Ensuring Fair Pay Standards – What Constitutes Employee Work?

Building on what was covered in PDR's Issue Brief #1 (August 2008) -- Is the Risk Worth It?

Complying with the Fair Labor Standards Act (FLSA) -- there can be much room for dispute between employers and employees as to what constitutes "hours worked." To maintain fair compensation practices, remain in compliance with labor laws, keep good employee morale and avoid possible litigation, employers should pay attention to what is considered payable and what is not when it comes to employee work.

Background

The FLSA never actually defines the phrase "hours worked." The closest the law comes to doing so is to describe the term "employ" as: "to suffer or permit to work." The U.S. Supreme Court has filled this gap, to some extent, with a two-point test for determining what qualifies as work:

- Whether the activity is controlled or required by the employer; and
- Whether the activity is pursued necessarily and primarily for the benefit of the employer's business.

At minimum, employee work subject to payment includes all the time an employer requires an employee to be on work premises, on duty, or at a prescribed workplace. However, an employer must also accurately record and pay for work that is simply "permitted," even if it does not require or request the work. For example, usually an employer will have to pay for the time an employee continues working beyond the end of his or her shift; the employer should either pay for this sort of work, or prevent the work from being done.

3051 W Maple Loop Dr, Ste 101 Lehi, UT 84043 P 801.404.5241 F 801.768.8386
www.pdrutah.com

Flashpoints

It is impossible to cover in this briefing all the many different and often complex rules and interpretations related to "hours worked." That said, some of the more common problem areas (potential flashpoints) are discussed below.

A. Waiting Time and On-Call Time

1. Waiting Time. An employee's time spent waiting for something to happen or for something to do can be compensable work time. The employee must be compensated if they are considered (using legal terminology) "engaged to wait" -- for example, unpredictable periods of inactivity while an employee is on duty, such as standing for another assignment during a shift, are usually regarded as being "engaged to wait." On the other hand, casual pick-up or same-day workers who show up on their own at a job site in the hope of being hired for the day are usually considered "waiting to be engaged" and need not be paid for this time.

2. On-Call Time. An employee who is not required to remain on your premises and who can use the "idle" on-call time predominantly for his or her own benefit (even if required to carry a beeper) generally need not be compensated for that time.

B. Preliminary and Postliminary Activities

In 1947, Congress passed a law called the "Portal-to-Portal Act" (PPA) that defined two categories of activity that do not count as hours worked if they occur before the employee starts, or after the employee stops, performing the "principle activity or activities" he or she is employed to perform.

These categories are:

Walking, riding or traveling to and from the place where one performs his or her principal activities; and

Activities which are "preliminary" or "postliminary" to the employee's principal activities.

3051 W Maple Loop Dr, Ste 101 Lehi, UT 84043 P 801.404.5241 F 801.768.8386
www.pdrutah.com

Example: Jose works as a ride attendant at a theme park. Every day, he parks his car in the employee lot and then waits for and boards an employee tram for a 15-minute trip to his work location on the other side of the park. He waits for and rides the tram back to the employee lot at day's end. Even though Jose spends a total of between 30 and 40 minutes in these activities each workday, the time does not count, per FLSA regulations, as hours worked.

Example: During his shift, Jose wears a bright orange theme park shirt and a bright green pair of uniform pants. He can wear these clothes to and from home if he wants, but he's embarrassed for anyone outside the park to see him dressed like that. When he gets to his work location, he changes into these clothes. He changes out of them before he leaves his work location at day's end. Because Jose could wear the clothes to and from home if he wanted, these are preliminary and postliminary activities, which do not count as FLSA hours worked.

Note: It should be noted, however, that the PPA also says that time falling within one of these categories will be counted as FLSA hours worked if there is a contract, custom or practice of treating the time as compensable.

The PPA also does not say specifically what constitutes an employee's "principle activities." The U.S. Department of Labor (USDOL) Wage and Hour Division and the courts have filled this gap, saying generally that principle activities are those activities an employee is employed to perform, as well as everything the employee does that is an integral part of those activities.

Example: Chad works on a tool-and-die machine. Each day, before he starts producing anything on his machine, he spends time oiling its parts and wiping off metal shavings from the previous day's work. This maintenance is an integral part of his principal activity and counts as compensable hours worked just as much as the time he spends making things.

3051 W Maple Loop Dr, Ste 101 Lehi, UT 84043 P 801.404.5241 F 801.768.8386
www.pdrutah.com

C. Commuting and Travel Time

Travel-time problems can be among the most-complex of all "hours worked" issues. Whether, and to what extent travel must be counted as hours worked, frequently can be evaluated only in the context of specific facts and circumstances.

Normal commuting to and from work is typically exempted -- although different rules might apply if an employee commutes in the employer's vehicle.

Travel between a "normal" workplace, such as an office, and another place of assignment, usually is counted as hours worked, as is travel between one assignment and another during a workday.

Relevant case law (29 C.F.R.785.38) related to employee travel time is excerpted below:

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to- work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F.)

Want to learn more? Take steps to ensure FLSA compliance?

Please Contact Us
Kyle Weston / Director of Human Resources / 801.404.5241

3051 W Maple Loop Dr, Ste 101 Lehi, UT 84043 P 801.404.5241 F 801.768.8386

www.pdrutah.com