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LABOR AND EMPLOYMENT

ALERT

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EMPLOYERS BEWARE – THE THIRD CIRCUIT STRICTLY CONSTRUES THE FLSA REGULATIONS TO PREVENT TAKING CREDIT TO OFFSET OVERTIME OBLIGATIONS WITH AMOUNTS PAID VOLUNTARILY FOR BONA FIDE MEAL PERIODS

By Karen Baillie

As employers prepare to implement the new federal Department of Labor regulations which, on December 1, 2016, will double the minimum salary required for many exemptions under the Fair Labor Standards Act ("FLSA"), employers should also consider revisiting how they are calculating hours worked for their nonexempt employees.

On October 7, 2016, the United States Court of Appeals for the Third Circuit, in *Smiley v. E.I. Dupont De Nemours and Company*, No. 14-4583, held that employers cannot offset their obligation to pay nonexempt employees for pre- and post-work time with amounts they have voluntarily paid for meal breaks. The Third Circuit's decision puts it at odds with at least two other circuit courts of appeals.

As many employers know, the FLSA does not require employers to pay for meal breaks of at least thirty minutes where the employee is completely relieved of her responsibilities. Indeed 29 C.F.R § 785.18 states:

> a. ***Bona fide meal periods.*** *Bona fide* meal periods are not work time. *Bona fide* meal periods do not include coffee breaks or time for snacks. These are rest periods. The 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. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating...
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> b. ***Where no permission to leave premises*.** 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.

Previous cases in other circuits, including *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996) and *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994), focused on whether or not the meal breaks were *bona fide* and assumed that if the meal breaks were *bona fide*, then the employer did

not have to pay for them, and therefore, could take credit against the paid meal breaks for pre- and post-shift work time.

In the *Dupont* case, the parties agreed that the meal times were *bona fide,* and thus, they agreed that FLSA did not require that Dupont pay its employees for meal times. The issue was whether the employer had to pay for pre- and post-shift time even though employees were already voluntarily compensated for meal times.

The *Dupont* employees worked 12-hour shifts with three 30-minute *bona fide* meal breaks. They were required to arrive on-site before their shifts and to change into uniforms and protective gear. They were also required to spend time speaking to the outgoing shift about the status of work on the previous shift. After their shifts, they again had to spend time speaking with the newly arriving shift and changing out of protective gear and uniforms. The parties agreed that this this pre- and post-shift time ranged from thirty to sixty minutes a day, but never exceeded the 90 minutes of paid *bona fide* meal time.

In concluding that Dupont had to pay the employees for pre- and post-shift time, regardless of the voluntary pay for *bona fide* meal periods, the Third Circuit focused on its obligation to construe the FLSA "liberally in favor of employees." It then looked to the rules regarding which payments must be included in an employee's "regular rate of pay," which is the rate which must be multiplied by one a half to determine the employee's overtime rate each workweek. In general, <u>*all*</u> payments to nonexempt employees are included in the employee's regular rate of pay and only those specifically excepted are not. There are eight exceptions listed in 29 C.F.R. § 207(*e*), including Christmas gifts and other special occasion gifts, vacation, holiday pay, reimbursement for travel and other expenses, discretionary bonuses, prizes and awards, payments to benefits and retirement plans, stock option grants, premiums for working more than eight hours in a shift, premiums for working on weekends or holidays and premiums for working outside the regular hours established by the collective bargaining agreement. The regulations make it clear, according to the Third Circuit, that only three of the listed kinds of exceptions from regular rate of pay may be used to offset overtime obligations. 29 C.F.R. § 207(h) ("Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section."). That is, according to the Third Circuit, the employer is *only* permitted to offset overtime pay in each workweek with the amount the employer has paid to the employee for the premiums associated with working more than eight hours in a day, on weekends or holidays or for working outside the regular hours established by the collective bargaining agreement.

The court concluded that these are narrow exceptions and the employer cannot take credit against overtime pay for any other reason other than credit for the three types of premium pay. As such, Dupont could not take credit for paying for meal time voluntarily in lieu of paying for pre- and post- shift work, such as changing into uniforms and protective gear and discussing the work with the prior and later shifts.

> "Thus, the FLSA explicitly permits offsetting against overtime only with certain compensation that is statutorily excluded from the regular rate, that is, only three categories of compensation, which are 'extra compensation provided by a premium rate. … No other types of remuneration for employment may be so credited.'"

The Court reached this decision even though Dupont properly included its voluntary *bona fide* meal time payments in the employees' regular rate of pay calculations and subsections 207(e) and (h) both speak to amounts excluded from the regular rate of pay.

As a result of this ruling, employers in the Third Circuit are warned: the Third Circuit will continue to interpret the FLSA in a manner that benefits employees, unless there is a clear statement in the regulations otherwise. Employers who wish to minimize overtime obligations may want to consider whether they are properly tracking working hours. The *Dupont* case illustrates that employers may not want to count towards working time *bona fide* meal periods of at least 30 minutes, but definitely do want to be sure to include time spent before and after a shift changing into the employer's required uniform and protective gear and participating in required work activities. ◆

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