

Compensable Time

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Compensable Time

Reference Number: MTAS-1185

Understanding the concept of “hours worked” is crucial to complying with the FLSA. According to the U.S. Supreme Court [Tn. Coal, Iron & R.R. Co. v. Muscodol Local No.123, 321 U.S. 590 (1944)], an employee must be compensated for “all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”

The courts and the U.S. Department of Labor, however, have recognized that insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording working time. 29 C.F.R. § 785.47. The rule applies only where a few minutes of work are involved and where the failure to count such time is due to considerations justified by “operational realities.” Such time is called “de minimis” (i.e., minor or trivial). The Portal-to-Portal Act of 1947 helps clarify the working-time issue. (See the discussion of the Portal-to-Portal Act in this section under Travel Time.)

Employees who, with the knowledge or consent of their employer, continue to work after their shifts are over, though voluntarily, are engaged in compensable working time. The reason for the work is immaterial; as long as the employer “suffers or permits” employees to work on its behalf, overtime compensation may be due. 20 C.F.R. § 785.11. This is true whether the work takes place at the place of business or at the employee’s home. For example, activities such as filling out reports, attending “roll call,” and returning to the station after completing a call are all compensable work if done at the employer’s behest and for the employer’s benefit.

Fringe Benefit Time

Reference Number: MTAS-1186

Fringe benefits provided by the employer are not considered compensable under the act. Fringe benefits include vacation time, holidays, funeral leave, paid jury duty, and paid weather-related closings. The FLSA does not even address these types of fringe benefits. The extent to which an employer provides fringe benefits, or does not provide them, is entirely up to the employer. Time that an employee takes off with or without pay for any provided fringe benefit does not count as compensable time for the purposes of calculating overtime.

Wait Time

Reference Number: MTAS-1187

Whether waiting time is compensable depends on the particular circumstances. The FLSA requires compensation for all time during which employees are required to wait while on duty or performing their principle activities. 29 C.F.R. § 785.15. This is particularly true where waiting periods are of such short duration that employees cannot use them for their own benefit.

Under the regulations (29 C.F.R. § 785.16), waiting time by an employee who has been relieved from duty need not be counted as hours worked, if:

1. The employee is completely relieved from duty and allowed to leave the job; or
2. The employee is relieved until a definite, specific time; and
3. The relief period is long enough for the employee to use the time as he or she sees fit.

A police officer waiting to testify in a court case, a detective waiting for a witness to arrive to be interviewed, and an officer waiting for a tow truck to arrive are all working during their periods of inactivity. The rule also applies to an employee who works away from the employer’s premises. Employees who wait before starting their duties because they arrived at the work place earlier than the required time are not entitled to be paid for the waiting time as long as the employee does not engage in work activity during that time.

DOL has defined “off duty” as:

[P]eriods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his/her own purpose are not hours worked. The employee is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless the employee is definitely told in advance that he or she may leave the job and that the employee will not have to commence work until a specified hour has arrived. DOL W.H. Publication 1459 (May 1985).

On-call Time

Reference Number: MTAS-1188

On-call time is time spent by employees in their own pursuits, usually away from the working premises, when the employee must remain available to be called back in to work on short notice, such as with a police detective. 29 C.F.R. § 785.17. The FLSA requires employers to compensate their workers for on-call time when such time is spent “predominantly for the employer’s benefit.” The regulations state that:

[A]n employee who is required to remain on-call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purpose is working while “on-call.” An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home where he may be reached or carries a pager or cell phone is not working while on-call

On-call time has become a contentious issue with the proliferation of cellular telephones and pagers. Many law enforcement employers require employees to maintain a working telephone to facilitate “call back” to duty in an emergency. Many employees use cellular telephones as their only telephone. Even if the telephone or pager is provided by the employer, requiring the employee to have a telephone or pager does not mean that the employee is “working” while off duty, even if the employee is “on-call,” as long as the employee is free to pursue personal activities during the on-call time.

It is important to note that on-call payments may alter an employee’s regular rate of pay. If the employer chooses to pay the employee for on-call time (for example, a specified amount of money or number of hours to be paid during the period of time the employee is “on-call.”), that would not otherwise be considered hours worked under the regulation. The additional compensation must nevertheless be included in the employee’s rate of pay calculation, thus increasing the hourly rate used to compute overtime pay. Of course, all payment for time actually worked must also be included in the regular rate calculation. 29 C.F.R. § 778.223.

