WORKING TIME UNDER THE FAIR LABOR STANDARDS ACT

I. INTRODUCTION

Under the Fair Labor Standards Act ("FLSA"), non-exempt employees generally must be paid the minimum wage of $5.15 an hour for all hours worked and overtime at time-and-one-half the regular rate of pay for all hours worked in excess of 40 hours per week. Thus, it is all-important for employers and employees to understand the definitions of "work" and "hours worked" (also called "working time"), so they can correctly compensate their workers.

Neither the FLSA nor the regulations of the Department of Labor ("DOL") provides a concise definition of these key terms. The U.S. Supreme Court originally stated that employees subject to the FLSA must be paid 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 and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944). Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all cases of employment in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944).

Activity can be "work" regardless of whether the employer has requested that it be performed or not. If an employee has been "suffered or permitted" to work, he must be compensated. DOL's regulations state:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.11.[1] The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked. 29 C.F.R. § 785.12.

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[1] This regulation, and many of the other regulations quoted in these materials, cites numerous

In light of this "suffered or permitted" rule, it is incumbent on management to exercise strict control over its employees and to see that work is not performed if management does not wish that it be performed. 29 C.F.R. § 785.13. Merely promulgating a rule against unauthorized work will not be sufficient. It is incumbent upon management to ensure enforcement of the rule.

The pages that follow address some of the most common "working time" questions that arise. Each of these working time issues involves only non-exempt employees. Exempt executive, administrative, and professional employees usually are paid on a salary basis and do not require additional compensation (although in some instances additional compensation may be paid to such workers). Accordingly, the discussion that follows is limited to non-exempt employees.

II. WAITING TIME

Employees must be compensated for all waiting time while on duty unless: (1) the employee is completely relieved from duty and allowed to leave the job, or (2) the employee is relieved until a definitely specified time, and the interim period is long enough for the employee to use as he or she sees fit.

Thus, whether waiting time is time worked under the FLSA depends upon the circumstances. The determination involves scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all other relevant circumstances. 29 C.F.R. § 785.14. As the Supreme Court pithily phrased it, the question to be answered is whether the employee is engaged to wait or waiting to be engaged. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

DOL's regulations define "On duty" as follows:

> A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, [a] fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is

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decided cases that purportedly support DOL's interpretation of the FLSA.

> unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.

29 C.F.R. § 785.15.

In contrast, "Off duty" is defined as:

> (a) *General.* 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. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.
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> (b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged.

29 C.F.R. § 785.16.

The effect of these rules is illustrated by two cases decided by the Deputy Secretary of Labor (sitting as the Board of Service Contract Appeals) under the Service Contract Act, 41 U.S.C. § 351 *et seq.* (The SCA is a wage-hour law covering Government service contractors, and it shares many principles in common with the FLSA.) In *Sidney W. Johnson*, 81-SCA 1390 (Dep. Sec'y of Labor, September 28, 1990), the principal issue was the contractor's obligation to pay for "layover time" for drivers on a mail delivery contract where the drivers waited either 2 or 4 hours between deliveries in small rural towns with very few amenities. The Deputy Secretary upheld the contractor's obligation to pay for the layover time, on the basis that the employees did not have "a reasonable opportunity to use the time effective for [their] own purposes." While they were free from other duties, the

small rural town in which they were laying over did not afford them opportunities to utilize their own time. In *Joy R. Manning*, 82-SCA-136 (Dep. Sec'y of Labor, September 28, 1990), the layover time was 9 hours. Again, however, the Deputy Secretary decided that the layover period was compensable time in light of the lack of amenities available in the small rural town.

In a case decided under the FLSA, nurses who were placed on standby duty from 8:00 pm to 6:00 am after completing a full shift were at work, even though they were provided sleeping, living, bath and kitchen facilities. *Service Employees Int'l Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994).

III. ON-CALL TIME

If employees must remain on the employer's premises or so near that they cannot use the time freely, this is compensable working time. If employees can come and go, though they must leave a telephone number or wear a beeper or pager, the time usually can be excluded. Employees whose work requires them to regularly be on-call should be provided with beeper equipment at the employer's expense.

The regulations state, with respect to on-call time, that:

> An 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 purposes 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 or with company officials where he may be reached is not working while on call.

