



To Pay or Not to Pay? Determining Whether Employees Deserve to Be Paid Involves a Close Look at FLSA

By Victoria L. Donati and Jason C. Kim

According to the Fair Labor Standards Act (FLSA), employers must keep track of and pay employees for all time worked. But what exactly counts as time worked? This question is somewhat loaded, requiring employers to work through a myriad of federal and state laws and regulations, as well as a number of fact-specific exceptions. For instance, are employees entitled to payment for engaging in passive activities, such as participating in meetings or training courses, traveling for work, or changing clothes? We will address some specific issues that questions like this typically raise. But the guidance we provide below is based on fairly fact-specific regulations and limited to federal law. It is important that you consult legal counsel to fully understand the regulations and ensure no applicable state or local laws mandate a different outcome. It also is important to note that these rules apply only to nonexempt employees (employees who are entitled to overtime compensation pursuant to applicable law).



Unauthorized Time

According to FLSA, time worked includes not just time an employee is asked or required to work but also time the employee is “suffered” or “permitted” to work. For example, an employee may voluntarily continue to work at the end of his shift or

scheduled workday with or without authorization. He may want to finish a job or save time and effort the following day. The reason for the extra time is immaterial, and it does not matter whether the time was authorized. If the employer knew or had reason to know of the extra time (whether by seeing or hearing of the employee performing the work, seeing the product of the work, receiving the time reported on a time sheet or time clock, or via some other means), it is considered time worked, and the employee must be paid at his regular or, as applicable, overtime or premium rate.

Such compensation is required regardless of any policies or special arrangements with employees. Employment policies requiring prior authorization of unscheduled or overtime work are only valid if they are enforced through careful supervision and prevention of the work itself. Such policies cannot be enforced through nonpayment for hours worked.

Work Done Away from a Job Site

The requirement that you pay employees for all time worked applies whether the work is performed at or away from your facilities or job site. It even applies, in some cases, to work performed at home. For example, if a supervisor asks an employee to prepare a report or estimate and the employee completes the work at home, the employee would be entitled to

pay for the time spent working at home. Although the fact that the employee was unable to finish the work during his regular hours may raise an issue of his efficiency, it does not limit his entitlement to pay. Unless an express exception applies, all time that results in a benefit to the employer must be paid.

Waiting Time

You generally must pay employees for “waiting time,” which is time spent waiting to begin a job or waiting for materials or instructions. The only waiting time that need not be paid is when an employee is released fully from his duties and given enough time to use for his own purposes.

An employee must be paid for time spent waiting for an assignment when it is difficult to predict when the employee will be required to begin work once the assignment is given. For example, a roofing worker who must wait for a shingle delivery or equipment repair before he can resume work must be paid while he waits. Similarly, a secretary playing solitaire on her computer while waiting for edits to a document must be paid. This rule can apply even if an employee is allowed to leave a job site while waiting. If the duration of time the employee is relieved for is too short to use for his own purposes, the time must be paid.

For instance, a roofing worker who is waiting for a delivery and is told by his supervisor he can leave the job site and return in 30 minutes when the delivery is expected likely still will be entitled to pay for that time if the 30 minutes is not long enough for him to do things for his own purposes. Employees who are told they can leave work for 45 minutes while their equipment is being repaired still may be entitled to pay for that time if the facility is in an isolated area with nothing nearby, leaving employees with no choice but to remain at the facility.



Career Tips

To determine whether employees have to be paid for waiting time, consider a basic question: Is the time spent primarily for your benefit or the employee’s benefit? When answering this question, consider the amount of control you have over the employee during that time and whether the employee truly can use the time effectively for his own purposes. In each scenario we described, the waiting time was for the benefit of the employer and considered an integral part of the job.

