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Recent Department of Labor Opinion Letters: Pay for Training and Travel

In November 2020, the U.S. Department of Labor (DOL) issued back-to-back opinion letters in response to scenarios posed as to whether certain employee trainings and travel time is required to be treated as compensable working hours under the Fair Labor Standards Act of 1938 (FLSA), ch. 676, 52 Stat. 1060.

Voluntary Training Programs

An employer requested an opinion from the DOL regarding the compensability of voluntary training sessions offered to its employees. DOL Wage & Hour Op.Ltr. No. FLSA2020-15 (Nov. 3, 2020) [https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_11_03_15_FLSA.pdf] . Here, the employer provided funds to each of its employees for continuing education, but attendance at any training was entirely voluntary. Employees gained no work-related benefit from attending a continuing education class, nor did they incur any penalty for failing to do so. If an employee chose to attend such a training during working hours, the employer required the employee to utilize their paid time off. If the training occurred after work, no compensation was provided. The DOL noted that these continuing education trainings were distinct from the compensable in-house training that previously had been mandated by the employer.

In the opinion, the DOL initially highlighted that its regulations provide that attendance at lectures, meetings, training programs, and similar activities do not need to be counted as working time (*i.e.,* compensable time) if the following criteria are met:

1. Attendance is outside of the employee's regular working hours.

2. Attendance is in fact voluntary.

3. The course, lecture, or meeting is not directly related to the employee's job.

4. The employee does not perform any productive work during such attendance. 29 C.F.R. §785.27.

As to the third criterion above, the regulations further recognize two key instances when training time may be excluded from an employee's compensable working time, even though the training directly relates to the employee's job. First, the regulations recognize that "special situations" exist when an employee's time attending lectures, training sessions, and courses of instruction is not regarded as hours worked, including when an employer establishes as an employee benefit an instructional program that corresponds to courses offered by independent bona fide institutions of learning. In this situation, voluntary attendance at such a course outside of working hours would not be considered hours worke even if the training session was directly related to the employee's job or paid for by the employer. Second, the regulations recognize that if an employee on his or her own initiative attends an

independent school, college, or trade school after hours, that time is not considered hours worked even if the courses are related to his or her job.

Considering the above, the DOL opined in this letter that when an employee used the continuing education funds for a training directly related to the employee's job and that went towards the employee's licensure requirements, but such training was voluntary and was completed after normal working hours, this did not need to be treated as compensable time under the DOL's "special situation" regulation. Even though the training could have been completed during normal hours, the DOL determined this fact to be immaterial for purposes of determining whether the time was compensable. The DOL went on to note that a training does not need to fulfill an employee's professional licensing requirement for it to be excluded from hours worked under the FLSA, as employers may offer its employees a training benefit that corresponds to courses offered by "independent bona fide institutions of learning." 29 C.F.R. §785.31. The DOL will consider a course to meet this standard if, for example, the course content is not tailored to any peculiar requirements of a particular job held by an individual employee and the skill or knowledge provided through the training would enable the employee to gain or continue employment with any employer.

The DOL also noted that if an employee travels to attend a training conference that is not considered to be work time (*i.e.,* constitutes a "special situation"), the time spent traveling is also excludable from work hours as personal travel time. Travel done at an employee's option, even if during hours that were normally part of the employee's workday, need not be considered hours worked under the FLSA and thus does not need to be compensated by the employer.

The DOL further noted that an employee's participation during regular work hours in a training program that directly relates to the employee's job is compensable time under the FLSA. Simply because a training is voluntary and can be completed outside of regular working hours is immaterial because the DOL's regulations provide that "[w]ork not requested but suffered or permitted is work time." 29 C.F.R. §785.11. While there are two circumstances in which attendance at a training program directly relating to an employee's job would not qualify as work time (outlined above), both scenarios address voluntary attendance that occurs *outside* of regular work hours. The DOL states that an employer may establish a policy to prohibit attendance at voluntary training during regular working hours.

In response to the DOL's position on the compensability of voluntary training time, and in order to avoid paying wages for time spent completing such training, employers offering this type of continuing education benefit for its staff should strongly consider implementing a policy prohibiting employees from completing the voluntary training sessions during their normal work hours.

Travel Time

A separate employer requested an opinion from the DOL as to whether travel time for nonexempt (*i.e.,* hourly) employees is compensable time under the FLSA. DOL Wage & Hour Op.Ltr. No. FLSA2020-16 (Nov. 3, 2020) [https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_11_03_16_FLSA.pdf] . The employer, a construction company, has jobsites in various locations, but stores its trucks at the principal place of business. Certain employees (foremen) are required to travel to this location to retrieve a truck, drive to the jobsite, and then return the truck to the principal place of business at the end of the day. Other employees (laborers) can choose to drive directly to their jobsite or drive to the principal place of business and ride to the jobsite with the foreman retrieving the truck. In some instances, the jobsite is close to the principal place of business; however, in others, the jobsite is quite far from the principal place of business, so the employer pays employees for hotel accommodations and provides a per diem meal stipend.

The DOL first noted that consistent with the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, an employee's time traveling to/from the actual place where the employee's principal job activity will be

performed is generally not compensable time when the travel occurs before the employee starts or after the employee stops their principal activity. However, the DOL has previously opined that required travel be counted as hours worked when an employee is required to report to a meeting place to receive instructions, to perform work there, or to pick up tools. In order to be compensable, the activity must be "integral and indispensable to the principal activities that [the] employee is employed to perform," or, in other words, must be an "intrinsic element" of the employee's principal activities and one the employee "cannot dispense" with if the employee is to perform the principal activities.

With respect to the employees required to retrieve a company truck at the principal place of business each day, the employees' travel time between the principal place of business and the jobsites was considered by the DOL to be compensable under the FLSA. Because the company needed the trucks at its jobsites to transport tools and materials, and the trucks needed to be stored at the principal place of business when not at a jobsite, an employee's retrieval and return of the truck was "integral and indispensable to the principal activities" he or she is employed to perform, making the travel time between the locations compensable time. However, with respect to the travel time for the employees not required to retrieve the trucks each day (*i.e.,* the laborers), their choice to meet the foreman at the employer's place of business and from there ride in the truck to the jobsite did not transform their commute into compensable worktime.

Regarding the scenario in which the employees are away from home overnight when working at a remote work site, time an employee spends driving to/from the remote location at the beginning and end of the job is compensable time if the travel cuts across the employee's normal work hours, even if they are traveling on what would otherwise be a non-workday. However, if the employee is a passenger while traveling to the remote work site, whether the travel time is compensable depends on when the employee travels. If the employee travels as a passenger outside of normal working hours, the DOL would not consider this time compensable. But if the employee travels to the remote jobsite as a passenger during his or her normal work hours, even if not on normal workdays, the time would be compensable under the FLSA.

If an employer offers to transport employees to the remote work site in the company trucks, but an employee chooses to drive his or her own vehicle, the employer may count as compensable work time either (1) the actual amount of compensable time the employee accrues in driving to the remote work site or (2) the amount of time that would have accrued during travel in the truck. The DOL notes that its regulations allow an employer to control travel costs by offering public or private transportation for employees to a remote jobsite on its preferred schedule. Whether or not employees accept the offer or decline in favor of driving themselves, the offer allows the employer to count as compensable time either the time the employees' travel takes or the time that would have been considered compensable if the employees had accepted the offered transportation.

While ordinary travel to/from work is not normally considered compensable time under the FLSA, employers with unique working situations should be cognizant of travel time compensation requirements, particularly when employees are required to travel between work locations to perform their principal activities.

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