2018 TOP WAGE AND HOUR ISSUES FACING CONSTRUCTION CONTRACTORS

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INTRODUCTION

Why this matters:

- About 900 federal wage-hour lawsuits in 1990
- About 1,900 suits in 2000
- About 6,700 suits in 2010
- About 8,900 suits in 2015
- About 8,300 suits in 2016 but value of settlements increased
- There are now more wage class/collective actions filed than discrimination class actions
- And that's just in federal court . . .

So . . . why the explosion of litigation?

- Archaic, counterintuitive laws
- Metastasizing liability
- Big penalties and mandatory fee-shifting
- Back pay, liquidated damages, attorney's fees
- Often inflated because no record of hours worked

COMMON PROBLEMS IN THE CONSTRUCTION INDUSTRY[1]

Failure to Record and Pay for All Hours Worked

The FLSA defines the word "employ" as including "to suffer or permit to work."[2] The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed work place.[3] Time spent by employees performing preparatory work such as loading materials and equipment for use on the day's project, fueling and cleaning trucks, and checking in for assignments all constitutes work time.

Engaged to Wait v. Waiting to Be Engaged: Shorting of Hours

Construction employers frequently attempt to avoid paying for waiting time which results from mechanical breakdowns or delays. Employees are entitled to compensation for all time during which employees are required to wait while on duty or performing their principal activity. Under certain limited circumstances, however, waiting time by an employee who has been relieved fully from duty need not be counted as hours worked if the employee is allowed to leave the job

[1] WHD Fact Sheet #1: The construction Industry Under the Fair Labor Standards Act
[2] 29 U.S.C. § 203(g)
[3] 29 C.F.R. § 785.7

or the employee is relieved until a definite, specified time and the employee is free to use the time as their own.[4]

Failure to Compensate for Meal Periods Where Employee Is Not Completely Relieved of All Duty

Employers are not required under the FLSA to provide rest or meal periods (state law differs). When an employer does provide a rest period of a short duration, typically 20 minutes or less, this time must be counted as time worked.[5] A bona fide meal time, when the employee is completely relieved from duty, is not worktime. A meal period is "bona fide" if the employee is relieved fully of his or her regular duties for 30 minutes or more to eat.[6]

Banking of Hours

Some construction employers "bank" employee's overtime hours or payment for overtime in the form of compensation time to be used at a later date (outside of that workweek). The FLSA does not permit the use of compensatory time off in lieu of overtime pay. However, federal enforcement policy permits employers to restrict an employee's workweek hours to 40 or less by the use of mandatory compensatory time off within that particular workweek.[7] In certain very limited circumstances, employers may also use compensatory time during subsequent weeks within the same pay period.[8]

Failure to Combine the Hours Worked for Overtime Purposes When Employee Works in More than One Job Classification During the Workweek

An employee paid on an hourly basis who performs two or more different kinds of work for the same employer, each with different pay scales, may be paid overtime on the basis of the regular rate calculated as the weighted average hourly rate earned during the workweek.[9] In the alternative, an employee may agree with the employer in advance to be paid overtime for the type of work that is performed during the overtime hours.[10]

Failure to Segregate and Pay Overtime On a Workweek Basis

Under the FLSA, the overtime requirement is based on a workweek, which is a fixed and regularly recurring period of 168 hours, 7 consecutive 24 hour periods. Employees paid on a bi-weekly or semi-monthly basis are entitled to overtime for each week in which overtime is worked. Overtime payments are based upon the regular rate earned during that particular workweek.[11]

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[4] 29 C.F.R. § 785.15, 785.16
[5] 29 C.F.R. § 785.18
[6] 29 C.F.R. § 785.19
[7] DOL Field Operations Handbook ¶ 32j16(b)
[8] Wage & Hour Opinion Letter No. FLSA2005-17 (May 27, 2005); Wage & Hour Opinion Letter No. 389 (Sept. 1, 1965)
[9] 29 C.F.R. § 778.115
[10] 29 C.F.R. § 778.419
[11] 29 C.F.R. § 778.104

Failure to Pay for Compensable Travel Time

Under the Portal-to-Portal Act, travel time to and from work and other preliminary or post-liminary activities do not constitute hours worked, unless compensable by contract, custom, or practice. Normal travel time between work and the employee's home is not considered work-time for purposes of the FLSA regardless of whether the employee works at a fixed location or at different job sites.[12] But if the employee is required to report to a meeting place where he or she performs a work task (e.g., pick up materials, equipment or other employees, or receive instructions before traveling to the work site), compensable time starts at the meeting place.

