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OUTSIDE COUNSEL

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Defining 'Hours Worked' Under the FLSA

The Fair Labor Standards Act (FLSA) requires employers to pay their employees for all hours worked, and to pay overtime for all such hours in excess of 40 per week. Failure to do so can lead to compensatory and liquidated damages for all similarly situated employees, as well as attorneys' fees.

Significantly, company owners, officers, supervisors and managers can be personally liable in certain circumstances. Compliance with the FLSA, therefore, is essential; and understanding the definition of "hours worked" is critical to such compliance.

This article examines the statutory and regulatory sources for such definition, along with several Second Circuit decisions applying those principles, and concludes with a brief discussion of the FLSA's liability and remedies provisions.

The FLSA does not define "hours worked." It does, however, define "employ" as "to suffer or permit to work." (29 U.S.C. §203(g).)

Work, in turn, is "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 and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

Against that background, let us look at the regulations contained in 29 C.F.R. Part 785, as well as the Portal-to-Portal Act (29 U.S.C. §251 et seq.).

Employers must pay for all hours an employee works — even if the employer does not request the work! The employer has the burden of preventing unwanted work, and

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"mere promulgation of a rule" is insufficient, the employer must "make every effort" to enforce the rule. (29 C.F.R. §785.13.) That the employee could have completed the work in less time is no defense.[1]

If the employer "knows or has reason to believe" the employee is working, he must pay for the time. (29 C.F.R. §785.11.) Under appropriate circumstances, constructive knowledge will be imputed; but "[w]hile an employer must pay for [all] work it suffers or permits, an employer cannot suffer or permit an employee to perform services about which the employer knows nothing." *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir.), cert. denied, 525 U.S. 1055 (1998).

> [A]n employer's knowledge is measured in accordance with his duty to inquire into the conditions prevailing in his business ... .
>
> The question then is whether an employer's inquiry was reasonable in light of the circumstances surrounding the employer's business, including existing overtime policies and requirements.

Hellmers v. Town of Vestal, 969 F. Supp. 837, 845-46 (N.D.N.Y. 1997) (citations and quotations omitted).

With the above in mind, let us consider specific categories of time and how they relate to "hours worked."

What Are 'Hours Worked'

Waiting and On-Call Time. Time an employee spends "waiting" may be work depending on the circumstances. In the words of the Supreme Court, "facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).

An employee waiting for work to become available is working, even if completely inactive and even if not required to remain at the work place, but only if such periods are unpredictable, of short duration, and "the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer ... . [W]aiting is an integral part of the job." (29 C.F.R. §785.15.)

On the other hand, "periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked" if the employee knows in advance that he can leave the job and need not return until a specified hour. (29 C.F.R. §785.16.) The regulations give the example of a truck driver to illustrate the difference — if after reaching his destination he must stay with the truck while it is loaded/unloaded he is working during the entire trip. If he is free to leave the truck at the location, he is not working from the time he can leave the location until the time he must return.

The same analysis applies to on-call time. "'On-call' time may, depending on the circumstances, qualify as 'work' under the FLSA ... ." *Brown v. Luk, Inc.*, 1996 U.S. Dist. Lexis 7173 *15 (N.D.N.Y. May 10, 1996). If the employee must remain on the employer's premises or "so

close thereto that he cannot use the time effectively for his own purposes," he is working. An employee who need only be reachable by his employer, in contrast, is not working. (29 C.F.R. §785.17.)

Meal Periods. A bona fide meal period of thirty minutes or more, during which the employee is completely relieved of duty, is not working time. To be relieved of duty, the employee need not leave the employer's premises, as long as he is "otherwise completely freed from duties during the meal period .... The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." (29 C.F.R. §785.19.) For example, an office employee required to eat at his desk is working through lunch — even if he does not perform any active duties.

Lectures, Meetings & Training Programs. Time spent at lectures, meetings or training programs (and similar activities) is time worked unless:

a) attendance is outside the employee's regular work hours;

b) attendance is completely voluntary;

c) the activity is not directly related to the employee's job; and

d) the employee does not perform any productive work.

(29 C.F.R. §785.27.)

Training designed to make an employee "better" at his job is directly related to the job. Training for another job or to acquire a new skill is not directly related, even if performance in the present job improves. (29 C.F.R. §785.29.)

