

# The Ultimate Backup

A Client News Bulletin

RAINS, LUCIA & WILKINSON LLP

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## A GUIDE TO THE BASICS OF THE FAIR LABOR STANDARDS ACT

*By Alison Berry Wilkinson*

### INTRODUCTION

To protect workers from substandard wages and oppressive working hours, the United States Congress enacted the Fair Labor Standards Act<sup>1</sup> (FLSA) in 1938 and mandated a nationwide minimum income. In addition, the Act represented a broad economic and social policy to maximize employment by imposing a sanction on excessive hours – overtime. Congress hoped that the deterrent of paying time-and-one-half would spread encourage employers to spread jobs among a greater number of workers. Thus, the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' " and would be protected from "the evil of 'overwork' as well as 'underpay.' " [Citation] *Id.*, 450 U.S. at 739, 101 S.Ct. at 1444.

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<sup>1</sup>The Fair Labor Standards Act is located in the United States Code at: 29 U.S.C. section 201 *et seq.*

### COLLECTIVE BARGAINING AND THE FLSA

The FLSA simply sets the *minimum* standards that employers must meet in order to avoid "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. §§ 202(a).

Additional rights can be established by state law or through collective bargaining. Since nothing prohibits the payment of wages higher than the statutory minimum wage, nor does it prohibit overtime from being paid sooner or in amounts greater than required by the FLSA, many employees covered by collective bargaining agreements find that the FLSA has little application to their working conditions.

For those engaged in collective bargaining, it is important to know a labor organization cannot waive an individual employee's rights under the FLSA, nor can a labor organization agree to

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provide *less* than the minimum standards set by the FLSA. In other words, the statutory rights of employees set by the FLSA are **guarantees** to **individual** employees that may not be waived through collective bargaining. 29 U.S.C. § 207(a)(1); *Collins v. Lobdell*, 188 F.3d 1124, 1127 (9<sup>th</sup> Cir. 1999); *Albertson's, Inc. v. United Food and Commerical Workers*, 157 F.3d 758, 761 (9<sup>th</sup> Cir. 1998); *McGrath v. City of Philadelphia*, 864 F. Supp. 466 (E.D. Pa 1994).

### HOURS WORKED

Under the FLSA, employees must be paid for all hours “suffered or permitted” to be worked. 29 C.F.R. section 785.11 to 785.13. The term “hours worked” generally includes all time that an employee is required to be on the employer’s premises, at a prescribed workplace, or on-duty (29 C.F.R. Section 785.7), and includes any work an employee performs or which the employer has knowledge of or reason to believe is being performed. *Fox v. Summit King Mines* (9<sup>th</sup> Cir. 1944) 143 F.2d 926, 932; *Forrester v. Roth's I.G.A. Foodliner, Inc.* (9<sup>th</sup> Cir. 1981) 646 F.2d 413, 414.<sup>2</sup>

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<sup>2</sup>The United States Supreme Court has determined that an employee must be compensated for “all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer, and pursued necessarily and primarily for the employer or his business. *Tennessee Coal, Iron & R.R. Co. V. Muscoda Local No. 123* (1994) 321 U.S. 590.

### “Volunteer” Work

Under the FLSA, an employer who has constructive knowledge that an employee is performing work, even if the employee “volunteered” to do the work, cannot sit back and reap the benefit of such work without compensating the employee.

Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

But, employees can only volunteer to perform work as long as the duties performed do not involve the same type of activities, whether similar or identical services, that the employee performs on a regular basis for the public agency. 29 C.F.R. sections 553.100 to 553.103. Consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee, will determine whether the employee has to be paid.

### Preliminary and Postliminary Activities

An employee’s preparatory and concluding activities outside the normal workday are generally not compensable (such as commuting to the workplace, checking in and out, and changing into uniform) unless those activities are integral and indispensable to the employee’s principal activities. Commuting does not become a compensable activity just because the employee is given a marked or unmarked car to drive home.