All time spent by an employee in travel that is part of his or her principal activity, such as travel between job sites during the workday must be counted as hours worked. However, typically, the use of an employer's vehicle for travel by an employee and activities performed by an employee that are incidental to the use of the vehicle for commuting shall not be considered working time if use of the vehicle for travel is within the normal commuting area for the employer's business and the use of the employer's vehicle is subject to an agreement between the employer and the employee.[13]

EMPLOYEE MISCLASSIFICATION

Economic Reality Test

Courts will look at several factors to determine the issue of whether a person is an employee or an independent contractor. Courts will use the "economic reality" test to determine whether an employer-employee relationship exists under the FLSA.[14] Under the economic reality test, courts typically consider the following, non-exhaustive, factors:

1. Which party has the right to control the means and manner of production;
2. The worker's opportunity for profit or loss based on his or her own managerial skills;
3. Which party supplies the equipment or materials used to accomplish the job;
4. The amount of skill, initiative or judgment required;
5. The permanence of the relationship; and
6. Whether the job being performed is integral to the company's business.

State Law Breakdown

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[12] 29 C.F.R. § 785.35
[13] 29 U.S.C. § 254(a)
[14] *Saleem v. Corp. Transp. Group, Ltd.*, 854 F. 3d 131 (2d Cir. 2017*); Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

Texas:

Under the Texas Workers' Compensation Act, an independent contractor is defined as "a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

A. acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
B. is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;
C. is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
D. possesses the skills required for the specific work or service."

New York:

The common law test:

1. whether the worker worked at his/her own convenience;
2. whether the worker was free to engage in other employment;
3. whether the worker received fringe benefits;
4. whether the worker was on the employer's payroll; and
5. whether the worker was on a fixed schedule.

These factors are not exhaustive, however, and New York courts often consider additional factors as well (*e.g.*, requirements to wear a uniform and to follow company procedures, employer's authority to decide the timing and selection of jobs, employer's right to fire employee, and existence of central dispatch system).

JOINT EMPLOYMENT

General Rule

Joint employment generally means that an individual is employed by two or more employers at the same time. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act is a fact-intensive, case-by-case analysis.[15]

On January 20, 2016, the U.S. Department of Labor's Wage and Hour Division (WHD) issued an Administrator's Interpretation (AI) on joint employment under the Fair Labor Standards Act (FLSA) and Migrant Seasonal Agricultural Worker Protection Act (MSPA).

[15] 29 C.F.R. § 791.2.

It confirmed DOL's broad view of joint employment, and signaled that the DOL would aggressively enforce the FLSA and MSPA against "joint employers"

The AI begins by advising the regulated community that joint employment relationships under the FLSA and MSPA "should be defined expansively."

WHD's expanded definition ensured that businesses and individuals would not be able to circumvent the requirements of these statutes by:

- setting up separate corporations (horizontal joint employment) or
- hiring contractors or staffing companies (vertical joint employment).

DOL declared that Joint employers, whether horizontal or vertical, would be held responsible, both individually and jointly, for compliance with the FLSA and MSPA.

The AI specifically mentioned enforcement of standard in construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

On June 7, 2017, U.S. Labor Secretary Acosta withdrew two Obama era Wage and Hour Division Administrator's joint employment and independent contractor AIs

DOL clarified that withdrawal of the two AIs "does not change the legal responsibilities of employers under the Fair Labor Standards Act or Migrant Seasonal Agricultural Worker Protection Act, as reflected in the Department's long-standing regulations and case law."

The withdrawal of these two AIs likely signals a policy shift in how DOL will interpret and pursue joint employment and independent contractor issues.

