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DOL Closes Out 2020 by Issuing Travel Time and Live-In Home Health Care Worker Opinion Letters

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The U.S. Department of Labor (DOL) issued two Fair Labor Standards Act (FLSA) opinion letters on December 31, 2020. One of those letters addresses travel time that occurs when employees schedule personal appointments during the workday and perform portions of their work remotely. The other addresses compensation arrangements for live-in home health care workers whose shifts may extend beyond 24 hours.

Both opinion letters were signed by Cheryl M. Stanton, the administrator of the DOL's Wage and Hour Division (WHD).

Travel Time

Opinion Letter FLSA2020-19 demonstrates that not all travel time that occurs during the workday is compensable under the FLSA. It also emphasizes the importance of the DOL's "off-duty" regulation, 29 C.F.R. § 785.16, when making this analysis.

Under what is known as the "continuous workday doctrine," "the period between an employee's first and last principal activities of the day will 'in general' be compensable" under the FLSA. This can trip up employers if they do not pay their nonexempt employees for the time that they spend traveling to a worksite after performing other work or traveling from a worksite prior to performing additional work.

However, under an example provided in the opinion letter, if an employee receives permission from her employer to leave work early to attend a parent-teacher conference and then to perform work at home, the travel time back home is noncompensable, just like a commute home following the regular workday. Similarly, if an employee asks for permission to work from home in the morning prior to attending a doctor's appointment and then goes to the office to continue working, the travel time to the doctor's appointment and then to the office is noncompensable.

The DOL explained that the time spent traveling in these examples is not "worksite to worksite" travel. "The employer is not requiring the employee to travel as part of her work; rather, she is traveling of her own volition for her own purposes during her off-duty time," the opinion letter states. In addition, the travel does not fall under the continuous workday doctrine, according to the DOL,

because it is “off-duty” time. “When an employee arranges for her workday to be divided into a block worked at home and a block worked at the office, separated by a block reserved for the employee to use for her own purposes,” the DOL explained, “the reserved time is not compensable, even if the employee uses some of that time to travel between home and the office.”

The DOL kept the facts very simple in the examples discussed in this opinion letter. In both scenarios, the employees had a one-hour commute to and from the office, and the aggregate travel time to the appointments and to the home or the office totaled one hour. The employees also requested and received permission to work a portion of the day at home to better accommodate their personal schedules.

The DOL noted that “[s]everal [court] decisions that may appear to be to the contrary analyze situations in which employees were potentially required to perform work immediately before commuting to or immediately after commuting from a work site.” The examples presented in the opinion letter did not involve such a situation. The DOL noted that one federal court had “concluded that travel time may be compensable even if the employees were not required to perform work immediately before or immediately after their commute,” but noted that this court did not consider the off-duty regulation.

The DOL’s approach to the examples in the opinion letter comport with common sense and the concept that an employee’s rights need not be at odds with an employer’s interests. If an employee requests and receives time off to engage in personal activities, then traveling to or from those personal activities need not be considered compensable time by the employer. Similarly, if an employee requests and is given the freedom to perform some work at home at whatever time of the day or night the employee pleases, that is unlikely to result in application of the continuous workday doctrine. This opinion letter does not necessarily state a change in the law but rather a clear attempt to clarify compensable travel time with more employees working remotely.

Live-In Home Health Care

Opinion Letter FLSA2020-20 addresses a pay plan for live-in home health care workers who may work extended shifts of more than 24 hours. In this situation, the employer precalculated what the employees would be paid based on their scheduled days and hourly rate and a premium of 1.5 times their hourly rate for hours worked beyond 8 in a day or 40 in a week. In making these calculations, the employer assumed that the entire shift was compensable, except for bona fide meal periods and sleep breaks (of up to eight hours). If employees’ meal breaks or sleep breaks were interrupted for work reasons, however, that time was tracked and resulted in additional pay based on the hourly rate and premium rate formula that the employer and employees had agreed upon.

The DOL treated this as an appropriate method for crediting the employer with meeting its overtime pay obligations under the FLSA. The employees always received 1.5 times their regular hourly rate for their expected hours over 40 based on their schedules, and if they worked unexpected hours, those also were paid at 1.5 times their regular hourly rate.

Employers that want to create a pay plan like this will likely want to confirm that the types of premiums they are paying are properly creditable toward their overtime obligations. Otherwise, the pay plan could result in the employer owing additional overtime. For example, night-shift premiums, hazard pay, and many other types of pay premiums normally must be added into an employee’s total compensation for the workweek in order to determine the employee’s regular rate for overtime purposes.

In addition, special rules exist with respect to the exclusion of sleep time for live-in employees, while other special rules exist with respect to the exclusion of sleep time for non-live-in employees who work shifts of 24 hours or more. As the DOL notes in the opinion letter, “Employees who work shifts of less than 24 hours may not have any sleep time excluded, even if [they are] permitted to sleep during a shift.” Thus, employers may want to take note not only of the nuances associated with calculating the regular rate, but also what constitutes compensable time for FLSA purposes.

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