitted to sleep or engage in other personal activities when not busy. The fact that sleeping facilities are not furnished does not matter when the employee's time is given to the employer and the employer requires the employee to be on duty.

When an employee is required to be on duty **for 24 hours or more**, the employer and the employee can agree to exclude sleep time from compensable time if:

- The employer does not exclude more than eight hours;
- The employer provides adequate facilities for the employee to sleep; and
- The employee can usually enjoy an uninterrupted night's sleep.

If the employer and employee do not have such an agreement, the employer may not exclude sleep time from compensable time.

If an employee's sleeping period is interrupted by a call to duty, the employer must count the length of the interruption as compensable time. All interruptions to an employee's sleep must be counted as hours worked. If the interruption prevents the employee from having **at least five hours** of sleep, the employer must count the entire eight-hour period as compensable time. If an employee sleeps more than eight hours, the employer may deduct only a maximum of eight hours from the 24 hours the employee is required to be on duty.

Additional special sleep time rules apply to public sector employees who are employed in fire protection and law enforcement activities.

Show-up Time

There may be times when an employer sends an employee home after they arrive at work but before any work is performed. Under the FLSA, employers are not required to consider any of this time as hours worked or give the employee show-up pay. For example, if an employee of a roofing company arrives for work at 8:00 a.m., as instructed, and their employer sends them home because it is too cold to work that day, the employer does not need to consider any of the time as hours worked since the employee did not perform any work.

However, some employers and employees have informal or contractual agreements that require a set number of hours to be considered hours worked. Additionally, some states have adopted laws requiring employers to compensate employees for show-up time.

Remote Work

Work performed remotely is treated the same as onsite work under the FLSA. Therefore, employers must compensate nonexempt employees for all hours worked if the employer knows or should know work is being performed.

Preliminary and Postliminary Activities

The Portal-to-Portal Act of 1947 (Act), which amended the FLSA, defines "work" as employee performance of their principal activities. Under the Act, **principal activities** are the tasks, duties and responsibilities that relate directly to an employee's job or position. This includes any activity employees must undertake to perform their principal activity. The

Act excludes certain preliminary and postliminary activities, such as ordinary commuting, from an employee's compensation. However, compensable time under the Act includes:

- All hours employees are engaged in principal activities; and
- Any time spent in preliminary and postliminary activities that are an integral and indispensable part of a principal activity.

Preliminary and postliminary activities may include inspecting machinery, putting on or removing required personal protective equipment.

Under the Act, preliminary and postliminary activities are an integral and indispensable part of principal activities if employees must perform them to perform their principal activities. The nature of an employer's business and the occupation of each employee determine which preliminary or postliminary activities are an integral part of each employee's principal activities.

The time an employee spends walking, riding or traveling to and from the actual place where the employee performs their principal activities generally would not be hours worked. For example, if an employee travels to a parking area and completes their trip to the worksite in a company bus, the time spent traveling to the parking area and riding on the bus to the jobsite is not hours worked. Additionally, activities that occur either prior to or after the time an employee ends their principal activities on any workday would not be hours worked. For example, showering at the beginning or end of each workday for the employee's own benefit and convenience, and not directly related to the employee's principal activities, would be considered a preliminary or postliminary activity and would not be hours worked.

Preliminary and postliminary activities must be evaluated on a case-by-case basis to determine whether they are compensable time.

Exceptions Based on Contract, Custom or Practice

There are two exceptions to the principles of preliminary and postliminary activities. An employer would have to consider this time as hours worked if:

1. The time is considered hours worked according to an express provision of a written or unwritten contract between the employer and the employee (or the employee's representative); or
2. The time is treated as hours worked according to custom or practice at the place where the work is performed.