Travel Time. Even in the world of cell phones and the internet, business travel is inevitable. Employees on a one-day assignment in another city are working while traveling to and from that city.

> Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question ....

(29 C.F.R. §785.37.)[2] When an employee must stay overnight, travel time is work time "when it cuts across the employee's workday. The employee is simply substituting travel for other duties." (29 C.F.R. §785.39.)

The Portal-to-Portal Act. Enacted in 1947 following several Supreme Court decisions broadly interpreting the FLSA, the Portal-to-Portal Act excludes from the definition of hours worked:

> (1)walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2)activities which are preliminary to or postlimary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(29 U.S.C. §254(a).)[3]

The net effect of the Portal Act is to require employers to pay only for time that benefits or is controlled by them.

Second Circuit Decisions

Three recent decisions from the U.S. Court of Appeals for the Second Circuit illustrate the court's application of the foregoing principles.

In *Kavanagh v. Grand Union Co., Inc.*, 192 F.3d 269 (2d Cir. 1999), plaintiff was a refrigerator mechanic who had to travel throughout Connecticut and New York to work at some of Grand Union's more than 50 stores. He sued to recover hourly and overtime wages for time spent driving from his house to his first job and from his last job back home. (Grand Union paid him for the time spent traveling between jobs.) The Second Circuit affirmed summary judgment in favor of Grand Union because such time was normal travel to and from work, excluded under the Portal Act.

> Here, 29 C.F.R. §785.35 specifically provides that employers are not required to compensate employees for their "normal travel" between home and work. We interpret "normal travel," as used in this regulation, to refer to the time normally spent by a specific employee traveling to work. The term does not represent an objective standard of how far most workers commute or how far they may reasonably be expected to commute. Instead, it represents a subjective standard, defined by what is usual within the confines of a particular employment relationship.

Id. at 272.

The Court went on to note that although the arrangement struck them as inequitable:

> because this extensive travel was a contemplated, normal occurrence under the employment contract entered into between Kavanagh and Grand Union, 29 C.F.R. §785.35 forecloses Kavanagh's entitlement to compensation under the FLSA.

Id. at 273.[4]

Plaintiff in *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2d Cir.), cert. denied, 525 U.S. 1055 (1998), was a police officer assigned to the K-9 unit, who sought compensation for off-duty time spent training, grooming, feeding and exercising his police dog. Plaintiff claimed that he spent forty-three hours per week engaged in such activities in addition to the two hours per week the department paid him for dog care. Despite finding that these activities were indispensable to the employer's use of police dogs, the district court instructed the jury that the amount of time plaintiff claimed to have spent on them must be reasonable.

The Second Circuit reversed, because the district court:

> inserted the qualification "reasonably necessary ... ." [T]he word "reasonable" is not found in the definition of "work." Rather, the key phrases are "controlled or required," "necessarily and primarily," "integral and indispensable." The difference is significant. An employer may require its employee to perform tasks that appear unreasonable, but which nevertheless are performed necessarily and primarily for the employer's benefit, and for which therefore the employee is entitled to be paid. Conversely, an employee may perform a task that seems reasonable in the context of his work, but which the employer neither required nor controlled, and for which therefore the employee is not entitled to be paid.

145 F.3d at 523 (citations omitted).[5]

In *Reich v. New York City Transit Authority*, 45 F.3d 646 (2d Cir. 1995), the Court reversed the district court's ruling that the Transit Authority had to pay its K-9 officers for the entire time spent commuting to and from work with the dog.

> [T]he activity of commuting involved neither exertion nor loss of time. Although forbidden to use public transportation, the handlers were not required to drive; the only requirement was that the ride be in a private vehicle. And the district court explicitly found that the handlers' commuting time was not substantially increased by their dog-care activities .... While there are occasions where dogs need to be walked or restrained, or the car requires cleaning, during the major part of the commuting time no work is required. The handler merely drives with the dog in the back seat. The mere presence of the dog does not make the commute compensable.

Id. at 651-52.

Time spent actually caring for the dog during the commute, however, was "indispensable to the dog's well being and to the employer's use of the dogs in its business," and thus compensable. Id. at 650.[6] Nevertheless, it was excludable as de minimus.

