

Proposed Emergency Regulations Could Change Wage and Hour Landscape for West Virginia Employers

Article By:

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The **West Virginia Division of Labor (DOL)** has proposed emergency regulations that will force nearly all West Virginia employers to change, by December 31, 2014, **a number of common wage and hour practices that comply with longstanding federal regulations.**

Although the DOL's emergency rules purport to adopt vast portions of federal Fair Labor Standards Act (FLSA) regulations, they simultaneously impose several new rules that contradict or otherwise differ from those same federal regulations, particularly as they relate to the determination of what constitutes compensable working time. The new rules will require West Virginia employers to depart from FLSA standards in at least the following areas:

- **Break Time.** Under FLSA, except where "special conditions" exist, an employer must pay for a meal break unless it is at least 30 minutes long, and the employee is free to leave his or her duty post and completely relieved of all duties. Rest breaks that are shorter than 20 minutes must be paid, but in many cases, employees need not be paid for rest breaks lasting more than 20 minutes. Under the new West Virginia rule, all breaks of 29 minutes or less will be compensable.
- **On-Call Time.** Whether on-call time is compensable under FLSA is determined on a case-by-case basis. The more limitations an employer places on an employee's activities and movements while on call, the more likely it is that the time will be compensable. Courts construing FLSA frequently have denied compensation to employees merely because they are required to spend on-call time at home. But under the new DOL rule, an employer who requires an employee to remain on or near the employer's premises, or at the employee's own home, will be entitled to compensation.
- **Sleeping Time.** When an employee's tour of duty is 24 hours or longer, FLSA allows employers to treat up to eight hours of sleeping time as non-compensable, provided that certain conditions exist. Among those conditions is that the employee must be able to get at least five hours of sleep during the scheduled sleeping period, although those hours need not be consecutive. Under the new West Virginia rule, an employer will be able to treat sleeping time as non-compensable only where the employee gets "8 hours of uninterrupted sleep."

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- **Uniforms.** Federal law allows employers to deduct the cost of providing and maintaining employee uniforms, provided that the deduction does not reduce the employee's wage below the minimum wage or cut into required overtime. The new West Virginia regulations state that "[w]hen an employer requires an employee to wear a uniform, the employer shall not take a credit against the employee's wages for the cost of the uniforms or their laundering." It is not clear whether this new regulation is intended to mean that employers must not charge employees for their uniforms, as has been customary for many West Virginia employers in certain industries. But its vague wording gives rise to that possible interpretation.
 - **Training Time.** Under FLSA, an employee is entitled to compensation for attending training sessions unless four criteria are met: 1) attendance occurs outside the employee's regular working hours; 2) attendance is voluntary; 3) the training is not directly related to the employee's job; and 4) the employee does not perform productive work while attending the training session. An employer need not compensate an employee for time spent doing homework or outside study for training unless that homework and studying are required by the employer. Under the new West Virginia rule, the compensability of training will depend entirely on whether the training is required by the employer. If it is, then the training time, and any time the employee spends preparing for the training, must be paid.
 - **Meal Credits.** FLSA regulations permit employers to take a credit against minimum wages and overtime for meals furnished by certain employers to their employees. Meals can only be credited at their "reasonable cost" or "fair value," and cannot include any profit for the employer. The new West Virginia rules concerning meal credits are far more restrictive. They allow an employer who makes meals available to an employee to deduct \$4 per day, provided that the employee works at least 8 hours during the workday and actually eats an available meal. If the employee works fewer than 8 hours during the workday and eats the meal, the employer can deduct \$.50 per hour as a meal credit from the employee's wages for that day. If the employee does not actually eat the meal even though it is available, the employer cannot take a credit.
 - **Lodging Credits.** Similarly, FLSA permits employers to deduct the reasonable cost or fair value of living quarters provided to employees. But under the new West Virginia rules, an employer can only take the credit where "living quarters are a compulsory condition of employment," and the employer provides "adequate and habitable living quarters" that include "heat, light, toilet facilities, hot and cold running potable water, and space for cooking, sleeping, and bathing." Where those requirements are met, the employer is permitted to take a credit of 33 percent of the hourly minimum wage.
 - **Rounding.** Both FLSA rules and the new West Virginia regulations permit employers to round an employee's starting and stopping times as long as the rounding applies on both sides of the normal clock-in time and therefore does not always favor the employer. But while the FLSA rule simply requires that an employer's rounding practices average out so that employees are fully compensated for all the time they actually work, the new West Virginia regulations contain more precise directions for rounding and require that employers have a written policy "that sets forth the interval of time that is the minimum block of time that will be used to calculate time worked or not worked."
 - **Exemptions.** One of the more troubling provisions of the new regulations appears to leave the determination of whether an employer or employee is exempt from state wage and hour law entirely in the hands of the DOL to be resolved on a "case-by-case basis." Although the

new regulations purport to adopt the FLSA rules on exceptions and exemptions, this new regulatory language suggests the DOL plans to chart its own course.

