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DOL Clears Up Travel Time Issue For Employees With No “Normal Working Hours”

Law and the Workplace Blog on **April 13, 2018**

The rules on what kinds of travel time are (and are not) compensable for non-exempt employees are complex. As opposed to exempt employees—who generally receive a salary intended to compensate them for all working time, including time spent in business-related travel—non-exempt employees are often only paid for the particular hours that the law deems compensable. Failure to pay a non-exempt employee for compensable travel time can lead to both straight-time and overtime pay claims.

One travel time issue that has confounded employers relates to business travel involving an overnight stay. Under federal rules, when an employee is required to travel away from home overnight, the travel time that cuts across the employee’s “normal” or “regular” working hours is counted as time worked and should be paid—regardless of whether the travel occurs on a day on which the employee ordinarily works. Conversely, travel that takes place outside the employee’s normal or regular working hours is not counted as time worked and is not paid, regardless of the travel day. Here’s the regulation (29 C.F.R. § 785.39):

> Travel away from home community.

> Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during ***normal working hours*** but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the [U.S. Department of Labor] will not consider as worktime that time spent in travel away from home outside of ***regular working hours*** as a passenger on an airplane, train, boat, bus, or automobile.

The rule is fairly straightforward for employees with "normal" or "regular" working hours. But what about an employee whose hours vary day to day, or from week to week? How do you apply the "travel away from home" rule to that employee? Pay nothing at all for the travel time, on the ground that there are no "normal" or "regular" working hours? Sounds risky. Paying for all of the travel time, if it cuts across *any* hours the employee might work on any day? Sounds costly. There's been scant authority on the issue, until this week.

In an opinion letter issued on April 12, 2018, the DOL's Wage and Hour Division outlined three permissible methods that employers can use to reasonably ascertain an employee's "regular" or "normal" work hours for purposes of the "travel away from home" rule:

- If the employee's time records during the most recent month of "regular employment" records reveal "typical work hours," the employer may consider those as the "normal" hours going forward unless some subsequent material change in circumstances indicates the normal hours have changed.
- If the records do not reveal any normal or typical working hours, the employer may instead choose the average start and end times for the employee's workdays.
- Alternatively, the employer and employee (or the employee's representatives) may negotiate and agree to a "reasonable amount of time or timeframe" in which travel outside of employees' home communities is compensable. On this third option, the DOL cited to a 1964 opinion letter in which the agency approved an employer's use of an employee's average daily number of hours worked as the number of

compensable hours on a travel day, provided the employer and employee agree on this method of determining the “normal” workday for travel time purposes.

The DOL notes that “[t]his is not an exhaustive list of the permissible methods for determining an employee’s normal start times or end times [for purposes of the “travel away from home” rule] … [b]ut when an employer reasonably uses any of these methods …, [the DOL] will not find a violation[.]”

A few other practical pointers for employers on this issue:

First, you can set a different rate of pay for travel time (*e.g.*, a flat fee for a travel day, or an hourly rate for time actually spent in travel that is lower than the rate you pay the employee for productive working hours), so long as (1) you notify employees of the separate rate in advance of the travel, (2) the rate is sufficient to cover the minimum wage for all compensable hours, and (3) the arrangement does not violate any existing contract with the employee.

Second, you can require business travel at times that do not cut across *any* working hours, even if there are no “regular” or “normal” working hours. Such a policy could, predictably, create employee morale issues.

Third, you must always remain mindful of state travel time laws, which may—depending on the state—require payment for certain travel time where the federal rules do not.

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