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### Top Ten Compensable Time Issues for Non-Exempt Employees

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Wage and hour lawsuits outpace all other types of employment litigation, and federal and state labor departments continue vigorous enforcement in this area. Under the Fair Labor Standards Act ("FLSA"), employees are categorized as either exempt or non-exempt. Exempt employees are paid a salary for all hours worked and do not receive overtime pay. Exempt employees must meet certain criteria under the FLSA to qualify as exempt based on the primary duties of the employee's job and they must be paid on a salary basis. Non-exempt employees are generally paid on an hourly basis. They must be paid for all hours worked in a workweek and receive overtime pay if they work over forty hours in a workweek. So, in order to calculate the amount of money a non-exempt employee should receive, an employer must determine the number of hours of work or "compensable time." Compensable time or working time is defined as any time the employer permits or allows an employee to perform the activity. This includes all time worked while at the office, work performed at home, and even work that is performed before the regular workday begins.

It is critical for employers to ensure that their non-exempt employees are properly compensated for all hours worked, including all overtime hours worked. The top ten list below highlights some of the common pitfalls for employers, and addresses areas of confusion under the FLSA's complex rules on compensable time for non-exempt employees.

#### 1. Waiting Time

If a non-exempt employee is not performing work during a regular workday, but is waiting for an assignment, such time must be considered compensable time because the employee is not free to leave. For example, an administrative assistant who is reading a romance novel while waiting for an assignment must still be compensated for that time since the employee is being required to wait. If, on the other hand, the employee is told that he or she can leave and come back in two hours, that time is not compensable waiting time because the employee is free to use the time for his or her own purposes.

#### 2. Seminars, Lectures, and Training Programs

Many non-exempt employees attend lectures, seminars, and training programs outside the office. Attendance at lectures, meetings, training programs, and similar activities is not considered compensable time only if *all* of the following criteria are met:

- Attendance is outside the employee's regular working hours,
- Attendance is voluntary,
- The course, lecture, or meeting is not directly related to the employee's job, AND
- The employee does not perform any productive work during such attendance.

Training is considered related to the employee's job if it is designed to help the employee handle his or her job more effectively and it is related to the job. If it is training for another job or a new or additional skill, then it is not job-related even if the course incidentally improves skills in doing the regular work. For example, an IT employee who takes classes toward an accounting degree may incidentally improve his or her organizational skills but that training is not job-related.

When employees attend independent trainings, courses, and college after hours, and it is not required by the employer, such time is not compensable time. Even if the employer pays or reimburses the employee for part of the tuition through an employee benefit plan, the time spent at the course is not compensable time. Similarly, if an employer offers a lecture or training session for the benefit of employees, voluntary attendance outside of work hours is not hours worked, even if it is job-related or paid for by the employer. For example, an employer may offer all employees an opportunity to hear an author to speak about a new book about improving management skills. If it is during work hours, the

time at the session is compensable time. If the speaker event is outside of regular hours, and is completely voluntary, it is not compensable time.

### **3. “Off-the-Clock Time”**

A non-exempt employee must be compensated for all hours worked in a workweek. This includes work performed that may be outside the employee’s regular workday. For example, a non-exempt employee may report to the office 30 minutes early each day due to a commuter bus schedule. If the employee begins working prior to the start of the regular workday, that time must be counted as compensable time, even if the employee does not record the time on the time sheet. The same requirement applies to the non-exempt employee who brings work home or responds to emails from home before or after the regular workday.

Non-exempt employees should be instructed not to perform work beyond their regular work schedule unless they receive prior approval from their supervisor. If an employee fails to obtain approval but performs work, he or she must still be compensated for that time, but the employer may address the situation as a disciplinary matter. Employers should carefully consider work schedules for non-exempt employees, and establish policies and train supervisors regarding off-the-clock work to avoid potential violations of overtime requirements.

