# DOL reverts to 'opinionated' ways – maybe a good thing

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As states like Oregon codify more robust and expansive employee protections, the federal government has been helping employers clarify and navigate murky federal statutes. The United States Department of Labor (DOL) issued two new opinion letters recently, bringing renewed life to the 70-year-old practice that then-President Obama temporarily stopped in 2010. This welcomed change may provide safe harbor to employers who take good-faith, reasonable efforts to conform to the advice offered in the letters. Such reliance may provide businesses with a defense in certain circumstances should an issue arise and litigation ensue.

The first opinion letter clarifies when time spent traveling by an employee must be compensated under the Fair Labor Standards Act (FLSA). Determining how much of an employee's travel time is compensable can bedevil even the most experienced human resources professionals, especially when employees have irregular work hours.

Generally, the DOL will review time records to discern a regular workday, and while travel from jobsite to jobsite is compensable, employers need not worry about preliminary or postliminary travel to or from employees' principal activities in ordinary workdays (think commuting time). In some instances, however, an employer may be required to compensate for travel when it cuts across the employee's workday because "the employee is simply substituting travel for other duties" the employee would otherwise be performing for the employer. Compensation may be required even if the employee travels over the weekend.

When there are no clearly established "regular" work hours for the employee's workdays, the DOL will allow an employer to average the start and end times. If there is no easy math to capture the complexities of irregular workdays, businesses can also negotiate and agree on a reasonable amount of compensable travel time with the employee. Although the DOL will carefully scrutinize any arrangement where the employee does not have a regular schedule, any reasonable method for determining employees' normal working hours could pass muster and limit exposure from a wage claim.

The second letter opinion explains that employees are not always entitled to compensation for taking breaks at work. Generally, when employers provide rest breaks, the DOL considers rest breaks of up to 20 minutes to be compensable time. The DOL reasons these breaks primarily benefit the employer by giving employees opportunities to re-energize and remain productive at work. However, employers do not generally need to compensate for employees who are allowed additional breaks or leave pursuant to the Family and Medical Leave Act (FMLA).

Notably, federal law does not require employers to offer employees any breaks; however, some state laws, such as Oregon's, do require mandatory breaks, depending on the length of the employee's shift. Employers should bear in mind that state law may be more favorable to employees, and employers must comply with the law most beneficial to employees.

In the case that prompted the DOL to issue this opinion letter, sharp back pain required an employee to take eight breaks a day, effectively shortening the employee's workday from eight hours to six. The FMLA protected these breaks because a doctor certified the employee's health condition. The DOL found such frequent breaks accommodated the employee's serious health condition. Because the employee primarily benefited from these accommodations and not the employer, the FLSA did not require the employer to compensate the employee for all of these breaks.

However, the DOL reminded the employer that it still must compensate the employee for some of the breaks, since "employees who take FMLA-protected breaks must receive as many compensable rest breaks as their co-workers receive." Therefore, if an employer allows all of its employees to have two 10-minute breaks a day and compensates employees for this time as hours worked – in accordance with Oregon law – then the employer must still compensate an employee who needs multiple FMLA-protected breaks throughout the workday for two 10-minute breaks, even if those breaks are taken for FMLA purposes.

While these clarifying opinion letters are not game-changers, they are positive steps in the right direction and give employers sound, practical advice. As the DOL adopts more employer-friendly initiatives and has already reinstated 17 opinion letters Obama withdrew, the DOL will continue to issue opinion letters. While keeping abreast of these changes can help one's business navigate thorny wage and hour issues as well as provide some protection from exposure, nothing beats a call to employment counsel to ensure compliance with wage and hour laws.

For more on wage and hour laws, join Barran Liebman LLP for its next Food for Thought seminar: "Beyond the Basics of Wage & Hour Law: Advanced Training for Employers." To register for this May 8 training, please email Jessica Timm at jtimm@barran.com.

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