

BLOGS

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FLSA Fundamentals: What is Time? Compensable vs. Non-Compensable Time

In honor of the Fair Labor Standard Acts 78th birthday and the highly anticipated changes to the DOL overtime regulations, the Modern Workplace is running a special multipart series entitled FLSA Fundamentals which will cover the basics of this important law and culminate in a discussion of the final changes to the regulation upon their release. This is our second post in that series.

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As discussed in our previous FLSA blog post, it is crucial for an employer to accurately calculate a non-exempt employees regular rate of pay. If you missed it, the correct calculation method for the regular rate of pay can be found [here](#).

It is also important to remember that employers are required to pay their non-exempt employees for *all* hours worked, even when the employer did not expressly request or authorize the work. Many employers have policies or rules requiring non-exempt employees to take an unpaid lunch break and to obtain advance permission to work overtime hours. Even when a non-exempt employee violates such rules, the employee typically must be paid for the work time, given that the FLSA provides that the employee must be paid so long as the employer suffers or permits the employee to work. An employee can be disciplined for violating an employers break and work time rules, but generally still must be paid. Again, employers must pay non-exempt employees for *all* hours worked.

All means all.

In addition, in our evolving digital world, it is important to remember that a non-exempt employee who checks work email or voicemail at home is working for purposes of the FLSA and, therefore, must be paid. Employers are presumed to be aware of this after-hours work, particularly where employees are sending work emails after work. We've all gotten those work emails at 11:30 p.m. but, what you might not have realized is that if the employee sending that email is non-exempt, he/she's working!

Employers should also be mindful of unrealistic productivity goals. If unrealistic goals result in employees working off the clock to get their job done, an employer may face claims under the FLSA for unpaid work time that, in fact, should have been tracked and paid.

Another important consideration for employers is the metaphysical question, What is time? Employers need to know the answer to this question to properly calculate how many hours must be paid.

Time may be infinite, but, as Einstein noted, it is also relative. In the FLSA context, time may actually be modified by employers in two very limited ways. The FLSA regulations allow employers to modify time as follows:

- First, employers may round off employees time to the nearest five minutes or up to a quarter of an hour, as long as the rounding works both ways (rounding up and down), averages out over time, does not always favor the employer, and does not result in a failure to compensate employees for all time worked.
- Second, employers may disregard de minimis time entries beyond an employees scheduled hours if the employer cannot precisely record it as a practical administrative matter. Practically speaking, though, this exception has limited application in a digital timekeeping age, and employers should be extremely careful in its application.

With these general basics in mind, the following are some additional examples of compensable working time for non-exempt employees under the FLSA:

- changing uniforms or protective gear, if required by the nature of work;
- charitable work requested or controlled by the employer;
- driving employer-owned vehicles between worksites for the benefit of the employer;
- fire drills or other disaster drills, whether voluntary or involuntary, either during or after regular working hours;
- meal periods, if: (1) employees are not free to leave their posts, or (2) the time is too short to be useful to employees;
- on-call time where liberty is restricted;
- rest periods of 20 minutes or less;
- training programs required by the employer; and
- laundering uniforms to the extent it cuts into the minimum wage.

Conversely, here are some examples of non-compensable working time:

- absences during which work is not performed (such as, sick leave, annual leave, holidays, funerals and weather-related absences);
- employee sports team activities (e.g. softball team) if voluntary and not a condition of employment;
- charitable work done voluntarily outside of working hours;
- clothes changing at home;
- jury duty;
- meal periods involving no duties and lasting at least thirty minutes;
- on-call time where the employee merely leaves a telephone number and is not restricted;
- operation of an employers motor vehicle for employees commute to/from home; and
- voluntary training programs unrelated to regular duties and involving no productive work.

As can be seen through these short lists, the distinction between compensable and non-compensable time is nuanced and case-specific. Employers must be wary and carefully analyze their pay practices to ensure they are paying non-exempt employees for all hours actually worked.



The next two posts in the FLSA Fundamentals series will brave the murky waters of FLSA classifications. Stay tuned!