

3100 Centennial Tower
101 Marietta Street, N.W.
Atlanta, Georgia 30303
(404) 979-3150
(404) 979-3170 fax

DELONG, CALDWELL & BRIDGERS, LLC

Attorneys and Counselors At Law
A Limited Liability Company
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Michael A. Caldwell, L.L.C.

*Writer's Direct Dial: 404-979-3154
Email: michaelcaldwell@dcnblaw.com*

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In December, the U. S. Department of Labor's Wage and Hour Division announced that the Agency had recouped \$233,613,703 in unpaid wages and overtime for 341,624 workers during 2007, its second largest recovery rate since 1993. Such cases arise under the Fair Labor Standards Act (FLSA), and the Portal to Portal Act. Sometimes referred to as "Wage-Hour cases," FLSA cases have become the most common employment law cases filed in the nations federal courts, surpassing even racial discrimination cases. Wage-Hour claims can be brought both by the U.S. Department of Labor and by private attorneys on behalf of individuals or as "collective actions" by current or former employees. Indeed, bringing "collective actions" for unpaid wages and overtime pay in the name of individual employees is becoming one of the most lucrative litigation areas for plaintiffs' attorneys. They are a growth industry, and they have resulted in many judgments totaling millions of dollars. Making matters worse, an employer who loses such a case will in most cases be required to pay an additional amount equal to the unpaid wages as "liquidated damages" plus the employees' attorney fees.

Generally, the FLSA requires practically all employers to pay "non-exempt" employees for all "hours worked." Additionally it requires employers to pay the employee 1.5 times the employee's regular hourly rate for all time worked in excess of 40 hours during a 7 day pay period. (Special rules apply for public and law enforcement employees.) In this memo we examine the questions of whether and when the time employees spend traveling is considered "hours worked" which are compensable under the FLSA.

Paying an Employee for Travel Time

Is an Employer required to pay a non-exempt employee for travel time, even though the employee is not performing any productive work for the employer during that time ?

The answer is: "It depends."

Many employer clients have asked me whether and when they are required to pay employees who are traveling to places where they will be performing their duties. The answer to this question is determined by two laws: The *Fair Labor Standards Act*, and a related statute, The

Portal to Portal Act.

Both laws were initially passed as part of Roosevelt's New Deal legislation, which was designed to "jump-start" the Nation's stagnant economy during the Great Depression. The overall purpose of the Fair Labor Standards Act was to bring about greater diffusion of the nation's economic wealth among broader segments of the populace through a capital redistribution process. The investment and credit crash which followed the meltdown into the most devastating stock market crash culminating on Black Tuesday, October 29, 1929 created an unemployment rate of over 25% by 1932. Urban unemployment rate was exacerbated by the entry into the labor market of many farmers displaced by crop failures and declining markets for farm goods. The result was cut-throat competition between workers for the remaining jobs, through acceptance of *lower and lower wages*. In turn, this resulted in lower purchasing power and the declining demand for goods added to the unemployment rate. Roosevelt's New Deal legislation included passage of the Fair Labor Standards Act of 1937 which aimed to stop this downward wage and price spiral, in part, by setting a wage "floor" guaranteeing that every worker would be paid no less than a minimum wage amount for every hour (or part) that they worked. To encourage employers to hire more workers, the FLSA required paying workers a premium of 50% of their wage rate, in addition to their regular wages, for all time that they worked in excess of 40 hours. While there is continuing debate over whether it was the New Deal legislation or World War II that finally "cured" the nation's depression, unemployment eventually fell to the point where there was practically a "full employment" economy.

The FLSA only requires that the employer compensate an employee for time the employee actually *works*. The question then is what is considered to be "*hours worked?*"

In passing the FLSA, Congress established the United States Department of Labor to interpret, administer, and enforce the FLSA. The statute delegates to the DOL's Wage-Hour Administrator the power to create regulations which effectuate the purposes and policies embodied in the FLSA. These Wage Hour Regulations are given almost the same weight as the federal statute itself.

Under the FLSA Regulations, the key to identifying whether travel time during the workday is compensable is to determine whether the employees are engaged in travel as part of the employer's principal activity or for the convenience of the employer. Whether time spent traveling is paid work time for nonexempt employees depends on the type of travel involved. Travel time that is work time is subject to both the minimum wage and overtime pay requirements of the *Fair Labor Standards Act*.

The *Portal-to-Portal Act* established the enforcement mechanisms of the FLSA. It provides that traveling at the beginning and end of the work day to and from a location where an employee's work is performed is *not* work time (29 USC 251 to 262). Other travel time,

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 2

however, such as that which is associated with an individual's performance of his or her job is to be paid work time. As simple as this distinction appears, in fact there are many cloudy areas, some of which are clarified in the Regulations issued by the Wage and Hour Division of the U.S. Department of Labor (*29 CFR 785.33 to 785.41*).

