

# VENABLE<sup>®</sup> LLP

## Understanding Compensable Time Issues for Nonprofits under the Fair Labor Standards Act

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Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, DC 20004

**Moderator:** Jeffrey S. Tenenbaum  
**Presenters:** Robert A. Friedman, Grace H. Lee



## Overview

- Why are we concerned about compensable time?
  - Employers are failing to identify, record, and compensate "off-the-clock" hours spent by employees performing compensable, job-related activities.
  - One third of surveyed respondents indicated that their organization had been hit with a wage and hour claim in the past year.
  - Today, wage and hour class actions outnumber all other discrimination class actions combined.
  - According to the U.S. Department of Labor, more than 80 percent of employers are out of compliance with federal and state wage and hour laws.



## Overview (cont'd)

- We will cover:
  - “Off the clock” work
  - Meals and breaks
  - Waiting time
  - On-call time
  - Attendance at lectures and trainings
  - Compensatory time
  - Interns and volunteers
  - Travel time
  - Inclement weather
  - Shutdowns and furloughs



# What Is Compensable Time?

- Under the FLSA, all time spent by an employee performing activities that are job-related is potentially “work time.”
- Whether time spent at work is “work time” depends on whether the employer permitted or allowed the employee to perform the activity.
  - An employer permits or allows work if it knows the employee is doing the work, or could have found out by looking, and lets the employee do it anyway.
- Non-exempt employees must be paid at least minimum wage for all time worked, and overtime for all hours worked above 40 in a workweek.
  - A workweek is, for FLSA purposes, seven consecutive 24-hour days beginning when the employer chooses.
- In order to calculate the amount of money an employee should receive, an employer must determine the number of hours of “work” or “compensable time.”



## What Is Compensable Time? (cont'd)

- Usually includes all time employee is required to be at the premises.
  - All regular shift work time.
  - Nonproductive time (*i.e.*, receptionist reading a book).
- Includes work done “at home” or off-site.
  - Employers should limit the amount of time a non-exempt employee works from home.
- Includes unauthorized or unapproved work
  - Unauthorized overtime must still be counted as time worked and must be paid as overtime.
- Employer is responsible to “control the work” of its employees.
- Employers cannot accept time worked by non-exempt employees without counting the time when computing pay due.



## “Off the Clock” Work

- Employees coming in early or staying late to finish work must be compensated for those hours, provided that the employer knew or should have known the employee was working:
  - Pre-shift time setting up equipment.
  - Post-shift time dropping off mail or packages on the way home or other work-related activities.
- If the employee works unauthorized overtime, the employee must receive overtime pay for all hours worked, but can be disciplined for violating the employer’s policy.



## Meal Periods

- *Bona fide* meal periods are not work time and need not be compensated. *Bona fide* meal periods do not include coffee breaks or time for snacks.
  - Employee must be completely relieved from duty for the purposes of eating regular meals.
  - Ordinarily 30 minutes or more is long enough for a *bona fide* meal period.
  - It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duties during the meal period.
- Employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.
  - *i.e.*, An office employee who is required to eat at his desk and stand by for a call is not relieved of his duties.



## Rest Periods

- Rest periods of short duration, approximately 5-20 minutes, are common in the industry.
- They promote the efficiency of the employee and are customarily paid for as working time.





# Waiting Time

- Compensable Waiting Time:
  - Employee is not able to use the time effectively for his/her own purposes. Time is controlled by and belongs to the employer.
- Off Duty:
  - Employee is completely relieved from duty and able to use the time effectively for his/her own purposes. Employee must be told in advance that he/she may leave the job and will not have to commence work until a specified hour.
- Examples:
  - Assistant who is reading a book while waiting for an assignment.
  - Time spent waiting for computer or equipment to be repaired so work can resume.



## On-Call Time

- Compensable On-Call Time:
  - An employee is required to remain on employer's premises, or so close that he/she cannot use the time effectively for his/her own purposes.
- Non-Compensable On-Call Time:
  - An employee is not required to remain on the premises and just needs to tell employer where they can be reached.



## Attendance at Lectures, Meetings, and Training Programs

- Attendance at lectures, meetings, training programs and similar activities are NOT working time if the following criteria are met:
  - Attendance is outside employee's regular working hours;
  - Attendance is voluntary;
  - Course, lecture, or meeting is not directly related to the employee's job; and
  - Employee does not perform any productive work during such attendance.