The time spent in these preliminary and postliminary activities is hours worked only to the extent provided for by contract, custom or practice. For example, if the contract, custom or practice considers the time spent on the trip to the worksite as hours worked but not the return trip, the travel time spent on the return trip would not be hours worked. Only the amount of time allowed by the contract, custom or practice provision must be considered hours worked. For example, if the time allowed for showering at the beginning and end of the workday is 15 minutes but the activity takes 25 minutes, the time to be treated as hours worked would be limited to 15 minutes.

Meal Periods and Breaks

The FLSA does not require employers to provide meal periods or rest breaks for their employees. However, if an employer chooses to provide meal periods or rest breaks, the employer must comply with the FLSA's meal periods and rest breaks requirements. As a general rule, rest breaks are considered hours worked, but bona fide meal breaks are not.

Many states and localities have laws requiring employers to provide meal periods and rest breaks. These requirements prevail over the FLSA's silence on the subject. In situations where an employee is subject to both federal and state law, the employee is entitled to the most beneficial provisions of each law.

Meal Periods

In general, bona fide meal periods are not compensable if they are 30 minutes or longer and the employee is completely relieved from duty. However, a period shorter than 30 minutes may be long enough under special conditions.

Employees are not completely relieved of all duty if they are required to perform any duties, whether active or inactive, while eating. For example, an employee who remains at their desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty. Permission to leave the employer's premises during the meal break is not required for an employee to be relieved of all duties. Employers may need to count interrupted meal breaks as hours worked and compensate their employees accordingly.

Rest Periods

Employers that provide rest periods of five to 20 minutes to their employees must count the entire length of the rest period as compensable time. This includes short periods that employees are permitted to spend away from the worksite for any reason, including coffee breaks, smoke breaks, restroom breaks, personal telephone calls or visits. Compensable time for rest periods cannot be offset against waiting or on-call time.

Unauthorized extensions of authorized work breaks do not need to be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that:

- The authorized break may only last for a specific length of time;
- Any extension of the break is contrary to the employer's rules; and
- Any extension of the break will be punished.

Nursing Breaks

Under the FLSA, most nursing mothers have the right to a reasonable time to express breast milk while at work for their nursing children for up to one year after birth. This break must be provided each time the employee has the need to express milk. When an employee is using break time at work to express breast milk, they must either be completely relieved from duty or be paid for the break time. When employers provide paid breaks, an employee who uses the break time to pump breast milk must be compensated in the same way that other employees are compensated for break time.

The employer must also provide a location, other than a bathroom, where the employee can express milk in privacy. A location is private if it is shielded from view and free from intrusion from co-workers and the public.

Employers with **fewer than 50 employees** are exempt from this requirement if it would impose an undue hardship. Whether compliance would be an undue hardship is determined by assessing the difficulty or expense of compliance for a specific employer relative to the size, financial resources, nature and structure of the employer's business.

Lectures, Meetings and Training Programs

In general, time spent by employees attending lectures, meetings, training programs and similar activities is considered compensable time unless all the following conditions are met:

- Attendance is outside regular working hours;
- Attendance is voluntary;
- The course, lecture, meeting or training is not directly related to the employee's job; and
- No other work is concurrently performed.

Failure to satisfy any one of these factors renders the time compensable.

Attendance is considered mandatory if an employee is led to understand or believe that their employment, including the terms and conditions of employment, would be adversely affected if they do not attend. Additionally, training is directly related to an employee's job if it is designed to help the employee handle their job more effectively. This is not the same as training employees for another job or to gain new or additional skills.

There are some special situations in which the time spent attending lectures, training sessions and courses of instruction is not regarded as hours worked. These situations include:

- An employer establishing a program of instruction similar to courses offered by independent bona fide institutions that is for the benefit of employees (voluntary attendance by an employee at such training courses, outside of working hours, would not be hours worked even if the courses directly relate to the employee's job or are paid for by the employer);
- An employee voluntarily decides to attend an independent school, college or trade school after work hours (the time is not hours worked even if the courses are related to the employee's current position or the employer pays for the courses);
- Time spent in certain supplemental classroom instruction held in conjunction with an apprenticeship program; and
- Police officers and firefighters attending a police or fire academy or other training facility (police officers and firefighters are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use the time for personal pursuits).