However, roll calls and briefings are generally considered an integral part of or closely related to

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an employee's principal activities and are, therefore, compensable activities. In *Adair v. City of Kirkland, Wa.* (9<sup>th</sup> Cir. 1999) 175 F.3d 707, the city required the officers to attend ten minutes of briefing before each shift, which covered new policies and procedures, events that had occurred on recent shifts, job assignments and similar matters. That work time was deemed compensable.

### **The De Minimus Rule**

Insignificant or insubstantial periods of time beyond the scheduled work hours, which cannot for a practical matter be recorded for payroll purposes, may be disregarded as *de minimus*. 29 C.F.R. section 785.47. In *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, the United States Supreme Court held that "when the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."

But, an employer cannot arbitrarily fail to count as hours worked that time which an employee must regularly spend on assigned duties. 29 C.F.R. section 785.47. Thus, the Ninth Circuit has established a three-part test for determining if time is *de minimus*: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the work is performed on a regular basis. *Lindow v. United States* (9<sup>th</sup> Cir. 1984) 738 F.2d 1057.

### **Meal Periods**

An employee must be compensated for a meal period if the employee cannot use the time for his or her own benefit and is subject to burdensome interruptions. Under the FLSA, meal time is a rest period during which the employee must be

completely relieved from duty for the purposes of eating regular meals. However, 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. *See*, 29 C.F.R. section 785.19.

### **Travel Time**

Whether an employee must be paid for travel time depends on the type of travel involved.

For example, commute time is not compensable. 29 C.F.R. section 785.35. However, when an employee is sent out of town for one day or less, the travel time in excess of the employee's normal commute must be paid. 29 C.F.R. section 785.37.

When an employee travels and stays overnight, travel time during normal work hours, even on non-workdays, is considered compensable work time. 29 C.F.R. section 785.39. 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 whether it falls on the regular work day or on Saturday and Sunday. However, time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not considered compensable. *Id.*

### **ON-CALL or STAND-BY PAY**

Whether or not on-call or stand-by time is considered hours worked always depends on the specific restrictions placed on the employee during the on-call period. Generally, it on-call time is not considered compensable under the FLSA if the employee is free to engage in personal pursuits and only has to be reachable by the employer. This includes restrictions that an

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employee must wear a pager or leave a telephone number where he or she can be reached. Only if the employee is truly unable to use the on-call time for his or her own personal pursuits will the time be considered compensable.

The Ninth Circuit issued a comprehensive decision addressing standby time in *Berry v. County of Sonoma* (9<sup>th</sup> Cir. 1994) 30 F.3d 1174. In that case, the court found that deputy coroners who were required to be on call did not have to be compensated for stand-by time even though they received death reports, on average, every 6.45 hours. There, the coroners were considered still able to pursue personal activities while on call, even though they were required to respond by phone or two-way radio within fifteen minutes of the call and had to wear a pager. Although the restrictions were considered inconvenient, they were not considered so onerous as to require the employer to pay the employee for his or her waiting time. *See also, Renfro v. Emporia*, (10<sup>th</sup> Cir. 1001) 948 F.2d 1529 [firefighters were not entitled to pay even though they were required to carry pagers and were required to respond within 20 minutes of being paged].

In determining whether an employee can use on-call time for personal pursuits, appellate courts have examined such factors as:

- On-premises living requirements
- Geographic restrictions on employees
- The frequency of call-backs
- Time limits for responding to call backs
- The use of pagers
- Whether employees could easily trade on call responsibilities
- Whether employees actually engaged in personal activities while on-call
- Whether the on-call policy was based on an collective bargaining agreement

Notably, a restriction from drinking alcohol while on-call was not considered unduly restrictive. *Allen v. United States*, 1 C. Ct. 649.

### CALCULATING OVERTIME

Under the Fair Labor Standards Act, employees who work more than the specified maximum time during a pay period must receive overtime compensation at a rate of at least time and one-half their “regular rate of pay” for the excess hours worked. 29 U.S.C. § 207(a)

#### *Determining the “Regular Rate”*

The FLSA does not define “regular rate” as merely the employee’s base hourly rate. Rather, the FLSA defines “regular rate” to mean “all remuneration for employment paid to, or on behalf of, the employee ...” 29 U.S.C. § 207(e). Consequently, holiday pay that is amortized over the entire year may result in payments to employees in every pay period that must be considered part of the regular rate for overtime purposes.