## Attendance at Lectures, Meetings, and Training Programs (cont'd)

- If attendance is not voluntary, it is compensable time.
- Is it directly related to employee's job?
  - If designed to help employee handle his/her job more effectively, it is related to the job.
  - If it is training for another job or a new or additional skill, then it is not job-related even if the course incidentally improves skills in doing regular work.
- Independent training, courses and college after hours are not compensable time.
- If employer offers a lecture or training session for the benefit of employees, voluntary attendance outside of work hours is not hours worked, even if it is job-related or paid for by employer.



## Meetings and Conventions

- Non-exempt employees must be compensated for all hours worked at an organization's meeting or convention.
- Attendance at a meal during a conference is not hours worked if held outside normal working hours and attendance is purely voluntary.
  - Employee must not be led to believe that non-attendance would adversely affect his or her employment.
- Free time spent at hotel is not compensable time even though the employee is only there because of business.



# Compensatory Time

- Compensatory time (“comp”) is often offered in lieu of monetary pay for overtime worked.
- Exempt employees can use comp time without restriction, pursuant to association policy.
- Non-exempt employees must generally be paid for overtime worked, except:
  - Comp time can be used in one week to offset overtime worked in another week if it is used within the same pay period and comp time is calculated at time and one-half, or
  - Comp time can be used in a single workweek to prevent an employee from working more than 40 hours in the workweek.



## Compensatory Time (cont'd)

- Example of Comp Time Used in a Single Pay Period:
  - A non-exempt employee works 50 hours during the week of the association's annual conference. The following week falls within the same pay period. The association can require the employee to take 15 hours of comp time (time and one-half for the hours worked over 40 in the previous week) during the following workweek.



## Compensatory Time (cont'd)

- Example of Comp Time Used Within a Single Workweek
  - Employee who normally works 8 hours per day, Monday through Friday, works 10 hours per day, Monday through Thursday. Employee may use comp time on Friday and avoid working overtime during that workweek.
- Comp Time Tips:
  - Comp time should be clearly explained in employee policies and closely managed by supervisors in a consistent manner.
  - Comp time should require advance approval of a supervisor.
  - Comp time should be carefully tracked and recorded on time sheets or other records.





## Time Spent Performing Civic and Charitable Work

- Time spent at work for public or charitable purposes at employer's request, or under their direction or control, or while the employee is required to be on the premises, is working time.
- Time spent voluntarily in such activities outside of employee's normal working hours are not hours worked.



# Volunteers

- Under the FLSA, an individual is a volunteer if he/she:
  - Receives no compensation other than expense and/or a nominal fee to perform services, and
  - Such services are not the same type of service for which the individual is employed.
- Other considerations:
  - Was there a clear understanding that the individual would not be paid for the services?
  - Did the individual offer services freely without coercion from the nonprofit organization?



# Interns

- The Supreme Court focused on the “economic reality” of the training program and asked whether it provided a direct or immediate advantage to the employer and whether the program compensated the interns to determine whether an employee is a “trainee”.
- The U.S. DOL later released a six-part test to help determine whether an individual qualifies as an intern instead of an employee. Individuals qualify as interns if each of the following criteria are satisfied:
  - The internship, even though it includes actual operation of employer facilities, is similar to training given in an educational environment;
  - The internship experience is for the benefit of the intern;
  - Intern does not displace regular employees, but works under close supervision of existing staff;
  - Employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
  - Intern is not necessarily entitled to a job at the conclusion of the internship; and
  - Employer and the intern understand that the intern is not entitled to wages for the time spent in the internship (note: tuition assistance and nominal stipends for students are not considered wages for purposes of this criterion).



## Interns (cont'd)

- Key considerations of whether an individual is an intern or employee:
  - Did the individual contemplate receiving compensation for the work?
  - Did the employer receive an immediate advantage from the work completed?
- **NOTE U.S. DOL draws distinction between for-profit and non-profit orgs:** Unpaid internships in the public sector and for non-profit charitable organizations, where intern volunteers *without expectation of compensation*, are generally permissible.
- Intern who receives academic credit from his/her educational institution for completion of internship with the employer will easily qualify as a intern/trainee.
- Examples when an intern will not be considered a trainee:
  - Intern is used to substitute for regular workers or to supplement the employer's work force.
  - But for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours.
  - The intern is engaged in the employer's routine operations and/or the employer is dependent on the intern's work.



