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Insights

Training and Compensable Time: The DOL's Opinion Letter on when an Employee Must be Paid

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On November 3, 2020, the Department of Labor (DOL) issued an **Opinion Letter** addressing various situations in which an employee was engaged in training activities and opined as to whether or not such training was compensable time under the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay employees for their work.[1] Although the FLSA has not specifically defined "work", the Supreme Court has determined that the compensability of an employee's time depends on "[w]hether [it] is spent predominately for the employer's benefit or for the employee's."[2]

Generally, the FLSA explains that "[a]ttendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met":

- Attendance is outside the employee's regular working hours;
- Attendance is in fact voluntary;
- The course, lecture, or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.[3]

There are two situations in which training may be excluded from an employee's work time under the FLSA, even if it directly relates to the employee's job and those are: (1) if an employer establishes for the benefit of employees a program which corresponds to courses offered by an independent bona fide institution of learning; and (2) if an employee, on his or her own initiative, attends an independent school, college, or trade school after hours. Neither of these situations are considered working hours even if outside the hours worked or in the first circumstance, even if paid for or sponsored by the employer.[4]

The Opinion Letter goes on to address six specific scenarios. In each scenario the DOL assumes that the training program is voluntary, and that the employee does not perform any productive work during the training. After analyzing the facts, the DOL opined on whether the training time is compensable under each scenario.

1. Nurse uses employer funded education funds to attend an on-demand webinar that counts toward her required continuing education requirements to maintain her license. The webinar is directly related to her job. Nurse can view the webinar at any time but chooses to do so on her off-work time. Is this compensable time?

- The DOL determined that Nurse's attendance at the webinar is non-compensable and thus is not required to be paid. The decision is tied to the fact that the course is offered by an independent bona fide institution of learning, Nurse's attendance is voluntary, and Nurse views it during non-working hours. The fact that Nurse could have viewed the webinar during work-hours is immaterial, what matters is when her attendance occurred.

2. Accounting Clerk is approved to use education funds for on-demand webinar directly related to his job but has no continuing education component. Although he could view it at any time, Accounting Clerk views it during off-work time. Is this compensable time?

- The DOL opined that there is not sufficient information to determine if this is compensable working time for FLSA purposes. Although a webinar does not have to satisfy a continuing education requirement to be excluded from hours worked, the course content cannot be tailored to peculiar requirements of a particular employer or a particular job and must be regarding a skill or knowledge that would enable an individual to gain or continue employment with any employer. Because there are not facts that show those two requirements, the DOL could not opine whether the webinar "corresponds to courses offered by independent bona fide institutions of learning."[5] If there were facts to determine this webinar did correspond with courses offered by independent bona fide institutions of learning, then the time spent watching the webinar would not be compensable hours worked.

3. Accounting Clerk is approved to use education funds for on-demand webinar directly related to his job but has no continuing education component. He views this webinar during work hours. Can the employer require Accounting Clerk to substitute paid time off for the time spent watching the webinar?

- The DOL examined this situation and determined that, while an employer can establish a policy prohibiting the viewing of such webinar during working hours, if such a policy is not established, this is working time and must be paid. If instead the Accounting Clerk viewed the webinar outside of working hours, it could be non-compensable time as in scenario 2 depending on what the additional facts revealed.

4. Accounting Clerk is approved to use his education funds for an on-demand webinar that is not directly related to his job and has no continuing education requirement. He views this webinar during work hours. Can the employer require Accounting Clerk to substitute paid time off for the time spent watching the webinar?

- The DOL determined that even though the webinar is not directly related to his work, it is viewed during working hours and thus must be considered compensable time. As in scenario 3, the employer can establish a policy that prohibits the viewing of the webinar during working hours, but absent such a policy this time must be paid and the employer cannot require the substitution of paid time off.

5. Nurse is approved to use her education funds for an on-demand webinar that is not directly related to her job but counts toward her required continuing education requirements to maintain her license. She views this webinar during regular work hours. Can the employer require Nurse to substitute paid time off for the time spent watching the webinar?

- The DOL opined that this was the same situation as Situation 4, and thus must be paid as compensable time. Although the employer could establish a policy prohibiting this as explained above.

6. Nurse is approved to use her education funds for an in-person weekend conference that covers many topics, some of which are directly related to her job. This conference counts toward her required continuing education requirements to maintain her license. Nurse has to travel out of town to attend the conference. Both the travel and the conference cut across her normal working hours, but the actual conference occurs on days she doesn't normally work. Does she have to be paid and if so, can the employer require Nurse to substitute paid time off for the time spent travelling and attending?

- The DOL determined that the Nurse did not have to be compensated for any of her travel time or training time. The time spent at the training conference falls into the "special situation" described in 29 C.F.R. § 785.31 that does not count as hours worked because it is voluntary, outside of working hours, and corresponds to courses offered by independent bona fide institutions of learning. Further, all the time spent travelling would not constitute work time and is instead personal travel time.

Takeaways
When analyzing whether training time is compensable, it is important to have all the facts. Further, as can be seen above, a large determining factor is whether the training is completed during normal working hours. Even if it is not job related and is voluntary, if it is completed during normal working hours, it is likely compensable time. Employers should consider enacting a policy prohibiting the viewing of such trainings if their employees begin to take advantage of this situation. If your company or entity has any questions regarding the application of the DOL's guidance, please contact **Elizabeth M. Roberson** or another member of our **Labor and Employment Law Team** for further analysis on the specific situation.

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. § 201 et seq.
[2] Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944).
[3] 29 C.F.R. § 785.27
[4] Id. § 785.30.
[5] Id. § 785.31.