Commuting To and From the Employee's Regular Jobsite

Normal travel from home to work is not work time. This is true whether the employee works at a fixed location or at different jobsites (*29 CFR 785.35*). Commuting includes the time spent walking from the parking lot to the worksite. If an employee has to report to a central meeting site to pick up equipment, supplies, or co-workers, or to get instructions, work time starts at that location.

1. *"Call-Back" Time for Emergency Situations*

When an employee has gone home after completing his or her day's work and is subsequently called out at night to travel a *substantial distance* to perform an emergency job for one of the employer's customers, all time spent traveling is work time (*29 CFR 785.36*). While the Wage and Hour Division has not addressed whether travel to and from the regular workplace in an emergency after hours is work time, the safest course is to treat such travel time as work time. Thus such travel time when an employee is "called back" to work for an emergency should be included in the employee's compensation, and counted toward hours worked for purposes of calculating overtime pay.

2. *Travel in Employer-Provided Vehicles*

The Portal to Portal Act provides that travel between home and work in a company-owned vehicle is not paid work time as long as the travel is within the normal commuting area for the employer's business, and the use of the vehicle is subject to an agreement between the employer and the employee or the employee's representative (*29 USC 254(a)*). This exception also applies to time spent in activities incidental to the use of the vehicle for commuting (such as stopping for gas).

According to a Department of Labor Opinion Letter, commuting time in the employer's vehicle is not paid work time if: (1) commuting in the employer's vehicle is strictly voluntary and not a condition of employment; (2) the vehicle involved is the type of vehicle that would

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 3

normally be used for commuting; (3) the employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere; and (4) the worksites are within the normal commuting area of the employer's establishment.

3. *Temporary Assignments to Different Locations*

If an employee who regularly works at a fixed location in one city is given a special one-day assignment in another city, much of the time spent traveling is considered “work time” which must be compensated. Consider, for example, an employee who works in Atlanta, GA. with regular work hours from 9 a.m. to 5 p.m., is given a temporary assignment in New York City, with instruction to leave Atlanta at 8 a.m. She arrives in New York at noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Atlanta at 9 p.m. Such travel is not regarded as ordinary home-to-work travel and must be compensated. It was performed for the employer's benefit and at its special request to meet the needs of a particular and unusual assignment. Therefore, such travel would qualify as an integral part of the principal activity that the employee was hired to perform on that day.

Not all the time involved, however, need be counted. Except for the special assignment, the employee would have had to report to her regular worksite. The travel time between her home and the airport need not be compensated. Also, the usual mealtime need not be paid (29 *CFR* 785.37).

4. *Voluntarily-Paid Commuting Time*

Some employers agree to pay certain employees for ordinary commuting time, particularly where the employee is a highly-valuable one who lives at considerable distance from the Company's premises. Since the Fair Labor Standards Act is intended only to set *minimum wage and hour* standards, the employer is free to compensate the employee for such time. Doing so does not require the employer also to count the commuting time as “hours worked” for purposes of calculating overtime pay entitlement.

Travel During Regular Work Time

Time that an employee spends traveling as part of his or her principal activity, such as travel from jobsite to jobsite during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions, pick up tools, or to perform other work there, the travel from the designated place to the place where the work actually is performed is considered part of the day's work and must be counted as “hours worked” regardless of contract or custom (29 *CFR* 785.38).

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 4

For example, if an employee normally finishes his work on the premises at 5 p.m. and is sent to another job, which he finishes at 8 p.m., and is required to return to his employer's premises, arriving at 9 p.m., *all* of the time is work time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

Overnight Travel

If an employee regularly is scheduled to work from 9 a.m. to 5 p.m., Monday through Friday, the travel time during these hours is work time, even if the travel occurs on Saturdays and Sundays. However, regular meal period time on these days need not be counted as “time worked.” For example, if an employee who normally works 9 a.m. to 5 p.m. from Monday through Friday is a passenger on a plane departing for San Francisco at 9 a.m. on a Saturday, the employer must treat his time spent traveling as “work time” because it cut across his normal working hours, regardless of the fact that Saturday is not a normal workday. However, if the plane departs on Saturday at 6 p.m., this travel time need not be counted as “work time” for compensation or overtime calculation purposes because the employee would be traveling outside of his normal working hours.

I sometimes am asked what happens if the employee uses his own private automobile for such travel? If an employee is offered public transportation but *requests* permission to drive his or her car instead, the employer has a choice: The employer may count this private automobile driving time as “hours worked” for purposes of calculating compensation and overtime. Alternatively, the employer may choose to compensate the employee and count as “hours worked” only that time which it would have been required to count as “hours worked” if the employee had used the public transportation (*29 CFR Sec. 785.40*). For example, if an employee chooses to drive her car to Charleston, (normally a four-hour trip for all but the lead-footed), instead of flying, which takes just one hour, the employer may treat as the employee’s “hours worked” either four hours or one hour. On the other hand, if the employer *requires* employees to use their personal vehicles for company business, the employer must count all time spent en route as “hours worked” regardless of whether or not the hours were normal working hours. In such a case the employee also should be required to show proof of insurance coverage and to keep accurate and detailed records (time, date, duration, purpose).