Regardless, in the event two or more employers are found to be joint employers of an employee or employees, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[16]

<u>Relevant Factors</u>

Where the employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, the DOL regulations provide that a joint employment relationship generally will be considered to exist in situations such as:

1. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;

2. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

[16] *Id.*

3. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[17]

Courts have identified several factors in determining whether or not an individual or entity is considered the "employer" of a worker. They include: (1) who provided the equipment the employee used; (2) whether the employee was economically beholden to the putative employer; (3) the level of skill employed by the workers; (4) whether the putative employer has an ownership interest in the subcontractor; (5) the degree to which the employee's efforts are supervised by the putative employer; (6) whether the employee worked predominantly for the putative employer; (7) who set the terms and conditions of the employment; and (8) who maintained the employment records regarding the employee.[18]

In addition, courts consider the historical practice in the industry, which may of course be a significant factor in the construction industry due to its traditional use of subcontractors.[19]

WHAT CONSTITUTES COMPENSABLE TIME

General Rule

To properly compensate non-exempt employees, an employer must determine the amount of compensable time the employees have worked. The FLSA does not define "work" or "hours worked." Rather, the FLSA uses the term "employ" which is defined to mean "to suffer or permit to work." Using this "suffer or permit" construction, whether an employee's time is compensable turns on whether the time spent by the employee is primarily for the benefit of the employer. The employer, however, must know or have reason to believe that the employee is working for the employer.[20]

Compensation is Required by Contract, Custom, or Practice

An employer may be required to pay employees for the performance of activities that would otherwise be exempt under the FLSA if a contract, custom or practice specific to an employer indicates an intent to compensate for that activity.[21]

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[17] Id.
[18] *Grenawalt v. AT&T Mobility LLC*, 2016 U.S. App. LEXIS 4612 (2d Cir. Mar. 14, 2016); *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 72 (2d Cir. 2003); *Morcon v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003); Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).
[19] *Zheng,* 355 F.3d at 73; *see also Quintanilla v. A&R Demolition, Inc.*, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005).
[20] *29* C.F.R. § 785.11.
[21] 29 U.S.C. § 254(b)(1) and (2).

Continuous Workday Doctrine

Under the continuous workday doctrine, an employee must be compensated for work-related activities performed during the workday. Workday is defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.[22] "Principal activities" are defined as all tasks that are an integral part of the employee's job and include those closely related activities which are indispensable to its performance.[23] Thus, during a continuous workday, any time that occurs after the beginning of the first principal activity and before the end of the employee's last principal activity is excluded from the scope of the Portal-to-Portal Act limitations on compensable activity, and as a result is covered by the FLSA."[24]

- *Colella v. City of New York*, 986 F. Supp. 2d 320 (S.D.N.Y. 2013); *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2d Cir. 2011), employer was not required to pay employee for morning pre-shift activities because those activities were not integral to employee's principle work activities. ("[T]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity'").

- Example: Second Circuit (*Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2d Cir. 2011))

Greg Kuebel was employed as a "Retail Specialist" for Black & Decker. He was responsible for merchandising and marketing B&D's products at six Home Depot stores located in his territory. The stores were 20 minutes to three hours from his home by car. He did not report to a central office, instead, working from a home office and commuting to the various stores from home.

Kuebel was issued a PDA by his employer and was required to record the time he entered and exited a store, and sync his PDA with B&D's server, which he did from home by plugging it into a cradle attached to his home computer. Significantly, there was no particular time that he had to sync his PDA, and it took less than a minute to complete this task. However, he also read and responded to company e-mail, checked voicemail, reviewed sales reports, and prepared for his store visits. B&D required employees to record time spent performing these activities, and it paid for the time spent completing them.

B&D's commuting policy provided that time spent traveling in excess of 60 miles (or, in some cases, in excess of 60 minutes) was compensable, but not commuting time of less than 60 miles or 60 minutes.

[22] 29 C.F.R. § 790.6(b).
[23] 29 C.F.R. § 785.24(b).
[24] IBP, Inc. v. Alvarez, 546 U.S. 21, 28 (2005) (citing 29 CFR § 790.6(b)).

Kuebel sued B&D, arguing that *all* time spent commuting to the first and from the last work assignment of the day (not simply time in excess of 60 minutes) was compensable time under the Fair Labor Standards Act and New York Labor Law under the "continuous workday" rule. He claimed that his workday began when he checked e-mail, voicemail, and performed other tasks before he left home and that the workday did not end until he completed work-related tasks after he returned home at the end of the day.

The appellate court held that even if the work performed at home was integral and indispensable to Kuebel's principal activities (which, under U.S. Supreme Court precedent, would render the time compensable), this did not mean that the *commute time* was compensable.