Special rules apply to public-sector employees who attend, outside of regular working hours, specialized or follow-up training that is required by law for certification of public-sector employees.

Travel Time

Whether the time an employee spends traveling is compensable depends on the type of travel involved.

Ordinary Home-to-Work Commute

Employees who travel from home before the regular workday and return to their home at the end of the workday are engaged in ordinary home-to-work travel or commuting. Normal commuting time is generally not compensable. This is true whether the employee works at a fixed location or at different jobsites.

However, if an employer requires employees to perform some work-related duties while traveling between home and the worksite, the time may be considered hours worked. Examples of work-related duties that may be hours worked include providing transportation for other employees to or from the worksite; picking up supplies or equipment from local suppliers while traveling to or from the worksite; or stopping at the employer's place of business to pick up supplies or tools, receive instructions or do other work before traveling to or from the worksite.

Travel During the Workday

Time an employee spends traveling as part of their principal activity, including performing job-related work before reaching the worksite and traveling between jobsites during the workday, is hours worked. This is true whether the employee travels as part of their principal activity on a regular basis or only infrequently. The time spent in this type of travel is part of the day's work and must be counted as hours worked regardless of contract, custom or practice.

Additionally, travel that occurs after the employee's first principal activity and before the last is compensable, including travel between jobsites.

The part of an employee's travel that occurs during the employee's regular hours of work is likely hours worked under the FLSA. However, if the employee is a passenger and some part of their travel occurs outside of regular working hours, the travel time outside those hours is probably not hours worked.

Work Performed While Traveling

Any work that an employee is required to perform while traveling must be counted as hours worked. This would include activities such as driving, mandatory reading, clerical work and acting as a tour guide. Employees who drive a truck, bus, automobile, boat or airplane, or employees who are required to ride therein as an assistant or helper, are working while riding (except during meal or sleep periods). If an employee is offered public transportation but requests permission to drive their own automobile instead, the employer may count as hours worked either the time spent driving the automobile or the time the employer would have to count as hours worked if the employee had used public transportation.

Special One-day Assignments in Another City

Different rules apply when an employee regularly works at a fixed location in one city and is given a special one-day assignment in another city with the expectation of returning home that same day. This type of travel qualifies as a necessary part of the principal activity that the employee was hired to perform on that particular workday. As a result, the time the employee spends traveling to and returning from the other city is work time. However, all the time involved does not need to be considered hours worked. Employers may deduct from this time the period employees would normally spend commuting to their regular worksite. For example, the travel between the employee's home and an airport or other public transportation terminal is normal home-to-work travel and not hours worked.

Out-of-Town Travel

Travel that keeps an employee away from home overnight is travel away from the employee's home community. Travel away from an employee's home community is compensable as hours worked if it occurs during the employee's regularly scheduled working hours. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. However, employers are not required to consider as hours worked the time employees spend traveling away from home outside regular working hours as passengers on an airplane, train, boat, bus or automobile.

Enforcement and Penalties

Failure to meet the FLSA's compensable time requirements can lead to costly investigations, civil and criminal penalties, lawsuits and reputational damage. FLSA violations are punishable by a fine of up to $10,000, imprisonment for up to six months or both. Fee amounts may increase for repeat and willful offenders. Employees may pursue FLSA violations by filing a lawsuit or bringing an administrative action before the DOL. These actions can result in back wages, liquidated

damages equal to unpaid wages, civil penalties, and attorneys' fees and costs. Additionally, employers that violate the FLSA may be subject to DOL audits.

Employer Takeaway

Employers that fail to properly compensate their employees for all hours worked may face costly legal penalties under the FLSA. Therefore, employers should ensure they understand and comply with the FLSA's compensable time requirements.