- **Volunteers.** The new West Virginia regulations state that “[a]n employer shall not require or permit an employee to volunteer his or her services in any activity that is a normal and regular part of the employee’s job duties.” The rule under FLSA is similar, but contains exceptions, for example, to allow a teacher who also has a child enrolled in the school to volunteer at the school. There is a comprehensive set of FLSA regulations that explain in detail how federal wage and hour law applies to individuals performing volunteer services for state and local governments. Although the new rules purport to adopt the FLSA volunteer rules, the text of the new West Virginia rule contains no exceptions.
- **Full-time Students.** The new West Virginia rules provide a broad exclusion for full-time students “in a recognized school or college.” Provided the full-time student works “no more than 24 hours in a workweek,” the state wage and hour law will not apply. If the full-time student works more than 24 hours in a workweek, the state law minimum wage and overtime rules will apply. Whether a student qualifies as “full-time” is determined by his or her school. Although the FLSA regulations contain several sets of provisions permitting the employment of students at wages below the federal minimum wage, those provisions are far more limited than the exclusion contained in the new West Virginia rules.
- **Tip Credits.** Because the Legislature has now applied the statute’s tip credit rules to West Virginia’s private employers, a new set of requirements similar to, but different from, FLSA’s tip credit rules will apply after December 31. The state tip credit rules are based on percentages rather than specific dollar amounts. In general, an employer will be able to take a tip credit equal to 70 percent of the state minimum wage for all hours worked by a tipped employee, provided that the employee receives tips equal to the amount of the credit.
- **Preliminary and Postliminary Activities.** The DOL’s new rules require employers to compensate employees for “time an employee spends in preparing to begin work at his or her place of employment, or in preparing to leave work at his or her place of employment, such as changing clothes or washing, when such activities are an indispensable part of his or her work, when such activities are required by law or by the employer, when required by contract, or by the custom and usage of a particular trade.” This is a heavily litigated area under FLSA, and the problems that will be caused by having a state rule that differs from the FLSA rule are limited only by the imagination. Here are a couple of examples:
 - Earlier this week, the U.S. Supreme Court held that the FLSA does not require employers to pay employees for time they spend going through security screenings as they leave work. The Court held that the security screenings were not “integral and indispensable” to the employees’ primary duties of retrieving and packaging goods for shipment. But under the new DOL regulations, those security screenings may well be compensable because, even though they may not be “an indispensable part” of an employee’s work, they nonetheless are required by the employer. Moreover, because the new rules require pay for time during which an employee is “engaged to wait,” which the DOL defines as “time an employer suffers, permits or requires an employee to remain at work and under the employer’s direction and control, even if the employee is not performing work-related tasks,” employer-required security screenings and similar mandates appear to be compensable under the new West Virginia rules.

- FLSA specifically excludes from compensable time any time a union worker spends changing clothes or washing at the beginning or end of a workday as long as the collective bargaining agreement allows that exclusion. Under the new West Virginia rule, an employer who requires union employees to change clothes or wash before or after the workday apparently must count the time as compensable regardless of whether the collective bargaining agreement permits exclusion of the time.
- **Commuting Time.** Federal law has been clear for many years that an employee's normal home-to-work travel is not compensable working time. The DOL's new rules require that employers compensate employees for "time the employee spends traveling to perform his or her job assignments and responsibilities." Although the DOL probably intended this new rule to apply to travel from worksite to worksite during the workday, the language is vague and could reasonably be construed to include commuting time.

The emergency regulations, which the DOL released to the Secretary of State on November 19, 2014, result from changes the Legislature made earlier this year to West Virginia's minimum wage law. Although the Legislature's aim was to raise the state minimum wage, it did so in a way that subjected nearly every West Virginia employer to a law that previously had applied to almost no one in the private sector.

Outcry from employers about the unintended consequences of that change forced the Legislature to amend the law again during a special session. But the amendment was drafted in a way that only delayed many of the consequences of the original amendment instead of repairing them.

The DOL represented in a statement it filed with the Secretary of State that the new regulations are intended to provide employers with "essentially one set of rules to follow in complying with state and federal law." But the contradictions with the FLSA contained in the new rules conflict with that representation. The new set of rules will further confuse West Virginia wage and hour law and impose on employers the requirement to comply with two complicated sets of laws that differ in many important respects.

Because the new regulations are emergency rules, they will become effective without legislative action upon approval by the Secretary of State, or on December 31, 2014, if the Secretary of State does not act. Employers who wish to comment on the emergency regulations should contact John R. Junkins, Acting Commissioner, West Virginia Division of Labor, 749-B Building 6, Capitol Complex, Charleston, West Virginia 25305.

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