The Court explained that Kuebel, for example, could have woken up early to complete the administrative tasks, then gone to the gym or taken his kids to school before beginning his commute to the first assignment. If his performance of administrative tasks at home began the continuous workday, these activities also would be compensable. The fact that Kuebel may have *chosen* to perform the tasks immediately before and after his commute did not mean that B&D had to pay for it, the Court held.

Example: Ninth Circuit (*Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010))

The Lojack technicians installed and repaired vehicle recovery systems in vehicles at customer locations. They are required to travel to customer locations in a company vehicle. Lojack paid the technicians from the time they arrived at the first customer location until the time they completed their final installation at the end of the day. The technicians alleged that they should have been paid from the time they received their assignments in the morning through the time they transmitted the work completed at the end of the day.

The court determined that the technicians' travel in the company van from home to the first job and to home after the last job of the day was normal commute time and was not compensable.

Unlike the facts in *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000), which found travel time on a mandated company bus to be compensable because the employees were "subject to the control of the employer" while traveling, the facts in *Rutti* show that the Lojack technicians were not required to meet at a specific departure point or at a certain time. Rather, the technicians were free to determine when they left, the routes they took, and which assignments to visit first. Thus, they were not subject to the "control of the employer," and the travel time was not compensable under California law.

Reporting Completed Work

After the technicians returned home, Lojack required them to send a transmission of the jobs they performed during the day on a Lojack modem. The court reversed the granting of summary judgment on this claim, concluding that whether this time was compensable created a genuine issue for trial. First, the court concluded that the transmissions appeared to be "part of the regular work of the employees in the ordinary course of business" and "necessary to the

business…." The court further found that the time spent was not *de minimis*. It took only 5 to 10 minutes to initiate and send the transmission, but often the transmissions were unsuccessful, and the technicians were required to check and resend the information. The court noted that while most courts have found daily periods of approximately 10 minutes to be *de minimis*, there is no precise amount of time that may be denied compensation, and no "rigid rule can be applied with mathematical certainty."

Rest and Meal Periods

The FLSA does not require employers to provide rest periods. Such periods of short duration, however, are common in industry. 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.[25]

Bona fide meal periods, in contrast to rest periods, are not compensable work time. 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, however, 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.[26]

- DOL Opinion Letter (September 24, 2000), 15 minute non-compensable meal period permitted where (1) the employees were completely relieved of all duty, (2) the building had numerous readily accessible lunch rooms for employees, (3) no eating establishments existed within a 30 minute drive, and (4) the employees requested the shortened meal period because it was adequate and allowed them to end the day earlier.

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.[27]

Preparatory and Concluding Activities

1. General Rule

Under the Portal-to-Portal Act of 1947, an employer is not required to pay an employee for activities that are "preliminary or postliminary" to an employee's "principal activities.[28]" If, however, such preparatory or concluding activities are an "integral and indispensable" part of the employee's principal activities, or they are required by the employer, the time spent in such activities is compensable.

[25] 29 C.F.R. § 785.18.
[26] 29 C.F.R. § 785.19(a).
[27] 29 C.F.R. § 785.19(b).
[28] 29 U.S.C. § 254(a)(2).

2. Transporting Tools and Equipment

Transporting tools and equipment is common in the construction industry and may be compensable depending upon the circumstances. Although the transportation of an employee's own tools is normally not enough to make travel time compensable, circumstances in which the transportation of the tools and equipment is necessary for the business has been found to be integral and indispensable to the principal activities to be performed by the employee and is therefore compensable.

- *Dekker v. Construction Specialties of Zeeland*, 2012 WL 726741 (W.D. Mich., March 6, 2012), employee evidence that that they received instructions at meeting place and were required to pick or drop off essential equipment while traveling sufficient to defeat summary judgment on travel time claim.

- *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 554-555 (10th Cir. 1958), the court held that an oil and gas well servicing company was required to compensate employees for time spent transporting equipment to and from work sites because the equipment was required in order to repair wells, and therefore was an integral and indispensable part of the employees' principal activities.

3. *Security Screening*

Time spent waiting in line to complete a security screening, although necessary and indispensable for the performance of principal activities, they are not necessarily integral to the principal work, or performed for the benefit of the employer, and accordingly are not compensable.

- *Integrity Staffing Solutions, Inc., v. Busk*, 135 S. Ct. 513 (U.S. 2014), employee's time spent waiting to undergo security screenings is not integral and indispensable and is therefore, not compensable under the FLSA. "[A]n activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. Because the employees' time spent waiting to undergo and undergoing Integrity Staffing's security screenings does not meet these criteria."

