U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-16

November 3, 2020

Dear **Name***:

This letter responds to your request for an opinion on whether the travel time of non-exempt foremen and laborers is compensable worktime under the Fair Labor Standards Act (FLSA) in three different scenarios. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced before your request.

BACKGROUND

You state that a construction company that has job sites in various locations employs foremen and laborers, all of whom are non-exempt under the FLSA. For safety and security reasons, the company keeps its trucks at its principal place of business. In each scenario, you explain that foremen are required to travel to the employer's place of business to retrieve a company truck; drive the truck to the job site, where it is used to transport tools and materials around the job site; and return the truck to the employer's place of business to secure it.

A. Scenario One: Local job sites.

The job site is local; that is, close to or within the same city as the employer's principal place of business. Each foreman retrieves a company truck in the morning from the employer's principal place of business, drives it to the job site, and returns it at the end of the day. You state that laborers may choose to "drive directly to the job site" or "drive to the principal place of business and then ride to the job site with the foremen[.]"

B. Scenario Two: Remote job sites.

The job site is between 1-½ and 4 hours' travel time from the employer's principal place of business. The employer pays for hotel accommodations for all employees who work at the job site and pays to those employees a per-diem meal stipend. Each foreman retrieves a company truck from the employer's principal place of business at the beginning of the job, drives it to the job site, and returns it at the end of the job. Laborers "are to drive their personal vehicles" to and from the remote job site at the beginning and end of the job, but some "want to drive their personal vehicles to the employer's principal place of business and ride to and from the job site with the foremen[.]"

C. Scenario Three: Employees commute to remote job site.

The facts are the same as in Scenario Two, but the laborers choose to travel between the remote job site and their homes each day rather than stay at the hotel.

GENERAL LEGAL PRINCIPLES

An employee is working and must be compensated when suffered or permitted to work. *See* 29 U.S.C. § 203(g); 29 C.F.R. § 785.11. An employee's workday ends when the "employee is completely relieved from duty [for] long enough to enable him to use the time effectively for his own purposes[.]" 29 C.F.R. § 785.16. Under the Portal-to-Portal Act, an employee's time "walking, riding, or traveling to and from the actual place of performance of the [employee's] principal activity or activities" is generally not compensable worktime when the walking, riding, or traveling occur before the employee starts or after the employee stops his principal activity or activities. 29 U.S.C. § 254(a). Whether the employee "works at a fixed location or at different job sites," travel to and from home or a place of lodging at either end of the workday is "ordinary home to work travel which is a normal incident of employment" and "is not worktime." 29 C.F.R. § 785.35; *see id.* § 790.7(c).

On the other hand, WHD has long interpreted the Portal-to-Portal Act to require that "travel from [a] designated place to the work place is part of the day's work, and must be counted as hours worked" when an employee is "required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools[.]" 29 C.F.R. § 785.38. But a preliminary or postliminary activity is not compensable under the Portal-to-Portal Act simply because it benefits the employer and the employer requires it. Instead, as the Supreme Court recently clarified in *Integrity Staffing Solutions, Inc. v. Busk*, the Portal-to-Portal Act requires that the activity be "integral and indispensable to the principal activities that [the] employee is employed to perform"; that is, the activity must be both "an intrinsic element" of the employee's principal activities and one that the employee "cannot dispense [with] if he is to perform his principal activities." 135 S. Ct. 513, 518–19 (2014).

Travel to another city on a special one-day assignment is compensable worktime from which the employer may deduct the amount of time (either the actual time or an average commute time) that the employees would have used to travel to their usual work site. 29 C.F.R. § 785.37. Travel that keeps an employee away from home overnight is travel away from home. *Id.* § 785.39. Whether that travel is compensable depends on *when* the employee travels and *how* the employee travels. Travel away from home that cuts across an employee's normal working hours is compensable; the travel is simply substituting for other duties. *Id.* This is the case even if the employee is traveling on what would normally be a nonwork day. *Id.* As an enforcement policy, WHD does not consider "travel away from home outside of regular working hours as a passenger" to be compensable. *Id.* If an employer offers public transportation to an employee but the employee chooses to drive his own vehicle, the employer may count as hours worked

either the amount of time the employee spent driving or the amount of time the employer would have had to count if the employee had used the offered transportation. 29 C.F.R. § 785.40.