On-call Time

The rule for paying employees for on-call time is similar to that governing pay for waiting time. An employee must be paid for on-call time when, though relieved from his immediate duties, he is required to remain ready to work. This rule applies whether the employee is required to wait on the employer’s premises, at the job site, or nearby so he cannot effectively use the time for his own purposes. Pay is not required if the employee merely is required to leave word as to where he can be reached and can return to work quickly.

This rule raises interesting questions about employees who must wear pagers or carry company cell phones and how quickly those employees are expected to be able to return to work.

Consider this: If a facility or job site is located in a congested area and the required response time is relatively short — say, 30 minutes or 45 minutes — an employee may not be able to travel far from the premises or use the time effectively for his own purposes. Therefore, his on-call time must be paid. If an on-call employee typically is called to work multiple times on his on-call days, effectively preventing him from doing other things on those days, such on-call time must be paid.

You may impose some restrictions on employees without having to pay them, but exercise caution to ensure that you do not impose excessive restrictions on employee movement or response time or call so frequently as to restrict the employees’ use of the time for their own purposes.

Meal Periods

Bona fide meal periods are not considered working time. To qualify as a bona fide meal period, an employee must be completely relieved from duty. Thirty minutes or more ordinarily is enough time to constitute a bona fide meal period, though a shorter period may suffice if special circumstances apply. Note that an employee literally must

be relieved of all work duties if pay is to be avoided. An employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

For example, an employee who is required to perform certain tasks, such as answering occasional calls (even if the telephone does not ring) or reviewing documents, is not sufficiently relieved and must be paid. Likewise, an office employee who is required to eat at his desk and a roofing worker who is required to be on a job site during his lunch break are considered to be working while eating and must be paid. This is not the case if the employee is allowed to leave but chooses to stay.

Bona fide meal periods do not include coffee breaks, snack times, or other short rest periods (generally lasting from five minutes to 20 minutes). Indeed, federal regulations require that rest periods of such short duration “must be counted as hours worked” if they are provided (or if they are required by applicable state or local law).

Training Time/Seminars

Attendance at meetings, training programs, and similar activities does not have to be counted as time worked if all the following criteria are met: attendance is outside the employee’s regular work hours; attendance is voluntary; the activity is not directly related to the employee’s job; and the employee does not perform any productive work while attending. Attendance at a program is not voluntary, of course, if the employer requires the employee to attend, nor is it voluntary if the employee is led to believe his present working conditions or employment would be adversely affected if he did not attend.



Training is considered to be directly related to an employee’s job if it is designed to make the employee more effective as opposed to training him for another job or a new skill. For example, a roofing worker who takes a course in shingle repair is engaged in an activity to make him a better worker, and the time spent in the course would be considered hours worked. However, a course in concrete paving would not be related directly to his job as a roofing worker, and time spent taking such a course would not necessarily need to be paid. The same holds true if the training were preparing the employee for advancement by upgrading him to a higher skill level. Such training is not intended to make the employee more efficient in his present job, and the training, therefore, need not be paid.



Career Tips

Safety Equipment

The time an employee spends putting on and removing required safety equipment has been a particularly active area for litigation. Such time generally is considered time worked and must be paid. The rationale is that the activities are an integral part of an employee's principal activity and indispensable to performance. If an employee cannot perform his principal activities without putting on certain clothes or personal protective equipment, time spent changing at the beginning and end of the workday may have to be paid.

For example, if health and hygiene considerations require workers exposed to spray polyurethane foam to spend 15 minutes putting on and taking off respiratory equipment, time spent doing so arguably would be considered an integral and indispensable part of the employees' principal activities and would, therefore, be counted as time worked.

The U.S. Supreme Court recently concluded time spent at the beginning of a shift walking from the changing room after putting on required safety equipment to the work area or from the work area to the changing room at the end of the shift counts as time worked because the walking is an integral part of the employees' principal activity of putting on or taking off the required equipment.

On the other hand, if changing clothes merely is a convenience to the employee and not directly related to or required to perform his principal activities, it would be considered non-compensable, a "preliminary" (at the beginning of a shift) or a "postliminary" (at the end of a shift) activity, rather than part of the employee's principal activity.