Once the employee arrives at work after being called into service, all working time must be compensated. If this pushes the hours worked above the overtime threshold for the work period, overtime must be paid.

Staff Breaks and Meals

Reference Number: MTAS-1189

Break periods, such as lunch or dinner meals or rest periods, may or may not be compensable depending on whether the employee is relieved from duty and the amount of time allocated for the activity. The FLSA does not require that employees be given rest periods, 29 C.F.R. § 785.18, but if rest periods are provided, they must be counted as hours worked if they last 20 minutes or less [*Mitchell v. Turner*, 286 F.2nd. 105 (5th Cir. 1960; *Mitchell v. Grienez*, 235 F.2nd. 621 (10th Cir. 1956); and *Aeromotive Metal Products, Inc. v. Wirtz*, 312 F.2nd 728 (9th Cir 1963)]. Coffee and snack breaks are compensable rest periods and cannot be excluded as meal periods from hours worked. Whether rest periods that last longer than 20 minutes are compensable depends upon an employee’s freedom during breaks.

A bona fide meal time, when the employee is completely relieved from duty, is not work time. 29 C.F.R. § 785.19. Short periods, such as coffee or snack breaks, are not considered meal time. Of course, if an employee works during the meal, the time is compensable. Whether or not an employee’s meal period can be excluded from compensable working time depends on the employee “freedom meal test.” 29 C.F.R. § 785.19.

Unless all of the following three conditions are met, meal periods must be counted as hours worked:

1. The meal period generally is at least 30 minutes;
2. The employee is completely relieved of all duties. If the employee must sit at a desk and incidentally answer the telephone, as a dispatcher might often do, this would be compensable time; and
3. The employee is free to leave his or her duty station. There are no requirements, however, that the employee be allowed to leave the premises or work site.

Meal time spent out of town on business trips, such as at out-of-town training programs, is not generally compensable time. 29 C.F.R. § 785.39. If, however, an employee works during the meal, such time is compensable.

Any volunteer work done during meal periods must be counted as compensable working time if the employer knows or has reason to believe the work is being performed. If the employer does not know of the work, and the employee's work during meal time is essentially de minimis, no compensation is required. *Baker v. United States*, 218 Cl. Ct.602 (1978).

Training Programs

Reference Number: MTAS-1190

DOL regulations make clear that attendance at a bona fide police academy or other training facility, when required by the employing agency, constitutes engagement in law enforcement activities outlined in 29 U.S.C. § 207(k). Therefore, basic and advanced training is considered part of the employee's law enforcement activities. Time spent in actual training constitutes compensable hours of work.

Time spent studying or in other personal pursuits is not compensable even if the employee is confined to campus, such as at a police academy, 24 hours a day (Wage and Hour Opinion, February 5, 1990). Police officers who attend a police or other training facility are not considered to be on duty during the time they are not in class or training, as long as they are free to use such time for personal pursuits. 29 C.F.R. § 553.226(c).

When officers are assigned to in-service training classes, the time is considered compensable hours of work. In-service pay supplements provided by the state for completing state-mandated in-service training are just that: supplements. The state training supplement payment is not payment for the hours worked. The employer is responsible for compensating the employee for the hours worked during in-service training.

Staff Travel Time

Reference Number: MTAS-1191

Whether travel time is compensable or not depends entirely on the kind of travel involved. Under the Portal-to-Portal Act, the employer generally is not responsible for time spent by the employee in walking, riding, or otherwise traveling to and from the actual place of performance of the principle activities. 29 U.S.C. § 254(a). Excluding normal commuting time, the general rule is that employees should be compensated for all travel unless it is overnight, outside the regular working hours, on a common carrier, or where no work is done. Generally, an employee is not at work until he or she reaches the work site.

An employee who drives a police car home does not have to be compensated for commute time simply because he or she is operating the employer's vehicle, so long as it is for the employee's convenience. *Field Operations Handbook* § 31c01. According to the Wage and Hour Letter, April 13, 1995, an employee does not have to be compensated if all of the following conditions are met:

- Driving the employer's vehicle between the employee's home and the work site is strictly voluntary and not a condition of employment;
- The vehicle involved is the type of vehicle that would normally be used for commuting;
- The employee incurs no cost for driving the employer's vehicle or parking it at home; and
- The work sites are within the normal commuting area of the employer's establishment.

