

When Is Travel Time Compensable For Employees With No Regular Workday?

Labor & Employment Law Update

on June 29, 2018

Employees' work schedules seem to be as fluid than ever. More and more, employers are bending to the employment market's demand by allowing employees to work remotely from home and/or to reasonably set their own hours to accommodate personal obligations such as caring for children or loved ones. If done thoughtfully and effectively, these accommodations can lead to happier and more productive employees.

But it is not without potential pitfalls. A common concern for employers with employees who keep odd or fluid work schedules is whether they are required to compensate these employees for travel time away from home.

The answer, unfortunately, is not always clear. As employers know, the Fair Labor Standards Act (FLSA) requires employers to pay employees for their "work." Over time and through the passage of subsequent legislation, Congress has clarified that employers are not required to pay their employees for time spent commuting from home to work. That is not compensable worktime, regardless of if the employee works at a fixed location or at different work sites.

But what about when an employee without a regular work schedule has to travel away from home for work? Must he or she be paid for time traveling to and from the destination?

The answer is a qualified "maybe." The Code of Federal Regulations (CFR), 29 C.F.R. §785.39, provides that travel away from home is compensable worktime if and when it cuts across the employee's workday. In such a case, the employee is just substituting travel for other compensable work activities, even weekends or dates the employee does not typically work. So if an employee has a regular work schedule – say, 9:00 a.m. to 5 p.m. – their time spent traveling during those times is compensable. Easy enough.

So what happens when an employee has no easily discernable, regular "workday?" How do employers determine what travel time is compensable – and what is not?

How to determine whether an employee has a “regular workday”

The Department of Labor (DOL) recently attempted to clarify employer obligations and offer them more certainty in potential wage and hour disputes arising in these situations. FLSA 2018-18.

Employers should be cautious in making any unilateral determination that an employee does not have a “regular workday,” even if the employee’s hours are not rigidly set. If challenged, the Wage and Hour Division (WHD) or a court will review employee time records with an eye to establish work patterns that such a “regular workday” existed that requires the employee to be compensated for travel time. So fair warning: just because an employee has a non-traditional schedule or work setup does not mean she does not have a “regular workday.”

Any determination that an employee does not have a “regular workday” should be the result of a situation-specific (hopefully, time-record-supported) analysis. Otherwise, it may not pass muster if challenged by employees seeking additional compensation.

The DOL provided several permissible methods to an employer to conduct this analysis:

- Review the employee’s time records during the most recent month of employment. If they reveal typical work hours, the employer can consider those as normal hours going forward absent a material change in circumstances.
- If there are not typical work hours revealed upon review of the employee’s time records, the employer can choose to average the start and end times of the workday.
- If neither of the above methods reveal a typical workday, the employer can negotiate an agreement with the employee as to what the reasonable amount of time spent traveling falls within a regular workday and what time is otherwise compensable.

Each of these methods, if used reasonably, will shield the employer from an adverse finding by the WHD that the CFR was violated for not compensating employees’ travel only during work hours. Employers looking to reduce potential risk would be well advised to take heed of these recommended methods.

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