

## Insights

### DOL Opinion Letter Addresses When Travel Time Between Work Sites is Compensable for Non-Exempt Employees

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Employers with non-exempt employees who travel to and from various worksites should review and be aware of the impact of a recently issued opinion letter, **FLSA 2020-16**, from the U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD"), which addresses the issue of compensable time under the Fair Labor Standards Act ("FLSA").

On November 3, 2020, the DOL's WHD issued an opinion letter pertaining to the compensability of travel time for non-exempt employees in different scenarios. While the focus of the opinion letter is geared toward the construction industry, the general principle are relevant to any employer with non-exempt employees who travel between sites for work with the primary focus being on whether the travel is a choice or part of the required processes that the employee must follow in the course of completing their day-to-day tasks.

#### Factual Background of Opinion Letter

The opinion letter applies the different scenarios to two types of non-exempt employees, foremen and laborers. The main difference between foremen and laborers? Foremen must first pick up a company vehicle from the employer's principal place of business, drive to the job site, and then return the vehicle to the principal place of business; laborers, on the other hand, may choose to drive directly to the job site or to the employer's principal place of business and then accompany a foreman to the job site.

The different scenarios presented include: (i) local job sites, i.e., job sites near or within the same city as the employer's principal place of business; (ii) remote job sites involving between 1.5 and 4 hours' worth of travel with a hotel stay; and (iii) employee commute time to remote job sites without a hotel stay.

- i. Principal Place of Business to Local Job Sites. For local job sites, the foremen retrieve the company truck from the employer's principal place of business, drive to the job site, and then return the truck at the end of the day. The laborers can choose to drive directly to the local job site or drive to the employer's place of business and then ride with a foreman.
- ii. Principal Place of Business to Remote Job Sites with Hotel Stay. For remote job sites between 1.5 and 4 hours' worth of travel, the employer pays for the hotel accommodations of all employees working on the site and pays a per-diem meal stipend. Foremen drive to the principal place of business at the beginning of the job to pick up the company truck and then drive to remote job site, returning the company truck once the job has ended. Laborers have the option to drive directly to the job site in their own car or to the employer's principal place of business and then ride with a foreman.

iii. Remote Job Sites without Hotel Stay. While foreman stay at the hotel for the duration for a job at a remote job site, some laborers elect to commute from their home to the job site each morning.

## **FLSA Background**

Under the FLSA, employees are entitled to compensation when they are working, which includes when suffered or permitted to work.<sup>1</sup> For purposes of the FLSA, the workday begins when the employee engages in a principal activity(s) and ends when the employee is free to use the employee's time as the employee sees fit. The Portal-to-Portal Act provides that employees are not generally entitled to compensation for the time spent traveling to work before the workday begins or after the workday ends in the employee's ordinary home to work travel. Generally, commuting to and from work is a pre-workday (preliminary) or post-workday (postliminary) activity.

The WHD has interpreted the Portal-to-Portal Act to require employers to compensate employees for travel time when the travel time is the result of a requirement that employees "report at a meeting place to receive instructions or to perform other work there, or to pick up and carry tools[.]"<sup>2</sup> When the travel is required by the employer for a specific aspect of the employee's job, such travel is considered a principal activity rather than a preliminary or postliminary activity and must be paid.

Likewise, time spent traveling "to another city on a special one day assignment is compensable worktime;" however, the employer may deduct the employee's usual commute time from that amount. Even if the reason for travel may lean towards compensability, the method of travel may render time non-compensable. For example, if an employee is traveling as a passenger away from home and outside of normal working hours, the time is not considered compensable.

## **Application for Foremen**

For the non-exempt employees who are foremen, the time in each of the scenarios is compensable. For Scenarios (i) and (ii), the time the foremen spends traveling from the employer's principal place of business to the job site, whether remote or local, is compensable because the travel to the job site is required and is "integral and indispensable" to the foremen's principal activities, i.e., picking up the company truck and materials/tools for the particular job site. Notably, the time a foreman spends traveling from home to the employer's principal place of business is not compensable as it is incident to the principal activity, picking up the truck and materials and traveling to the job site.

## **Application for Laborers**

Whether travel time for laborers is compensable depends on the specific scenario:

i. Local Job Sites. For local job sites, the laborers' travel time is not compensable because it constitutes the laborers' usual commute. The option for a laborer to drive directly to the site or to the employer's place of business and then ride with a foreman makes no difference.

ii. Remote Job Sites with Hotel Stay. For remote job sites between 1.5 and 4 hours' worth of travel, the laborers' travel time before the job and after the job is compensable if (a) the laborer drives and (b) the travel cuts across their normal work hours, even if on a non-workday. If the laborer is a passenger, the time is still compensable so long as the travel cuts across normal work hours even if it is on a non-workday; however, the employer has a choice when it comes to treating the travel time as hours worked. The employer could either count as hours worked (1) the time that accrues during a trip in the company trucks, or (2) the time the laborer actually takes to travel to the remote worksite.

iii. Remote Job Sites without Hotel Stay. If laborers decide to travel home each night during the course of a job, such intervening travel time is treated differently than the time spent traveling to the job at the beginning of the job and from the job site at the end of the job, which is compensable as described

above. In contrast, the intervening travel time is not compensable since the employer provides accommodations for all employees working the site and traveling home during the job is not required or part of a principal activity of the laborers' job.

### **Takeaways**

The DOL's guidance in this opinion letter is equally instructive for employers outside of the construction industry with employees traveling to and from numerous worksites. The reason for the travel, the time when the travel takes place, and the method of travel are all important factors in determining whether the travel time is compensable. The travel time issue is also important as it relates to calculating whether a non-exempt employee is entitled to overtime pay. The failure to accurately calculate and compensate employees for such time can have costly impacts for employers both through state wage claims and federal claims under the FLSA.

If you have questions about how this opinion letter may impact your travel policies for non-exempt employees, or any other questions about wage and hour practices, please contact any member of the Krieg DeVault LLP Labor and Employment Law team.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] 29 U.S.C. § 203(g); 29 C.F.R. § 785.11

[2] 29 C.F.R. § 785.38.