29 C.F.R. § 785.17.

There have been numerous cases regarding the compensability of time spent on-call. In each of these cases a key question is how restricted the employee is in the use of time spent "on call." For example:

- Detectives who were on stand-by for one week during a strike, who had to leave their phone numbers or carry beepers, who could not consume alcohol, and who had to stay in town nevertheless did not have to be compensated because the time was "not used predominately for the employer's benefit." *Birdwell v. Gadsden*, 970 F.2d 802 (11th Cir. 1992). Even employees who did not have beepers and thus had to stay near a telephone could not claim to be restricted since they were allowed to own and rely upon beepers. Many of their colleagues even had no trouble working two jobs under such an arrangement.

- A single repair technician on call via beeper 24 hours a day, 365 days a year did not have to be compensated because he could use the time effectively for his own purposes. *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991).

- An ambulance dispatcher required to remain at home from 5:00 p.m. to 8:00 a.m. to respond to calls did not have to be compensated for these hours because she was free to use the time as she pleased. *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989).

- Employees who had to monitor radio 24 hours a day and respond immediately to emergencies had to be compensated for time spent on call. *Cross v. Arkansas Forestry Comm.*, 938 F.2d 912 (8th Cir. 1991).

- Firefighters who had beepers 24 hours a day and had to respond within 20 minutes had to be compensated for their on-call time. *Renfro v. Emporia*, 948 F.2d 1529 (10th Cir. 1991).

- Mechanics on a rotating call-in schedule who had to respond within 10 minutes when called did not have to be compensated for time spent on call. *Owens v. Local No. 169*, 971 F.2d 347 (9th Cir. 1992).

- Probation officers who had to live on the premises were at work, even though actual calls were infrequent and employees could trade on-call time and could engage in personal activities. *Service Employees Int'l Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994).

Unfortunately, it is not always possible to reconcile the decisions made by different courts. In some cases, differing results reflect slight factual differences. In other cases, the different jurisdictions simply disagree.

No single factor determines whether on-call time is compensable; instead, certain closely related facts have traditionally influenced the courts in their review of employers' on-call policies. Among those factors are:

- The terms of the employment agreement, if any;

- The physical restrictions placed on an employee while on call, if any;

- The maximum period of time allowed by the employer between the time the employee was called and the time he reports back to work ("response time");

- The percentage of calls expected to be returned by the on-call employee;

- The frequency of actual calls during on-call periods;

- The actual uses of the on-call time by the employee; and
- The disciplinary action, if any, taken by the employer against employees who fail to answer calls.

The underlying inquiry concerns the amount of freedom enjoyed by the employee while on call and whether this measure of freedom allows this on-call time to be effectively used by the employee for his or her own purposes. Some minor restrictions on this freedom do not trigger compensation requirements. However, the more restrictive the on-call policy is, the more likely that a court will conclude that the on-call time is compensable working time.

IV. TRAINING TIME

No compensation is required for training programs and lectures if attendance is outside regular working hours, is voluntary, results in no productive work, and is not directly related to the employee's job. 29 C.F.R. § 785.27. Even if the training is clearly related to the employees' job, it still is not compensable if it corresponds to courses offered by independent bona fide institutions of learning and is voluntarily attended by an employee outside of normal working hours. 29 C.F.R. § 785.31. Attendance is not voluntary if it is required by the employer. It also is not voluntary if, in fact, the employee is given to understand or led to believe that his present working conditions or continued employment would be adversely affected by non-attendance. 29 C.F.R. § 785.28.

Training directly related to an employee's job is defined as:

> The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or for a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

29 C.F.R. § 785.29. Thus, for example, in a Wage-Hour Opinion dated July 31, 2001, DOL stated that to determine whether time that nurses spent at educational conferences was

compensable, "it is necessary to determine if attendance at the conferences trains the nurses for a new position, as opposed to providing training to enable them to perform their current duties more effectively."

If an employee, on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer, even if the courses are related to the job. 29 C.F.R. § 785.30. The same is true regarding state-required training, e.g., bus driver relicensing courses. Because such training is of general applicability and is not tailored to meet the particular needs of individual employers, it is not compensable. W.H. Opinion dated May 3, 2001.