- *Cervantez v. Celestica Corporation*, 253 F.R.D. 562 (C.D. Cal, July 30, 2008), time spent by employees while in the security line at the end of the shift found to be under control of employer and such time is therefore compensable under California law because employees cannot choose to leave the premises without going through the line nor can they choose to run a personal errand before going through the line.

<u>Training Programs, Lectures, and Meetings</u>

Time spent by employees attending training programs, lectures and meetings are not counted as hours worked if the attendance is voluntary on the part of the employee and all the following criteria are met:

1. attendance is outside regular working hours;

2. attendance is in fact voluntary;

3. the course, lecture, or meeting is not directly related to the employee's job (training is directly related to an 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 to a new or additional skill); and

4. the employee does not perform any productive work during such attendance.[29]

Attendance is not voluntary if the employee is led to believe that present working conditions or the continuation of employment would be adversely affected by nonattendance.[30]

If an employee on his or her own initiative attends an independent school, college, or trade school after hours, the time does not count as hours worked for the employer even if the courses are related to the employee's job.[31]

An employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.[32]

Adjusting Grievances

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.[33]

Travel and Commuting Time – What is Compensable?

1. Ordinary Travel Between Home and Work

Normal travel time to and from work from the employee's home is not considered hours worked for purposes of the FLSA. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not work time, even if the employer agrees to pay for it.[34]

[29] 29 C.F.R. § 785.27.
[30] 29 C.F.R. § 785.28.
[31] 29. C.F.R. § 785.30.
[32] 29. C.F.R. § 785.31.
[33] 29 C.F.R. § 785.42.
[34] 29.C.F.R. § 785.34, .35.

2. Emergency Travel Between Home and Work

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.[35]

3. Special One-Day Assignments in Another City

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in §785.36), or like travel that is all in the day's work (see §785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.[36]

4. Travel That Is Part of Work

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.[37]

5. Travel Away From Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is work time on Saturday and Sunday as well as

[35] 29 C.F.R. § 785.36.
[36] 29 C.F.R. § 785.37.
[37] 29 C.F.R. § 785.38.

on the other days. Regular meal period time is not counted. As an enforcement policy the Divisions will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

If an employee is offered public transportation but requests permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.[38]

6. Work Performed While Traveling

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.[39]

7. Travel or Commuting Time That Qualifies As Work Under the Continuous Workday Doctrine

Under some circumstances, normally non-compensable home-to-work travel time can become compensable time under the continuous workday doctrine.

a) Travel or Commuting Between A Central Location and An Outlying Area

While travel from a central location to an outlying work area is generally considered to be home to work commuting time and therefore not compensable, this travel becomes compensable under the continuous workday rule if the employee performs principal duties prior to the travel.[40]

- *Abell v. Sky Bridge Res., LLC*, 2017 U.S. App. LEXIS 20642 (6th Cir., 2017), stating that 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.

- *Adams v. Alcoa*, 822 F. Supp. 2d 156 (N.D.N.Y. 2011), "[A]ny walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last activity" is compensable under the FLSA.

[38] 29 C.F.R. §§ 785.39, .40.
[39] 29 C.F.R. § 785.41.
[40] 29. C.F.R. § 785.38, .41.

- *Dekker v. Construction Specialties of Zeeland*, 2012 WL 726741 (W.D. Mich., March 6, 2012), employee evidence that that they received instructions at meeting place and were required to pick or drop off essential equipment while traveling sufficient to defeat summary judgment on travel time claim.

b) Home-to-Work Travel Is Compensable If Employee Performs Substantial Principal Duties at Home Immediately Prior to Traveling to Work or Immediately After Returning Home.

While home to work is not normally compensable under federal law, such time becomes compensable under circumstances where the employee is required to perform principal duties at home immediately before or after travel.

- *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 94 F. Supp. 3d 47 (D. Mass. 2015), MBTA employees, from when their shifts begin in one location and end in another, are not compensated for the time that it takes them to travel from the end of their assigned route back to where they began.

- *McLaughlin v. Somnograph, Inc.*, 2005 WL 3489507 (D. Kan. Dec. 21, 2005), sleep technicians entitled to compensation for commute time where required to clock in 30 minutes prior to their departure to the job site and they were not permitted to clock out until they completed the download of information from equipment at home.