For instance, if an employee chooses to change his clothes and shower because he must go to school immediately after work and does not want to wear sweat-stained clothes, the time spent cleaning up (and the associated walking time to the changing room) would be considered a postliminary activity for the employee's own convenience and need not be paid.

Unfortunately, there is no simple answer to the question of whether time spent changing into and out of clothing and equipment must be paid because the determination depends on the unique facts and circumstances of each situation.

For example, if donning equipment simply consists of putting on steel-toed boots and a hard hat at the beginning

of a shift, the time arguably is too minimal to be considered work time under FLSA, even though it may be integral to the employee's performance of his job duties. Accordingly, you should carefully assess the type of "donning" and "doffing" requirements you impose to determine whether time spent doing such activities must be paid.

Travel Time

Time spent traveling may be compensable depending on the kind of travel involved. The regulations that govern pay for travel time are highly fact-specific and not necessarily intuitive. Generally, the following rules apply:

Ordinary travel from home to work need not be counted as hours worked. This is true whether the employee works at a fixed location each day or at different job sites (within the same general vicinity) on different days. If the worker is required to report to the office before going to a job site, the time he spends commuting to the office is not compensable. The time spent driving from the office to the job site likely would be compensable because the employee was required to report first to the office rather than directly to the job site.

An employee may need to be paid if he is required to travel from home to work in an emergency situation. For example, if an employee, after going home for the day, is called to handle an emergency and must travel a substantial distance to a work site that is different than his usual work site, he must be paid for his travel time. Such pay may not be required if the emergency travel is to the employee's usual work site because the regulations do not address that circumstance. Practically speaking, however, it may be prudent to pay the time for morale reasons.

An employee must be paid for travel time if he is asked to make a longer than normal commute to a special assignment away from his fixed location or outside his usual commuting area. For example, an employee who lives in a suburb of Chicago and works in the Chicagoland area may be given a special assignment in Indianapolis. The employee's travel cannot be regarded as ordinary home-to-work travel because it is far greater than his usual commute. The travel is considered an integral part of the "principal" activity the employee was hired to perform on that day and must be paid.

Whether an employee must be paid for travel that keeps him away from home overnight depends on when the travel occurs in relation to the usual work schedule. If the



Career Tips

employee regularly works from 7 a.m. to 3 p.m., any travel during those hours is time worked. This is true whether the travel is on Monday through Friday, or on Saturday or Sunday. Travel outside of those hours need not be counted as working time as long as the employee is merely a passenger (not a driver) on a plane, train, boat, or bus, or in a car.

Tracking Time

FLSA requires employers to keep accurate time records of employees, including the “nonworking” but compensable time spent in the scenarios discussed. Such records must be retained for specified periods — typically two years to three years — as prescribed by FLSA and its state and local counterparts.

Insubstantial or insignificant periods of time beyond scheduled work hours (such as waiting in line briefly to punch in or out of the time clock) may be disregarded if they cannot be recorded precisely because of practical administrative considerations. But this rule applies only when there are uncertain, indefinite periods of time consisting only of a few seconds or minutes and where the time cannot be counted because of business realities.

Review Your Practices

There are numerous other fact-specific regulations that govern instances in which you must count nonworking or inactive hours as time worked. A regular review of your pay practices and policies will ensure compliance with applicable federal and state laws governing compensable time issues.

Of course, simply paying for any time about which you are uncertain is the easiest and safest course of action. However, that could expose you to greater costs than necessary and strain profitability. The better course would be to spend the time and resources necessary to determine what must be paid and what need not be paid. Contact your legal counsel for further guidance.

About the Authors

Victoria L. Donati and Jason C. Kim are partners in the employment law group with the Chicago-based law firm Neal, Gerber & Eisenberg (<http://www.ngelaw.com/>).

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