### **4. Attendance at Receptions, Dinners, and Other Social Events**

Many employers sponsor or host receptions, dinners, happy hours, and other social events. If a non-exempt employee is required to attend a reception, dinner, happy hour, or other social event, that time is treated as compensable time, even if the employee is not performing work that he or she usually performs in the office. Again, it is important to clearly communicate to non-exempt employees what is required and what is not required. In addition, supervisors should be trained not to pressure non-exempt employees to attend an event that is not mandatory.

### **5. Volunteer Activities**

Employers may offer “volunteering” or “team building” opportunities. If such activity is mandatory for non-exempt employees, it must be counted as compensable time even if the activities are held on the weekend outside normal working hours. Or, if the employer requires all non-exempt employees to “volunteer” two hours at a book drive, that is compensable time.

If, however, a non-exempt employee volunteers to work at the employer’s annual dinner outside regular work hours and is not performing work regularly performed by the employee, that can be considered volunteering and does not need to be compensated. For example, a research assistant volunteers to be a greeter at an event on Saturday night, and is not required to volunteer, that is not compensable time. If the volunteering occurs during regular working hours, it is considered compensable time.

### **6. Travel as a Passenger during Non-Shift Hours Where No Work Is Performed**

As a general rule, an employee who travels from home before his or her regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment and is not compensable.

Oftentimes, employees are asked to travel longer distances to attend conferences or other out-of-town events. However, if all of the following conditions are met, even this longer form of travel to a different city is not considered compensable time: the employee is a passenger on an airplane, train, boat, or automobile; the travel is during non-shift hours; AND no work is performed during the travel.

For example, an employee who takes a four-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane need not be compensated for this travel time.

### **7. Travel as a Passenger during Shift Hours**

On the other hand, if an employee travels to an out-of-town conference during shift hours, that employee must be compensated for the commuting time to the conference which exceeds that employee’s regular commute, whether or not he or she performed any work during the commute.

For example, an employee whose regular commuting time is 30 minutes, and who takes a three-hour train ride for a one-day trip to another city during regular shift hours and performs no work on the train, must be compensated for the two-and-a-half hours which are not part of regular commute.

### **8. Work Performed while Commuting**

One frequent area of confusion stems from situations where an employee performs work during his or

her commute. As a general rule, any work which an employee is required to perform while commuting must be counted as hours worked and compensated accordingly. For example, time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or other mode of transportation) to or from work.

It is important for employers to clearly communicate to non-exempt employees when work is and is not required to be performed. Moreover, supervisors should be trained not to give non-exempt employees work to do once the employee's shift ends which must be completed by the beginning of his or her shift the next morning.

### **9. Interns**

Whether an employer must compensate interns for time worked is an often misunderstood topic. Unpaid internships in the public sector and for nonprofit organizations, where the intern volunteers without expectation of compensation, are generally permissible. Importantly, an intern who receives academic credit from his or her educational institution for completion of an internship with an employer will easily qualify as an intern/trainee.

On the other hand, examples of when an intern will not be considered an intern/trainee include: (1) where the intern is used to substitute for regular workers or to supplement the employer's workforce; (2) where, but for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours; and (3) where the intern is engaged in the employer's routine operations and/or the employer is dependent on the intern's work.

### **10. Time Waiting for/Receiving Medical Attention**

Time spent waiting for and receiving medical attention on the premises or at the direction of an employer during an employee's normal working hours on days when he or she is working constitutes hours worked and must be compensated.

For example, if a teacher's assistant feels dizzy during regular shift hours and her supervisor instructs her to lay down for 15 minutes in the employee lounge, this time must be compensated.

### **Conclusion**

Of course, this top ten list only highlights some of the most common issues. Employers must first make sure employees are properly classified as exempt or non-exempt. Remember that not everyone who is paid a salary is exempt. For non-exempt employees, employers should carefully track hours worked. It is the employer's responsibility to keep records of hours worked and wages paid to employees. If the records do not exist, there is a presumption that the employee's assertions are correct. Also, train supervisors to be familiar with overtime requirements for non-exempt employees and to closely monitor hours worked by non-exempt employees. Employers are encouraged to establish clear policies about non-exempt employees working from home or working while traveling, coming in early and staying late, and working beyond their regular schedule to avoid some of the common pitfalls.

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