## Travel Time

- The Portal-to-Portal Act exempts employers from compensating employees under the Fair Labor Standards Act “for or on account of” time spent “traveling to and from the actual place of performance of the principal activity or activities of employment ...” *29 U.S.C. § 254(a)*.



## Home-to-Work Travel

- As a general rule, an employee who travels from home before his/her regular workday and returns to their home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment.
  - This is true whether he/she works at a fixed location or at different job sites.
  - This is also true even if an employer agrees to pay for the commute.
  - Normal travel from home-to-work is not work time.



## “Normal” Home-to-Work Travel

- The key to determining whether commuting time must be compensated is ascertaining whether it is “normal travel.”
  - “Normal travel” is not an objective standard of how far most workers commute or are reasonably expected to commute, but rather a subjective standard defined by what is usual within the confines of a particular employment relationship.



## “Normal” Home-to-Work Travel (cont’d)

- Examples:
  - Travel from home to several on-site training workshops in different counties on different days in a given week.
  - Farm workers whose travel time on bus sometimes exceed 2 hours.
  - Construction employer with projects located at job sites that are 1 to 1½ hours from the home office.
  - An employee’s commute to the first job site in the morning takes 4 hours.





## Working From Home

- Employee who does work from home (*i.e.*, has personal home as his/her main worksite) may be compensated for commuting time.
  - For example, a court determined that an automobile damage appraiser who worked from home was entitled to compensation for morning and evening commutes to a worksite.



## Home-to-Work in Emergency Situations

- There may be instances when travel from home to work would be considered compensable time.
  - For example, if an employee who has gone home after completing his/her day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his/her employer's customers, then all time spent on such travel is working time.



## Home-to-Work on a Special One-Day Assignment in Another City

- Employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city.
- Employee travel time that is not part of employee's "ordinary commute" is compensable time.



## Home-to-Work on a Special One-Day Assignment in Another City (cont'd)

- Example:
  - Employee works in Washington, DC with regular working hours from 9:00 a.m. to 5:00 p.m. and is given a special assignment in New York City with instructions to leave Washington at 8:00 a.m. He arrives in New York at 12:00 p.m., ready for work. The special assignment is completed at 3:00 p.m., and the employee arrives back in Washington at 7:00 p.m.
  - Such travel is not ordinary home-to-work travel. Employer can't argue that employee in this scenario had an uncompensated "four-hour commute" each way.
  - However, travel between employee's home and the railroad depot may be deducted from compensable time.



# Travel Away From Home

- Travel that keeps employee away from home overnight is travel away from home.
- Travel away from home is compensable time when it cuts across employee's workday. Employee is simply substituting travel for other duties.
- The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days.
  - If an employee regularly works from 9:00 a.m. to 5:00 p.m. from Monday through Friday, the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. Regular meal period time is not counted.



## Travel Away From Home (cont'd)

- U.S. DOL has said it will not consider as “working time” the time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.
  - Thus, if employee normally works from 9:00 a.m.– 5:00 p.m., and has a flight leaving at 5:00 p.m. from Washington, DC to a conference in New York and will then be taken by cab to the hotel from the airport, the two hours or so of this trip are not counted as working time.
- However, if employee is offered public transportation but requests permission to drive his/her car instead, employer may count as hours worked either the time spent driving the car or the time it would have had to count as hours worked during working hours if the employee had used the public mode of transportation.



# Work Performed While Traveling

- Any work which employee is required to perform while traveling must be counted as hours worked.
- Time spent by employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or other mode of transportation) to or from work.
- However, the time spent working on the commute must be more than a *de minimis* amount in order to be compensable.
- Examples:
  - Law enforcement officer required to monitor radios during commute.
  - Fire alarm inspector required to carry a briefcase with safety inspection documents during his commute.
  - Employee required to carry a work-issued Blackberry with him/her to take home every night.



## Travel Time in Organization-Owned Vehicles

- Under the Employee Commuting Flexibility Act of 1996, when an employee has the use of a organization vehicle for normal travel between home and work and on occasion stops before or after his/her regular working hours to have the vehicle washed or the oil changed, the time spent is not considered compensable.
- In this situation, it is best that the employer and employee have reached a formal usage agreement under the provisions of the ECFA.
  - If employee has to travel outside of the normal commuting area for work, the time spent beyond the normal commuting distance is compensable.