OPINION

A. Foremen.

The foremen's travel time between the employer's principal place of business and the job sites is compensable in each scenario.

A foreman's trip from home to the employer's place of business is ordinary home-to-work commuting and is not compensable. 29 U.S.C. § 254(a); 29 C.F.R. § 785.35. WHD has long interpreted the Portal-to-Portal Act to include as compensable all time spent traveling from a central location to a job site when the employee is directed to first report to the central location. 29 C.F.R. § 785.38; *see* WHD Opinion Letter FLSA-727 (Nov. 15, 1990);[1] WHD Opinion Letter FLSA-980 (July 9, 1990).[2] But being required to report to the central location by itself cannot make travel from that location to the job site compensable. Instead, as the Supreme Court clarified in *Busk*, travel time that begins or ends a work day is compensable if it is "integral and indispensable to the principal activities that [an employee] is employed to perform." 135 S. Ct. at 519.

You have indicated that the job sites are large and that the company needs the trucks to transport tools and materials around those sites. You have also indicated that, for safety and security, the employer requires that the company trucks be secured at the employer's principal place of business when not at a job site. For these reasons, the company requires the foremen to retrieve the truck from the principal place of business, drive the truck to the job site, and return the truck when done at the job site. We thus conclude that the foremen's retrieving the truck at the beginning of the work day, driving it to the job sites, and returning the truck at the end of the work day are integral and indispensable to the principal activities they are employed to perform, making the travel time between the employer's place of business and the job site compensable worktime. This is true whether the job site is local, as in Scenario One, or remote, as in Scenario Two.

B. Laborers.

1. Scenario One: Local job sites.

The laborers' travel time to and from a local job site is normal commuting between home and work, which is not compensable. 29 U.S.C. § 254(a); 29 C.F.R. § 785.35. Their choice to meet at the employer's place of business and from there ride with the foreman in the company truck as

[1] Available at https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/legacy/ol_1990-11-15_a.pdf.

[2] Available at https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/legacy/ol_1970-07-09_a1.pdf.

part of their travel does not transform their commute into compensable worktime. *See, e.g.*, WHD Opinion Letter FLSA-980 (July 9, 1990).

2. Scenario Two: Remote job sites.

In this scenario, the laborers are away from home overnight. The laborers' travel from their hotel to the job site is normal "home" to work travel, which is not compensable. 29 U.S.C. § 254(a); 29 C.F.R. §§ 785.35, 790.7(c); WHD Opinion Letter FLSA2018-18 (Apr. 12, 2018).[3] The laborers' travel to and from the remote location at the beginning and end of the job, on the other hand, may or may not be compensable.

a. Laborers who drive.

You state in your letter that the laborers "are to drive their personal vehicles" to the remote job site at the beginning of the job and home at the end of the job. We assume that the actual requirement is that laborers be at the job site to perform their duties and that "drive their personal vehicles" is a description of how the laborers get to the remote job site rather than a command that they travel in a particular way. If their travel cuts across their normal work hours, even if they are traveling on what would otherwise be a nonwork day, the laborers' time is compensable. 29 C.F.R. § 785.39.

b. Laborers who are passengers.