In certain rare emergency situations, the regulations (29 C.F.R. § 785.36) provide that an employee must be compensated for home-to-work travel time. Generally, if an employee, after completing a day's work, is called at home and must travel a "substantial distance" to perform an emergency job, the travel time is compensable.

Out-of-town travel is a bit more complicated because DOL takes the position that out-of-town travel is not ordinary home-to-work travel. Because the travel is performed for the employer's benefit and at the employer's request, the employee must be compensated. Not all the travel, however, needs to be counted as hours worked. DOL specifically permits the employer to exclude the travel time between the employee's home and an airport, bus, or railroad station. 29 C.F.R. § 785.39.

The regulations provide that travel time is compensable work time when it occurs during the employee's regular working hours. DOL does not count as working time overnight travel that occurs outside of regular working hours as a passenger on an airplane, train, boat, bus, or car and where the employee is free to relax. 29 C.F.R. § 785.39. If an employee is required to drive or required to ride while another employee drives, the employee must be compensated for the travel time (29 C.F.R. § 785.41) except when the employee is on a bona fide meal break.

Examples of Compensable Working Time

Reference Number: MTAS-1192

The following are examples of working time for which an employee is entitled to be compensated:

- Caring for tools that are a part of principal activities, such as guns by police officers. *Cooley v. United States*, 26 Wage & Hour Cas. (BNA) 50 (Fed.Cir. 1983);
- Charitable work requested or controlled by the employer. 29 C.F.R. § 785.44;
- Emergency work/travel time. 29 C.F.R. § 785.36;
- Disaster drills, whether voluntary or involuntary, either during or after regular working hours. *Field Operations Handbook* § 31b15;
- Meal periods if (a) employees are not free to leave their posts or (b) the time is too short to be useful to employees. 20 C.F.R. § 785.19;
- Medical attention during working hours at the employer's direction. 29 C.F.R. § 785.43;
- On-call time where liberty is restricted. 29 C.F.R. § 785.17;
- Preparatory work that is a part of the principal activity. *Lindow v. United States*, 738 F.2d 1057 (9th Cir 1984);
- Principal activities: patrol, investigations, etc. 29 C.F.R. § 790.8;
- Rest periods of 20 minutes or less. 29 C.F.R. § 785.18;
- Training in regular duties to increase efficiency. 29 C.F.R. § 785.29;
- Training programs required by the employer. 29 C.F.R. § 785.27;
- Travel (but not performing work) from one work site to another or traveling out of town during working hours. 29 C.F.R. §§ 785.38 and .39;
- Waiting for work after reporting time or while on duty. 29 C.F.R. § 785.15; and
- Cleaning and maintaining police vehicles if the officers are responsible for those tasks. Wage and Hour Opinion Letter, Dec. 30, 1985.

Examples of Non-Compensable Time

Reference Number: MTAS-1193

The following are examples of work-related matters for which an employee need not be compensated:

- Absences (including sick leave, annual leave, holidays, funerals, and weather-related absences). 29 C.F.R. § 778.218(d);

- Athletic contest involvement as a participant, official, or scorer, even if sponsored by the employer, so long as it is voluntary and not a condition of employment. *Field Operations Handbook* § 31b05;
 - Charitable work done voluntarily outside working hours. 29 C.F.R. § 785.44;
 - Holidays on which an employee does not work. 29 C.F.R. § 778.218(d);
 - Jury duty. 29 C.F.R. § 778.218(d);
 - Meal periods involving no duties and lasting one-half hour or longer. 29 C.F.R. § 785.19;
 - Medical attention outside of working hours or not at the direction of the employer. 29 C.F.R. § 785.43;
 - On-call time when the employee merely leaves a telephone number or carries a pager or cell phone and is not restricted. 29 C.F.R. § 785.17;
 - Operating an employer's motor vehicle for the employee's own commuting convenience. *Field Operations Handbook* § 31c02;
 - Training programs voluntarily attended that are unrelated to regular duties and involve no productive work. 29 C.F.R. § 785.27;
 - Travel (a) from home to a work site and vice versa (29 C.F.R. § 785.35), or (b) on overnight trips during nonworking hours except while performing duties or other work. 29 C.F.R. § 785.39; and
 - Waiting time (a) in a paycheck line, (b) to check in or out, or (c) to start work at a designated period. 29 C.F.R. § 790.7(g).
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