Time spent in on-the-job training, for example, when police trainees "ride-along" in patrol cars, generally is compensable. W.H. Opinion dated May 22, 2001; W.H. Opinion dated February 16, 2001. However, DOL does have special rules regarding *apprenticeship training*. In general:

> As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:
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> (a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and
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> (b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

29 C.F.R. § 785.32.

V. TRAVEL TIME

Home to work travel time generally is not compensable. 29 C.F.R. § 785.35. Under the Employee Commuting Flexibility Act, P.L. 104-188, § 2102, August 20, 1996 (amending Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a))--

> [T]he use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be

> considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

DOL has explained in a Wage-Hour Opinion that:

> The legislative history of this enactment, House Report 104-585, 104th Cong., 2d Sess. (May 20, 1996), indicates the intent of the Congress that the vehicle involved be of a type that does not impose "substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting." For example, an automobile, a pick-up truck, a van or a mini-van would not normally involve substantially greater difficulties to operate, even if modified to carry tools or equipment, including having no passenger seats. The fact that a vehicle displays permanently-affixed decals or other advertising does not change the analysis. On the other hand, we would consider the following types of vehicles, by their very nature, to involve substantially greater difficulties to operate than a vehicle normally used for commuting: "18-wheelers," truck-mounted cranes, truck-mounted drilling rigs, concrete trucks, and trucks equipped to haul other heavy equipment. Additionally, if the employee is required to drive a different route than normally used for commuting (due to such vehicular restrictions as weight allowances on bridges, size allowances in tunnels, or chemicals transported), we would consider the vehicle to impose substantially greater difficulties to operate than a vehicle normally used for commuting.

W.H. Opinion dated April 18, 2001.

In an Opinion dated January 27, 1969, the Wage-Hour Administrator ruled that employees who are furnished transportation to the work site solely for their convenience are not working while traveling; however, the *driver* of the vehicle is working while traveling, and the payment he receives for the travel time must be counted in his regular rate for overtime purposes. *See also* W.H. Opinion dated Jan. 18, 1973.

By contrast, traveling from one work site to another all in a single day's work is compensable time. Where the employee has been called back to work after going home, such time is possibly compensable since the Labor Department has taken no position on this issue. The regulation states:

> There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

29 C.F.R. § 785.36.

Out-of-town travel presents a very tricky problem. As a general rule, employers need not pay for travel time if *all* of the following conditions are met:

- The trip is overnight;
- Is made on a common carrier;
- Outside of regular work hours; and
- No actual work is performed during the time spent traveling.

Employees who drive themselves on an out-of-town trip are at work regardless of the time of day unless offered public transportation by the employer. Non-exempt employees who travel by plane, bus, boat, railway or other common carrier, or as passengers in a car, need *not* be paid for the time spent traveling to the station or terminal; they must, however, be paid for all travel time except meal time if the trip is for one day. When employees travel for more than one day (i.e., usually overnight), they must be paid for all traveling done during normal working hours (including those same hours on what is otherwise a non-working day, such as Saturday, Sunday and holidays). However, passenger travel outside of regular working hours while away from work more than one day is not compensable time. Thus, it may be advantageous to book employees to travel overnight, i.e., outside of regular working hours, as passengers on planes, buses and railroads.

VI. REST PERIODS

Rest periods are counted as compensable working time if they last 20 minutes or fewer. DOL's regulations state:

> Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against

> other working time such as compensable waiting time or on-call time.

29 C.F.R. § 785.18. Thus, short coffee, smoking or bathroom breaks are usually compensable.

VII. MEAL TIME

For meal times to be excluded from working time and hence be non-compensable, they must generally be at least 30 minutes long; *and* the employee must be relieved of all duties, including answering the telephone; *and* the employee must be free to leave his or her duty post. It is not necessary that the employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. All employees should be encouraged, at the very least, to leave their work-stations, and to perform no work tasks during lunch time. Assigned lunch or meal periods for each employee should be conspicuously posted in the work location (or the employee notified personally) and adhered to strictly. 29 C.F.R. § 785.19.

Specifically, DOL's regulations state:

> (a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.
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> (b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

29 C.F.R. § 785.19.

The general requirement for a meal period of at least 30-minutes is not absolute. DOL has stated that where the employer and employees agree that a shorter bona fide meal period is sufficient and the facts of the particular situation demonstrate its sufficiency, it is DOL's opinion that even an agreed upon period of fifteen minutes would be adequate. W.H. Opinion dated September 25, 2000. In that particular case, readily accessible lunchroom facilities were located in all areas of the plant, and DOL confirmed by employee interviews that all employees either brought their own lunch or purchased it from vending machines located in the lunch rooms. The building had numerous lunchrooms, so no

employee was more than about a minute's walk from a place to eat. In addition, there were no eating establishments nearby, and DOL estimated it would take more than half an hour for employees to drive to a restaurant to eat. Also, the employees in that case requested the shortened lunch break because it both served as an adequate meal period and allowed them to end the day earlier.