Whether a passenger's travel time is compensable depends on when the laborer travels. If the laborers are traveling to the remote job site as passengers outside of their normal working hours, WHD would not consider their time to be compensable. 29 C.F.R. § 785.39. If the laborers are traveling to the remote job site during their normal working hours, even if not on normal workdays, their time would be compensable. *Id.*

You state in your letter that some laborers "want to drive their personal vehicles to the employer's principal place of business and ride to and from the [remote] job site with the foremen[.]" If the employer offers to transport laborers to the remote job sites in the company trucks but a laborer chooses to drive his own vehicle, the employer would have the option to count as compensable worktime either (1) the actual amount of compensable time the laborer accrues in driving to the remote job site or (2) the amount of time that would have accrued during travel in the truck. Our interpretive regulation addresses only offers of *public* transportation to employees who choose to *drive* themselves. 29 C.F.R. § 785.40. However, as our travel-time regulations themselves note, they do not purport to address every conceivable situation in which an employee must travel for work. Rather, they "discuss[]" the "principles which apply in determining whether or not time spent in travel is working time," *Id.* § 785.33, as part of the regulations' broader aim of explaining how hours-worked principles apply under frequently occurring situations, *see id.* §§ 785.1, .10. Applying those principles to the facts you

[3] Available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_04_12_01_FLSA.pdf.

have described, we conclude that the employer's choice of how much time to count as compensable worktime as described above is equally applicable to other offers of transportation, such as where employees choose to travel as passengers in employer-offered transportation.

The FLSA is not an inflexible bar that places employer and employee in opposition; it recognizes that employment is a relationship both parties enter into for their mutual benefit. *See, e.g., Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424–25 (1945) (parties are free to agree to wages and work hours, including overtime to be worked, at any time, as long as the FLSA's minimum-wage and overtime requirements are satisfied). "And that is as should be expected, because employees' rights … are not always separate from and at odds with their employers' interests." *Sec'y of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019). Thus, our travel-time regulations do not rigidly demand that all time spent on overnight travel be considered compensable worktime, nor do they treat all days involving overnight travel as typical workdays. This would leave employers with a single method of controlling travel-time costs: demanding that employees travel only on employer-determined schedules, lest they choose to travel on schedules that would turn noncompensable time into compensable time. Rather, WHD's regulations allow an employer to control those travel costs by offering public transportation to a remote job site on its preferred schedule. Whether employees accept the offer or decline it in favor of driving themselves, the employer has controlled its costs: The offer allows the employer to count as compensable time either the time the employees' travel actually takes or the time that would have been considered compensable if the employees had accepted the offered transportation. 29 C.F.R. § 785.40.

These principles do not change if an employer offers private instead of public transportation, or if the employees ask to travel as passengers rather than drive or otherwise transport themselves. We thus conclude that if the employer offers the laborers the opportunity to ride to the remote worksite with the foremen in the company vehicles, the employer may choose to count as hours worked either (a) the time that accrues during a trip in the company trucks or (b) the time the laborers actually take to travel to the remote worksite.

3. Scenario Three: Remote job sites, but laborers commute.

In this scenario, laborers choose to drive between the remote job site and their homes each day. The laborers' travel to and from the job site at the beginning and end of the job would be treated as in Scenario Two. The laborers' intervening drives home and back to the remote job site would not be compensable.

Once the workday ends, the laborers are presumably "completely relieved from duty" for long enough "to use the time effectively for [their] own purposes"; that time is not hours worked. 29

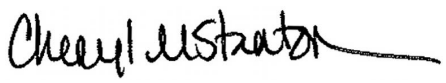
C.F.R. § 785.16(a).[4] The laborers' own purposes might be watching TV, reading, playing cards, working out, or calling or video chatting with friends and relatives. If their purpose is travel to their homes, however, that travel does not transform the time used at the laborers' personal disposal into hours worked.

CONCLUSION

We conclude that the foremen's travel time is compensable in every scenario; that the laborers' travel time is not compensable in Scenario One; that the laborers' travel time may be compensable in Scenario Two; and that the laborers' intervening travel time in Scenario Three—the drives from the remote job site to home and back between the beginning and end of the job—is not compensable.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*. We trust that this letter responds to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**

[4] This is the case even if the laborer's relief from duty cuts across what would normally be the laborer's work hours: If the employer has "definitely told [the laborer] in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived," his actual workday has ended, and his time is his to do with as he pleases—not worktime. 29 C.F.R. § 785.16(a). *See also* WHD Opinion Letter FLSA2004-15NA (Sept. 21, 2004), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2004_09_21_15FLSA_NA_travel.pdf.