

## Third Circuit Refuses to Give Progressive a (Rest) Break on Compensable Flex Time Policy?

Article By:

Laura Lawless

---

On October 13, 2017, the US Court of Appeals for the Third Circuit ruled in a precedential decision that employers are obligated by the Fair Labor Standards Act (FLSA) to pay their employees for breaks of 20 minutes or less, even if they are logged off their computers and free from any work-related duties. The case is *Secretary, United States Department of Labor v. American Future Systems Inc.*, No. 16-2685 (3d Cir. 2017).

American Future Systems, d/b/a Progressive Business Publications, publishes and distributes business publications and sells them through its sales representatives, who are paid an hourly wage plus bonuses based on the number of sales they complete per hour while they are logged onto their workstation computers. Progressive previously gave employees two paid 15-minute breaks per day. In 2009, Progressive eliminated paid breaks but allowed employees to log-off their computers at any time, for any length of time, for any reason, referring to the policy as “flex-time.” Progressive only paid employees for time they were logged off their computers if it was less than 90 seconds, such as bathroom or coffee breaks. The Department of Labor alleged this policy violated the FLSA “by failing to compensate . . . sales representative employees for break[s] of twenty minutes or less . . . .” The district court agreed that 29 C.F.R. § 785.18 created a bright-line rule that *de minimis* breaks of 20 minutes or less are compensable. The company argued on appeal that the time spent logged off does not constitute “work” under the FLSA. Progressive further argued that if employees were paid for short breaks, they could take as many as they please as long as they are under 20 minutes. The court recognized this is a theoretical, but not realistic, possibility.

The court opined that, “The policy that Progressive refers to as ‘flexible time’ forces employees to choose between such basic necessities as going to the bathroom or getting paid unless the employee can sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than 90 seconds. If the employee can somehow manage to do that, he or she will be paid for the intervening period. If the employee requires more than 90 seconds to get to the bathroom and back, the employee will not be paid for the period logged off of, and away from, the employee’s computer. That result is absolutely contrary to the FLSA.” Still, Progressive, which allows employees to do whatever they wish and be wherever they want for periods of twenty minutes or less while logged off their computers, does not constitute “hours worked” and the employer should not have to pay for this time. Except, according to the Third Circuit, that argument

“misses the point of the FLSA’s regulatory scheme.” The court recognized that the “log off” times are clearly “breaks” to which the FLSA applies.

Although employers need not have any break policy, the court rejected attempts by employers to circumvent the FLSA’s mandates by disguising break time as “flexible time.” Short rest breaks during the day should be compensated as hours worked.

© Copyright 2025 Squire Patton Boggs (US) LLP

---

National Law Review, Volume VII, Number 290

Source URL: <https://natlawreview.com/article/third-circuit-refuses-to-give-progressive-rest-break-compensable-flex-time-policy>