VIII. SLEEPING TIME

Under certain conditions, an employee is considered to be working even though part of his time is spent in sleeping or in certain other activities. 29 C.F.R. § 785.20. Specifically, if an employee's tour of duty is less than 24 hours, then the time he or she is allowed to sleep on the job is still working time. On the other hand, if the tour of duty is 24 hours or longer, then, under some circumstances, up to 8 hours may be excluded from compensable working time if the employee is allowed to sleep.

Where an employee has a shift shorter than 24 hours the regulation states:

> An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. [sic] It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime.

29 C.F.R. § 785.21. In the private sector, and for public sector employees other than those involved in public safety, the regulation requires the following where an employee is on duty for 24 hours or more:

> (a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.
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> (b) *Interruption of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours

> worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

29 C.F.R. § 785.22.

Public safety employees who use a special work schedule provided by 29 U.S.C. § 207 (k) may be credited with sleep time only if their work schedule *exceeds* 24 hours of consecutive duty. Consequently, public sector employers need to schedule police and firefighters who work such special schedules to work periods of 24 hours and ten minutes if they wish to exclude the sleep time.

IX. EXAMPLES OF COMPENSABLE WORKING TIME

The following are examples of working time for which a non-exempt employee is entitled to receive compensation:

- Time spent by budget or fiscal employees required to remain at work until an official audit is finished;
- Caring for tools that are a part of principal activities, such as fire hoses by firefighters and guns by police officers;
- Changing clothes, if required by the nature of work;
- Charitable work requested or controlled by the employer;
- Cleaning and oiling machinery;
- Driving van pools when the driver is chosen by the employer and under the control of the employer;
- Fire drills or other disaster drills, whether voluntary or involuntary, either during or after regular working hours;
- Grievance assistance (under a union agreement to handle worker complaints) during the time an employee is required to be on the premises, unless a contract provides otherwise;
- Labor-management committee meetings on daily operations or contract interpretations, unless a union contract provides otherwise;
- Make-ready work;

- Meal periods, if: (1) employees are not free to leave their posts; or (2) the time is too short to be useful to employees;

- Medical attention during working hours at the employer's direction;

- On-call time where liberty is restricted;

- Preparatory work which is part of the principal activity;

- Principal activities;

- Rest periods of 20 minutes or less;

- Show-up time of 10 or 15 minutes, if the employees are required to remain on the premises that long before being sent home;

- Stand-by time during short plant shutdowns;

- Training in regular duties to increase efficiency;

- Training programs required by employer;

- Traveling (but not performing work) from one work site to another or traveling out of town during work hours;

- Cleaning and laundering uniforms or other distinctive clothing required by the employer, at least to the extent it cuts into the minimum wage;

- Waiting for work after reporting time or while on duty; and

- Washing up or showering, if it is required due to the nature of the work.

X. EXAMPLES OF NON-COMPENSABLE TIME

The following are examples of activities for which a non-exempt employee need *not* be compensated (unless there is an agreement, policy or practice to the contrary):

- Absences (including sick leave, annual leave, holidays, funerals and weather-related absences);

- Athletic contest involvement as a participant, official, or scorer, even if sponsored by the employer, so long as voluntary and not a condition of employment;

- Changing clothes, if the change is for the employee's convenience;

- Charitable work done voluntarily outside of working hours;
- Clothes changing at home;
- Grievance procedures classified as non-paid by a union contract;
- Jury duty;
- Labor-management committee meetings on internal union affairs, unless a union contract provides otherwise, and labor-management committee meetings classified as unpaid time by a union contract;
- Meal periods involving no duties and lasting one-half hour or longer;
- Medical attention outside of working hours, or not at the direction of the employer;
- Operation of an employer's motor vehicle for employee's own commuting convenience;
- Residence on the employer's premises if free for personal pursuits;
- Sleeping time up to eight hours under a contract if the tour of duty is 24 hours or longer (or more than 24 hours for public safety workers);
- Shutdowns for regular, customary equipment maintenance where the employee is free to leave the premises for a period of time sufficient to use for own purpose;
- Trade school attendance, which is unrelated to present working conditions;
- Voting time, as long as state laws do not require compensation;
- Waiting time: (1) in a paycheck line; (2) to check in or out; and (3) to start work at a designated period; and
- Washing up or showing under normal conditions.

