Is an Employee's Voluntary Attendance at Training Programs Compensable?

Labor & Employment Law Update

on November 5, 2020

The U.S. Department of Labor (DOL) issued additional guidance to employers as to the compensability of time employees spend attending voluntary training programs under the Fair Labor Standards Act (FLSA). In other words, if an employee attends a training program related to work, on his or her own volition and not under compulsion by the employer, must he or she be compensated?

The answer, according to the DOL: it depends.

Stepping back, the FLSA generally requires that non-exempt employees receive the federal minimum wage for all hours worked and overtime at 1.5x the regular rate of pay for any hours worked over 40 hours per week. Over time, courts have held that an employee's time is – or is not – compensable depending on whether the time is spent predominantly for the employer's or the employee's benefit. If it is deemed for the employer's benefit, it is compensable. If for the employee's benefit, it is not.

In answering whether it is for the employer's benefit or employee's benefit, the DOL has traditionally followed guidelines which say that attendance at lectures, training programs and similar activities is NOT compensable work if four criteria are met:

- It is outside of regular work hours,
- Attendance is in fact voluntary,
- The programming is not "directly related to the employee's job," AND
- The employee didn't perform any productive work while attending.

However, there are two more "special situations" in which the DOL recognizes training time does not have to be paid:

- an employee, outside of normal working hours, voluntarily attends programming established by an employer that corresponds to courses offered separately by learning institutions, or
- where the employee on his or her own initiative attends an independent school or college outside of normal working hours, even if the courses are

related to the employee's job.

While these regulations may seem straightforward, the DOL's recent guidance proves, as always, that the devil will be in the details. In the recent guidance, the DOL addresses several situations:

1. If an employer approves an employee's request to use continuing education funds (provided by the employer) to attend a pre-recorded webinar that has a continuing education component, which the employee then voluntarily attends during off-work time, does the employee have to be paid?
    1. The DOL's answer is no, it is unpaid time. It does not matter if the course does not have a continuing education component. Rather, what matters is that it was voluntary and not required by the employer and when the employee actually viewed the webinar – which in this scenario was outside of work. Thus, the "special situation" exception above applies and the time is not considered hours worked under the FLSA.

- What about an employee who requests and is approved to use continuing education funds for an on-demand webinar, directly related to his job (but does not have a continuing education component) and watches it during working hours. You recognize this is compensable work time, but can you require the employee to use PTO or vacation time since the employee viewed it during work hours?
    - While it's a creative idea, the DOL says not so fast. Once again, the fact that it can be viewed outside of work hours doesn't matter. What matters is that it was participated in during working hours. Since the employee watched it during work hours, it is compensable and the employee cannot be forced to burn PTO or vacation time for it. In fact, the DOL cautions that it likely would still be paid work time if the webinar was not directly related to his job duties. It is noteworthy though that the DOL states that it is within an employer's ability to establish a policy prohibiting the viewing of these types of training during work hours – such that while the employee would still have to be paid for the time, the employee could be disciplined for violating the employer's policy.

The DOL's guidance here is not necessarily new. However, it does serve as a timely reminder to employers that the question of whether to compensate employees for time spent in voluntary trainings is very fact-specific. To avoid running into tough decisions like these, employers are well advised to work with their labor and employment counsel to adopt clear, unambiguous policies so employees know what is – and is not – compensable and allowed when employees voluntarily decide to attend these programs.

Finally, it should be noted that if you are in a state or municipality that requires training, such as mandatory sexual harassment training in California, Connecticut, Delaware, Illinois, Maine, New York, and New York City, that training time is considered time worked that has to be paid under the FLSA, even if the

employee completes the training during non-work hours via an on-demand webinar or live webinar.

Is an Employee's Voluntary Attendance at Training Programs Compensable?