

Is Your Company's "Flexible Scheduling" Policy a Violation of Wage and Hour Law?

Labor & Employment Law Update

on October 25, 2017

An employer who allows its employees the "flexibility" to self-schedule time off the clock must make sure that it is paying its employees for all time worked. And beware, under the Fair Labor Standards Act (FLSA), "hours worked" is not limited to only that time an employee spends performing his or her job duties. Short breaks of twenty minutes or less are also counted as hours worked and must be paid.

The Third Circuit Court of Appeals recently held as a bright-line rule: Where breaks of twenty minutes or less are in question, the time must be paid. The court adopted the U.S. Department of Labor policy rationale that "breaks of twenty minutes or less are insufficient to allow for anything other than the kind of activity (or inactivity) that, by definition, primarily benefits the employer." There will not be a factual analysis, or a case-by-case determination. Simply stated, if an employee is at the worksite, and is taking time away from their work-related duties for twenty minutes or less, they must be compensated for that time.

In the case decided by the Third Circuit, the employer did not deny that it permitted its call-center employees to log off their computers and use their time free from any work related duties, but it refused to call those time periods "breaks." Rather, the employer considered it part of a "flexible time" policy, in which employees could take an unlimited amount of unpaid time away from work at any time, for any duration, and for any reason.

The court rejected the employer's attempt to characterize time in a way that deprived employees of rights they were entitled to under the FLSA and considered the time an employee spent logged off the computer as a "break." The employer violated the FLSA by not compensating employees for breaks that lasted twenty minutes or less.

Bottom Line: This is a reminder to employers that all policies and procedures should be vetted by experienced labor and employment counsel. In addition, all time worked including break periods should be accurately recorded, not only to comply with the record-keeping requirements of FLSA, but to document any abuse.

Employers should also keep in mind that some states may have their own break requirements that employers in those states must follow. Therefore, it is imperative that employers review their break policies and check applicable laws to ensure compliance with both federal and state law.

Although federal wage and hour laws do not generally mandate employee breaks, and state laws may vary, a strict policy that forces employees to choose between getting paid and basic necessities such as using the restroom runs contrary to “humanitarian and remedial” purpose of the act and will violate the law. These kinds of short breaks must be compensated. The FLSA and corresponding state wage and hour laws are designed to protect employees, and will be liberally construed.

Is Your
Company's
“Flexible
Scheduling”
Policy a
Violation of
Wage and
Hour Law?