XI. STARTING AND QUITTING TIME

Non-exempt employees should be officially notified of the specific time prior to which they may not start work each day, and of the departure time beyond which they shall not be permitted to work. This will help prevent questions in the future about whether an employee was on-duty at a certain time and must be paid for that time.

XII. DE MINIMIS RULE

The courts and DOL 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. This rule applies, however, only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. Such time is considered *de minimis*, i.e., minor or trivial. This concept was first introduced by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946), where the Court stated: "when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Id.* at 692. According to DOL regulations, an employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time. If, however, an industry has established the practice of recording an employee's starting and stopping time to the nearest five minutes or to the nearest one-tenth or quarter of an hour, this practice will be accepted by the Wage and Hour Division for enforcement purposes. However, in the absence of such a practice, compensation as little as one dollar or time of ten minutes is not considered *de minimis*.

The difficulty in this area is determining what amount of time is legitimately *de minimis* and what constitutes compensable working time. The U.S. Claims Court has held that as little as 15 minutes per day is *not de minimis, Whelan Sec. Co. v. United States,* 7 Cl. Ct. 496 (1985), and that the employee must be properly compensated. DOL regulations even go so far as to state that 10 minutes a day is not *de minimis,* citing *Hawkins v. E. I. du Pont De Nemours & Co.,* 192 F.2d 294 (4th Cir. 1951). DOL's position on 10 minutes *not* being *de minimis,* however, is dubious. The case cited by DOL in the regulations was reversed by the appellate court, which found that 10 minutes per day *was* indeed *de minimis. E. I. du Pont De Nemours & Co. v. Harrup,* 227 F.2d 133, 135-36 (4th Cir., 1955)). *See also*, *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949); *Lindow v. United States,* 738 F.2d 1057 (1984); *International Business Investments, Inc. v. United States,* 11 Cl. Ct. 588 (1987).

XIII. TIME KEEPING AND ROUNDING OF HOURS OF WORK

The Fair Labor Standards Act ("FLSA") explicitly permits "rounding" of employees starting and stopping time. See 29 C.F.R. § 785.48. Specifically, the FLSA regulation provides:

> (b) "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of

> time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R. § 790.7. This means that if an employer has a policy of rounding time worked in 15 minute intervals, that is permitted. But, the employer must round both up and down. For example, if under such a policy, an employee reports to work at 9:08 a.m. rather than the 9:00 a.m. starting time, the employee need only be compensated for work commencing at 9:15 a.m. On the other hand, if the same employee clocked in at 9:07 a.m., they would have to be paid as if they commenced work at 9:00 a.m. Under this rounding practice, the hours of work will presumably even out in a fair basis.

The FLSA only requires employers to pay employees only for time actually worked. By virtue of the Portal to Portal Act, the FLSA specifically excludes from hours worked both preliminary and postliminary activities. See 29 U.S.C. § 257 et seq.; 29 C.F.R. § 790.7. Thus, the time required to walk from the work entrance to a workstation, or from a work station out the door at the end of the day, constitutes preliminary or postliminary time. Moreover, sometimes an employer and a union have agreed upon a "custom or practice" of not paying for certain time. An employee who clocked in at 9:06 a.m. would not automatically be at his or her workstation ready to commence work for another ten minutes due to the physical layout of the facility and the time spent on personal matters such as hanging up jackets, getting coffee, going to the bathroom, etc. Thus, with rounding in 15 minute increments, it may be permissible to round to 9:15 a.m.

As for postliminary time, if workers punch out late but do not engage in productive work activities after quitting time, this is not compensable working time. As noted in 29 C.F.R. § 785.48, the U.S. Department of Labor's regulations provide that early or late punching of time clocks can be disregarded –

> § 785.48 Use of time clocks.
>
> (a) Differences between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

The U.S. Department of Labor's Field Operations Handbook ("FOH") also has an instructive provision.

> 30a03 "Long-punching" of hours.
>
> (a) Where time records show elapsed time greater than the hours actually worked because of reasons such as employees choosing to enter their work places before actual

> starting time or to remain after their actual quitting time, the CO [Compliance Officer] shall determine whether any time is actually worked in these intervals. If an employee came in early for personal convenience and did not work prior to the scheduled beginning time, a recording of the fact that the employee worked, for example, 8 hours that day is all that is required.
>
> (b) The CO may suggest to the employer, but not require, that the punch-time be kept as close to the work-time as possible to avoid any question that work was performed during such intervals.

FOH § 30a03 (emphasis added). Thus, the employer may be able to demonstrate that the employees were not actually working during the "long-punching" time.