> The workweek contemplated by §7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Id. at 652 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)).[7]

Liability and Remedies

An unusual feature of the FLSA is personal liability of "any person acting directly or indirectly in the interest of an employer in relation to an employee." (29 U.S.C. §203(d).) Under this provision, a company's owners, officers, managers, and supervisors can face personal liability — without the traditional showing necessary to pierce the corporate veil. The key question is whether the person "possessed the power to control the workers in question, with an eye to the 'economic reality' presented by the facts of each case?" *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (citations omitted).[8]

Those who violate the FLSA face liability for unpaid wages, an equal amount in liquidated damages, and attorneys' fees. Liquidated damages are the norm, not the exception. The employer bears the burden of establishing that the violation was "in good faith" and based upon reasonable grounds for believing that the act or omission did not violate the FLSA. "The burden on the employer is a difficult one to meet, however, and double damages are the norm, single damages the exception." *Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp.2d 215, 222 (N.D.N.Y. 1998) (citing *Reich v Southern New England Telecom. Corp.*, 121 F.3d 58, 71 n. 4 (2d Cir. 1997)).[9]

The statue of limitations is two years, three if the violation is willful. To get the additional year, plaintiff must show "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *RSR Security*, 172 F.3d at 141 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

Conclusion

The FLSA is not a law to take lightly, and only by paying employees for all hours worked can employers comply with it. However burdensome compliance may seem, it is far more prudent than risking liability.

(1) Similarly, the employee's failure to claim the hours is no defense. See *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir.), cert. denied, 525 U.S. 1055 (1998).

(2) The employee must be paid for all hours of the trip, but if he enjoyed a bona-fide meal period such time may be excluded. Additionally, because he ordinarily has to travel from home to his regular job site and vice versa, the time traveling between his home and the train station/airport is not working time. See infra note 3 and accompanying text.

(3) The Portal Act does not actually exclude these activities from "hours worked." Rather, it provides that "no employer shall be [liable] ... on account of the failure ... to pay an employee minimum wages, or ... overtime compensation for or on account of" the listed activities. (29 U.S.C. §254(a).)

(4) Not all home-to-work travel is "ordinary." An employee who returns home after finishing work and then is called out and must travel a substantial distance to perform emergency work is working while en route to the job. (29 C.F.R. §785.36.)

(5) Whether a plaintiff is entitled to compensation is a mixed question of law and fact. The court determines whether the activities in question constitute work, and the jury decides how much time was spent on such activities and how much of that time "was spent with the employer's actual or constructive knowledge." 145 F.3d at 521.

(6) See also *Steiner v. Mitchell*, 350 U.S. 247 (1956) (time spent by employees who worked with caustic chemical in showering and changing clothes compensable); *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) (time spent by butchers sharpening their knives compensable). Cf. *Holzapfel*, 145 F.3d at 524 (if "some of plaintiff's claimed overtime hours ... are on account of personal devotion to the dog, such time spent would not represent compensable work required by the employer or principally for its benefit").

(7) When reviewing a de minimus defense, courts will look at: 1) the practical administrative difficulty of recording the additional time; 2) the size of the claim in the aggregate; and, 3) whether the employees performed the work on a regular basis. *Reich*, 45 F.3d at 652.

(8) The Second Circuit affirmed liability of a labor consultant who owned fifty percent of the company and, among other things: 1) had authority to hire employees; 2) occasionally controlled their conditions of employment; and, 3) ordered the company to pay workers as employees rather than independent contractors. Cf. *Johnson v. A.P. Products, Ltd.*, 934 F. Supp. 625 (S.D.N.Y. 1996) (dismissing claims against individual where complaint did not allege that she exercised control over the acts or omissions in question).

(9) There is also criminal liability:

> Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both.

(29 U.S.C. §216(a).) Despite the continuing validity of this provision, the latest reported decisions in the Second Circuit involving criminal prosecution for an FLSA violation are from 1969. See *U.S. v. Stanley*, 416 F.2d 317 (2d Cir. 1969) (affirming conviction of president of company); *U.S. v. Drago*, 1969 U.S. Dist. LEXIS 10622 (May 13, 1969) (individual employer convicted).