In order for such at-home activities to be substantial enough to trigger compensability, such activities must significantly interfere with the employee's ability to use the time at home effectively for their own purposes.[41] Employees may be considered to be effectively "completely relieved from duty" if they have sufficient flexibility about when they perform work related activities at home.

- *Rutti v. Lojack Corporation, Inc*., 596 F.3d 1046 (9th Cir., 2010), employer was not required to pay the employee for his morning preliminary activities because those activities were related to his commute, which is presumptively non-compensable under the FLSA, were not integral to employee's principle work activities, and appeared to be *de minimis* time in any event and therefore non-compensable even if otherwise compensable (see facts above).

- *Magana v. Coleman World Grp., LLC*, 2017 U.S. Dist. LEXIS 141710 (W.D. Tx. 2017), time spent at home waiting to see if an assignment was available and logging into computer program was not compensable because it is both *de minimis* and not integral and indispensable to the principal activities of the employee.

[41] 29 C.F.R. § 785.16.

8. Commuting in an Employer's Vehicle May Be Compensable Under Certain Circumstances.

An employee's voluntary use of an employer's vehicle does not render the commute time compensable. Before 1996, courts often held that such commute time was compensable if the employer received any benefit from the employee's use of the company vehicle. To limit employer's liability in this area, Congress passed the Employee Commuting Flexibility Act of 1996 (ECFA), which amended the Portal-to-Portal Act. ECFA established that the use of an employer's vehicle for travel by the employee and activities performed by the employee which were incidental to the use of the vehicle for commuting would not be considered part of the employee's principal activities *if* the use of the vehicle for travel is within the normal commuting area for the employer's business and the use of the vehicle was subject to an agreement between the employer and the employee or employee representative.[42]

- *Chambers v. Sears, Roebuck & Co.*, 428 Fed.Appx. 400, 2011 WL 2392359 (5th Cir., 2011). Time in-home service technicians spent traveling in company vehicles to first service call of day and traveling home from last service call was not compensable under FLSA; technicians' commutes were within normal commuting area under ECFA, since they were not greater than employer's 35-minute time allotment, and conditions employer placed on technicians' use of company vehicles, including that they could not use vehicles to pick up children from school, did not render commute time compensable under ECFA.

DAVIS-BACON AND RELATED ACTS (DBRA)

Transportation and Board and Lodging Expenses

Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished to the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished

[42] 29 U.S.C. § 25.4.

which are deductible from the predetermined wage pursuant to 29 CFR §§ 3.5(j). *See* 29 CFR § 5.29(f).[43]

EXEMPT STATUS OF CONSTRUCTION SITE NON-CRAFT EMPLOYEES

It is common in the construction industry for employers to classify their construction site non-craft employees as exempt from the FLSA overtime requirements. Project superintendents and general superintendents often fall under the executive exemption due to their responsibilities to manage and supervise the workforce, and other civil engineer employees may fall under the professional exemption. Several other categories of non-craft employees such as project or field engineers, operation managers, project managers, field supervisors and other similarly situated employees may not fall under either the executive or professional exemption. Accordingly, it is necessary for the employee to meet the requirements under the administrative exemption in order for the employee to be exempt from the federal overtime requirements.

An employee is in a "*bona fide* administrative capacity" if he or she is paid no less than $455 per week", "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and "whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."[44]

- *Sloane v. Gulf Interstate Field Servs.*, 2018 U.S. Dist. LEXIS 30132 (M.D. Pa. 2018), finding a factual dispute as to whether employee's primary duty as a welding inspector may be viewed as "quality control" that was not "directly related to the management or general business operations" or that his duties did not "include[] the exercise of discretion and independent judgment with respect to matters of significance."

- *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191 (6th Cir. 2017), the position of Account Manager involves the exercise of sufficient discretion and independent judgment such that the administrative exemption applied however, primary duties of Staffing Consultants could be found to be their non-exempt sales and routine recruiting tasks, and therefore may not fall under the administrative exemption. The court focuses "on evidence regarding the actual day-to-day activities of the employee rather than more general job descriptions contained in resumes, position descriptions, and performance evaluations."

[43] DOL Field Operations Handbook (Rev. 660 – 10/24/2010) § 15f19.
[44] 29 C.F.R. § 541.200(a).

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4841-7341-3730, v. 1