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 5

Work Performed While Traveling

Many employees, like me prefer to spend what would be “down time” on a long distance flight performing their regular work. Any travel time the employee actually spends performing work that the employee is required to perform must, of course, be counted as “hours worked.” Employees who drive trucks, buses, cars, boats, or airplanes, and employees who are required to ride as assistants or helpers on such trips, likewise are considered to be working while riding, and must be compensated for all such time, with the time also being counted toward their overtime accrual. The employer need not compensate such employees for meal periods or time when the employees are permitted to sleep in adequate facilities furnished by the employer (29 CFR 785.41).

Record Keeping

As with all time worked by employees, it is the *employer's* duty to maintain accurate records of all time worked by employees, the employee's regular compensation rate, all compensation paid to the employee for such time, and all overtime worked and compensated. This requirement also applies to “Travel Time” when an employer is required to treat such time as “hours worked.” An employer cannot escape liability under the FLSA and Portal to Portal Act by showing that it assigned the record keeping task to the employee, but the employee failed to keep accurate records. Such delegation of responsibility is no insulation from accountability and liability for failing to maintain accurate records in compliance with the FLSA.

Conclusion

The answer to the question posed at the beginning of this memo, whether the FLSA requires an employer to compensate non-exempt employees for travel time, even though the employee is not performing any productive work for the employer during that time, varies according to the individual circumstances. The answer depends upon whether such time is treated as “hours worked” under the Department of Labor's Wage-Hour Regulations.

Normally, the time spent traveling to and from the location where the employee ordinarily works is not treated as “hours worked” which are “compensable” under the FLSA. When,

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 6

however, an employee is required to travel a substantial distance outside the employee's regular working hours to handle an emergency for a customer, the time the employee spends traveling to and from the work site after receiving the call from the employer is compensable as hours worked. While the Department of Labor's Regulations are unclear as to whether the employer also is required to pay the employee for such travel time to and from *the employee's* usual work site, the safest course is to count such time as compensable.

Traveling to and from the employee's normal workplace in a company provided vehicle usually is not compensable if the conditions described above are met.

The travel time of employees temporarily assigned to work in a remote location rather than their normal place of work, must be compensated since it is performed for the employer's benefit and at its special request to meet the needs of a particular and unusual assignment. It is an integral part of the principal activity that the employee was hired to perform on that day. The employer may deduct regular meal periods which occur during such travel time from the "hours worked" calculation.

Employees' time employee spent traveling as part of his or her principal activity, from jobsite to jobsite during the workday must be counted as "hours worked" for compensation purposes, as is time which the employee spends traveling from his regular work site to a meeting place to receive instructions, pick up tools, or to perform other work there.

If an employee must travel during the hours that he normally works the entire travel is compensable even if it occurs on days that the employee normally is off duty such as a Saturday or Sunday. If the travel commences and ends outside the employee's normally scheduled work time, and all the time spent traveling is outside the employee's normally scheduled work times, the time spent in traveling is not compensable.

If the employee voluntarily uses his own vehicle for such travel instead of using public transportation the employer may choose to pay the employee for all the time spent driving, or the employer lawfully may choose to compensate the employee only for the time that the employee would have traveled had the employee used the public transportation. If the employer *requires* the employee to use his own private vehicle, all time spent driving must be compensated and counted toward overtime accrual.

Unsurprisingly, time that the employee actually spends working while traveling (even if it occurs outside the employee's regular working hours) must be compensated.

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 7

In all cases, the employer must keep accurate and complete records of all time that the employee works, and all payments and the rate of pay made to the employee. Failing to keep such records will result in the employer's loss of the ability to challenge an employee's testimony about the number of hours the employee actually worked.

The best way for an employer to avoid liability is to audit its own compensation practices to ensure that they comply with the FLSA and the Department of Labor's Regulations. The two most frequent causes of liability in Wage-Hour cases are an employer's failing to compensate employees for *all* of the employee's "hours worked," as defined in the FLSA, and the employer's mistaken mis-classification of supposedly "salaried" employees as "exempt" from overtime pay requirements.

Such mistakes can be extremely costly for an employer. Spending a sum for a competent labor and employment attorney's wage-hour compliance audit of a company's compensation practices can be a valuable investment.

As always, we stand ready and eager to help.

April 8, 2008

*Paying an Employee for
Travel Time*

DeLong, Caldwell & Bridgers, LLC
Page 8