## Inclement Weather

- Under FLSA, non-exempt employees who do not report to work due to inclement weather shut down do not have to be paid for that day.
- If the non-exempt employee is late for work due to inclement weather but the employer is open, the employer does not have to pay the employee for time not worked.



## Inclement Weather (cont'd)

- Exempt Employees
  - If shut down for less than a week, exempt employees still get paid for a week.
  - If shut down for an entire week due to inclement weather or other emergency, employer can technically dock full week pay, but should consider employee-relations problems.
  - Employers *may* be able to require exempt employees to use paid time off.



## Inclement Weather (cont'd)

### ■ State Laws

- Some states do not allow employers to require use of PTO due to inclement weather.
- Some states require a “report-in pay” for non-exempt employees.
  - *Ex.* DC Non-exempt employees who report to work for their regular schedule but are sent home get paid for the lesser of 4 hours or what their regular schedule would have been.



## Miscellaneous Issues

- Time Waiting for/Receiving Medical Attention: Time spent waiting for and receiving medical attention on the premises or at the direction of employer during employee's normal working hours on days when he/she is working constitutes hours worked.
- Time Spent on Suggestion Systems: Time spent outside of work developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours, then it must be counted as hours worked.
  - If employee is assigned to work on the development of a suggestion, time is considered hours worked.



## Forced Shut-Downs/Furloughs

- Is it legal for an employer to reduce the wages or number of hours of an hourly employee through a furlough?
  - All non-exempt employees must receive at least the minimum wage for all hours worked and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime.
  - FLSA does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.
- Does an employer need to pay an hourly employee for a full day of work if he/she was scheduled for a full day but only worked a partial day due to lack of work?
  - FLSA does not require employers to pay non-exempt employees for hours they did not work.



## Time Records

- Employer bears the burden of keeping records of employee's hours worked and pay.
- Non-exempt employees should be required to record time worked, vacation time, comp time, PTO, etc.
- Supervisor should be required to approve time records.



# Top Ten Compensable Time Quandaries for Nonprofits

Number	Hypothetical	Is the Time Compensable?	
		Yes	No
1	Administrative assistant is reading a romance novel at her desk while waiting for an assignment.	✓	
2	Research assistant attends continuing education seminar that will improve research skills during regular work hours.	✓	
3	Employee arrives to work thirty minutes early every day due to her commuter bus schedule and starts working but does not record this time on her weekly timesheet.	✓	
4	Employee is invited to dinner with members of the association at the annual conference but is not required to attend and is free to make other dinner plans.		✓ (as long as no coercion)
5	Employee volunteers to participate in employer-organized organization-wide trip to build houses for Habitat for Humanity.	✓  (if under employer direction or control)	



# Top Ten Compensable Time Quandaries for Nonprofits

Number	Hypothetical	Is the Time Compensable?	
		Yes	No
6	Employee takes 4-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane.		✓
7	Employee whose regular commuting time is 30 minutes takes a three hour train for a one day trip to another city during regular shift hours and performs no work on the train.	✓ (the 2.5 hours not part of regular commute is compensable)	
8	IT specialist volunteers to be a greeter at her nonprofit's annual fundraiser for two hours outside of regular working hours.		✓ (as long as no coercion)
9	A nonprofit which provides job training services to homeless men hires an intern to assist in conducting intake interviews of program participants.	✓ (but, probably not if intern receives academic credit)	
10	Teacher's assistant feels dizzy during regular shift hours and supervisor instructs her to lay down for 15 minutes in the employee lounge.	✓	





## Questions?

Jeffrey S. Tenenbaum  
575 7<sup>th</sup> Street NW  
Washington, DC 20004  
(202) 344-8138

[jstenenbaum@venable.com](mailto:jstenenbaum@venable.com)

Grace H. Lee  
575 7<sup>th</sup> Street NW  
Washington, DC 20004  
(202) 344-8043

[ghlee@venable.com](mailto:ghlee@venable.com)

Robert A. Friedman  
575 7<sup>th</sup> Street NW  
Washington, DC 20004  
(202) 344-4332

[rafriedman@venable.com](mailto:rafriedman@venable.com)

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