Significant "Bright-Line" Interpretation of Compensable Time Under the FLSA

Employers are often faced with the difficult dilemma of whether, and how much, it has to pay its employees who take rest breaks under the federal Fair Labor Standards Act ("FLSA") and corresponding state laws. On Friday, October 13, the Third Circuit Court of Appeals (covering Pennsylvania, New Jersey, Delaware and the Virgin Islands) provided a rare bright-line determination. Relying on the federal rest break regulation that interprets the FLSA, **the court held** that non-exempt (hourly) employees' rest breaks during their shifts, of **up to 20 minutes**, are compensable for the entire time, even if the employee is completely relieved of all work-related duties during that time. Previously, there was little guidance on this issue at the federal level. In defending the case, the employer argued a variety of defenses, including that "non-working" time when employees are logged off their computers is not covered by the FLSA, that the agency's rest break regulation should not be provided substantial deference, and that there should not be a bright-line rule. The Third Circuit forcefully shot down each argument, thereby providing clear guidance to employers: breaks taken during the continuous workday of 20 minutes or less, regardless of how characterized by policy, are compensable time (at least in the Third Circuit, but likely other jurisdictions will rely on this guidance).

At issue in this case was whether the employer's policy and practice of not paying hourly commissioned salespersons, if they were logged off of their computers for 90 seconds or more, complied with the federal rest break regulation (29 C.F.R. § 785.18). The employer had implemented this "flex time" policy to allow employees to log off and take breaks whenever they wanted during their shifts and for whatever reason and length of time. Additionally, the employer eliminated paid rest breaks. The U.S. Department of Labor's ("DOL") Office of Solicitor from the previous administration brought suit challenging this practice as an unlawful violation of federal minimum wage laws and requested that liquidated damages be awarded for this violation.

At the summary judgment phase, the lower court granted in part the DOL's motion, finding that the DOL's Wage and Hour Division ("WHD") rest break regulation, enacted in 1940, was entitled to "substantial deference," and concluded that these rest breaks, even if idle, cannot be used as an "offset" against other working time that could be considered "waiting" or "on-call" time.

On appeal to the Third Circuit, the employer argued that because under the "flex time" policy employees could leave their work stations at any time and use the time for their benefit, that the FLSA did not apply to this "logged off" and "non-working" time. The Third Circuit flatly disagreed and characterized this policy as an inappropriate attempt to recharacterize compensable working time as non-working time. The court emphasized: compensable time is "*not limited to the time an employee actually performs his or her job duties*." Indeed, although the FLSA does not *require* employers to provide breaks, if the employee has breaks during the day of 20 minutes or less, that time is compensable "working" time. This reinforces the concept of the "continuous workday—once an hourly employee clocks in, the time is paid except for meal breaks (although the court did not explicitly make this connection). Moreover, the Third Circuit found the trial court appropriately relied on and provided the highest level of deference to the WHD's 1940 rest break regulation, rejecting the employer's argument that the regulation was merely a "position." The court noted that the regulation's interpretation of the FLSA is consistent with the WHD's opinion letters. With the current administration's withdrawal of the joint employer and independent contractor guidance, this could portend different results in the future, to the extent future administrative guidance differs from the regulations. Finally, the court concluded that the rest period regulation should appropriately be characterized

as a bright-line rule—that rest periods of 20 minutes and less are compensable time and policies cannot circumvent this. The court also found unavailing the employer's attempt to characterize the time where an employee is logged off his computer as "completely relieved from duty" under section 785.16 such that it's outside of the FLSA's purview. Rather, the court found that section 785.18, rest breaks, is the appropriate framework.

For any employer that currently implements or is considering nontraditional compensation models for non-exempt employees, it is important to appreciate this "bright-line" rest period guidance. To that end, "pay to punch" (which is paying for the time the employee clocks in to the time the employee clocks out, regardless of what the employee does in between) may often be one of the more risk-averse practices. As a practical matter, this is administratively easier than an employer trying to parse what is and is not compensable time during the continuous workday.

The takeaway from this decision, at least for those companies that have operations in Pennsylvania, New Jersey, Delaware and the Virgin Islands, is that rest breaks of up to 20 minutes may be compensable time. Employers should review their handbooks and pay policies to ensure they are compliant. Additionally, we recommend some training for human resources professionals and/or those employees tasked with administering the ever-changing world of trying to decipher what is or is not compensable time. Finally, as the court alludes, an employer's recourse for an employee's potential abuse of potentially several 20-minute rest periods during a workday is discipline—train employees on the policy and practice, and when necessary, discipline employees who are not following it. As always, it is important for employers to continue to track state-level developments and whether other circuits adopt this read.

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