The United States Supreme Court has stated that “the regular rate refers to the hourly rate actually paid the employee for the *normal, non-overtime workweek* for which he is employed.” *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 424, 65 S.Ct. 1242, 1245, 89 L.Ed. 1745 (1945) (emphasis added)). The Ninth Circuit, in *Local 246 Utility Workers Union of America v. Southern California Edison Co.*, 83 F.3d 292, 297 (9<sup>th</sup> Cir. 1996), stated that:

The regular rate by its very nature must reflect all payments which the parties have agreed shall be

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received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.

*Id.* At 297. The Ninth Circuit further stated that “[t]he key point is that the pay or salary is compensation for work, and *the regular rate therefore must be calculated by dividing all compensation paid for a particular week by the number of hours worked in that week.*” *Id.* at 295. (Emphasis added).

Traditionally, the following types of remuneration are taken into account in computing the employee’s regular rate under the FLSA:

- Shift differentials (*Thomas v. Howard University Hospital*, 39 F.3d 370 (D.C. Cir. 1994));
- Payments for achieving certain levels of certification, such as POST certificates;
- Educational incentives;
- Longevity premiums (*Schmitt v. State of Kansas*, 844 F.Supp. 1449 (D. Kan. 1994));
- Hazardous duty pay (*Featsent v. City of Youngstown*, 859 F.Supp. 1134 (N.D. Ohio 1993), reversed on other grounds 70 F.3d 900 (6<sup>th</sup> Cir. 1995));
- Specialty assignment pay (*Thomas v. Howard University Hospital, supra*).

This list is not exhaustive, but illustrative.

### ***When Overtime Is Required***

Overtime at time-and-one-half the regular rate is only required for hours worked beyond the statutory maximum. “Hours worked” for overtime purposes are only those that the employee *actually* performs. Time that an employee is absent for sickness, vacation, holidays, or other similar reasons do not count toward the maximum hours worked.

Where the FLSA generally sets the maximum hours in a work week to be forty (40) hours in a seven (7) day work period, special rules can apply to public safety employees. An FLSA exemption allows a public entity to establish a larger work period for overtime purposes with a higher number of maximum hours before premium pay is earned. This is often-times called the “7k exemption” from the provision that enacted it – 29 U.S.C. section 207(k).

For law enforcement agencies, an employer may establish a work period of up to 28 days and is not required to pay overtime until its non-exempt employees have worked a total of 171 hours during that period. Shorter work period can be established, such as a maximum of 43 hours in a 7 day period, or 86-hours in a 14 day period. Once the 7k maximum has been reached, overtime must be paid at time-and-one-half the regular rate.

Not all law enforcement employees can be subject to the 7(k) exemption. An employer can claim that exemption only if the employee is (1) a uniformed or plainclothes member of a body of officers and subordinates who are empowered to enforce laws designed to maintain public peace and order; (2) with the power to arrest; and (3) with on-the-job training or a course of study that typically includes physical training, self-defense,

firearm proficiency, criminal and civil law, investigative and law enforcement techniques, community relations, and medical aid and ethics.

***Author's Note:** Alison Berry Wilkinson is the managing partner of Rains, Lucia & Wilkinson LLP, a law firm that almost exclusively represents public safety employees in collective bargaining, as well as administrative discipline, criminal and civil litigation. Alison has extensive experience resolving and/or litigating Fair Labor Standards Act claims against public agencies throughout California.*

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## DISCLAIMER

The *Ultimate Backup* newsletter is prepared for general information purposes only. The summaries of recent court opinions and other legal developments are not necessarily inclusive of all the recent legal authority of which you should be aware when making your legal decisions. Thus, while every effort has been made to ensure accuracy, you should not act on the information contained herein without seeking more specific legal advice on the application and interpretation of these developments to any particular situation.

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