

TO PAY OR NOT TO PAY

By Phil Schechter, SPHR

Travel Time and Payments for Attending Training Activities:

Generally time spent for the benefit of the employer, with the employer's knowledge and approval, performing activities and duties that are integral to the employee's job are considered to be working hours and, therefore, compensable. Usually, personal tasks performed before or after the employee's principal activities in a workday are generally not compensable unless they make up a portion of the employee's principal duties. Usually, tasks such as, picking up and delivering supplies and/or equipment, driving other employee's to a job site at the employer's request or going on a prolonged trip outside of the employee's normal commuting area would be considered compensable.

The rules covering travel, training and on call time do not apply to exempt employees. Exempt employees must be paid on a salary basis and receive the same salary in any workweek in which they perform any work regardless of the quantity or quality of work performed.

For non-exempt employees, the general rules governing when travel time is "working time" are from 29 C.F.R. §§ 785.33 - 785.41. These rules apply only to non-exempt employees.

The following summary outlines the prescribed approaches to handling compensable travel, training and on call situations:

1. Home-to-work in ordinary situations. Normal travel from home to work is not working time. Thus, the employee is not entitled to compensation for his/her commuting time. This rule applies whether the employee regularly works at the same site every day or is assigned to work at different job sites on different days of the week. The question here is what is normal travel. A rule of thumb is the time/distance a person generally spends going to his/her place of employment. For example:

<u>Situation</u>	<u>Extra Compensation</u>
• The employee's distance from home to work is 30 minutes.	No
• The employee is told to pick up supplies on his/her way to work.	Yes (1)
• The employee is sent to a different worksite(s) which are generally the same distance from home to the regular workplace.	No
• The employee is told to drive other employees to work.	Yes (1)
• The employee is told to go from <u>home</u> to a work site that is 90 minutes away, 30 minutes more than his/her regular commute.	Yes (2) (2a)
• The employee has <u>arrived</u> at his regular worksite and is then sent to a distance worksite that is 90 minutes away.	No (only regular rate) (3)

(1) The time from home to the worksite, in this case is compensable.

(2) The time difference between the normal commute 30 minutes is compensable. In this case the employee would receive 60 minutes of paid time.

(2a) If the employee returns to his/her regular worksite during the course of the normal work day, before the end of the normal days work, there would be no extra return trip pay.

If the employee went directly home from the distant worksite after the completion of the regular days work, there would be an additional 60 minutes of pay for the return trip home.

(3) No extra compensation because it occurred during regular work hours

2. Home-to-work in an emergency situation. A non-exempt employee has gone home after completing his day's work. He is called at home and asked to travel a substantial distance to perform a work related activity. In this situation, all the after hours travel time is working time and therefore must be compensated.
3. Home-to-work and work-to-home in a different location. An employee regularly works at a fixed location in city **A** and is given a temporary work assignment in city **B** which is 45 minutes further in distance from the employee's home to his/her regular work site. In this case, the additional travel time of 45 minutes to and 45 minutes from work would be considered working time and must be compensated. Therefore, the employee would receive a total of 90 additional minutes of paid travel time for each day worked on the temporary assignment.
4. Travel that is part of regular day's work. Time spent by an employee in traveling from location to location as part of his/her normal workday, must be counted as hours worked. For example, if an employee is assigned to work at one worksite in the morning and a different site in the afternoon the employee must be compensated for the travel time between sites. If the employee who works at one location is required to attend a meeting during the day at another site the travel time is considered hours worked. Therefore, any travel time that occurs during the employee's normal work hours is to be paid at the employee's normal rate of pay.
5. Travel away from the home community. Travel that keeps an employee away from home overnight is "travel away from home." "Travel away from home" is working time and must be compensated when it cuts across the employee's regular workday. For example, if an employee regularly works 8:00 a.m. to 5:00 p.m., travel on any day of the week (including Saturday and Sunday) during the 8:00 a.m. to 5:00 p.m. time period is working time and must be compensated. Travel outside the 8:00 a.m. to 5:00 p.m. regular work time need not be compensated. However, if the employee is performing assigned work outside the 8:00 a.m. to 5:00 p.m. regular work time, the time spent working must be compensated regardless of what time during the day the work is performed. Note item 8 for more details.
6. Work performed while traveling. If an employee is required to perform any work while traveling, whether that travel occurs during the employee's regular workday hours or not, the travel time is working time and must be compensated. For example, if an employee is required by an employer to drive other employees to a conference, the driving time is work time for the driver even if it occurs after regular work hours.
7. Payment for time spent in training programs. Under regulation (29 C.F.R. § 785.27-.32), employers must pay employees for attendance at lectures, meetings, training programs and other similar activities if any one of the following four factors is met:
 - A. Attendance is during the employee's regular working hours;
 - B. Attendance is not voluntary. Attendance is not considered voluntary if the employer leads the employee to believe that his or her working conditions or continued employment will be adversely affected by failure to attend;
 - C. The course, lecture, or meeting is directly related to the employee's job;

D. The employee performs any productive company work during such attendance.

Training, even if the subject is related to the employee's job, is not compensable, if it is designed to teach the employee a different job or if the employee, on his or her own initiative, attends an independent school or college or outside program even when sponsored by the employer. This would be true under many tuition reimbursement situations.

8. Travel time that occurs outside of the employee's regular work hours. Traveling times (that have not been covered by the conditions expressed in items 1 through 7) are not compensable unless the employee is doing work. Work could include: driving other employees, reading and actually preparing for a presentation in the same amount of detail that he/she would have done at their regular worksite, would be compensable.
9. Use of a company vehicle. Under the Employee Commuting Flexibility Act of 1996 (ECFA), when an employee has the use of a company 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 and 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 ECFA. If the employee has to travel outside of the normal commuting area for work, the time spent beyond the normal commuting distance is compensable.
10. Personal time when staying and working at a distance city. When working at a distant location, personal "down time" such as: sleeping, personal meals and relaxation, and travel to and from the hotel to the worksite are not considered hours worked. Business meals and working lunches are considered working hours.
11. Work stoppage at a distant and or local worksite. In the event that work has to be halted due to such things as bad weather, lack of materials, equipment failures, etc., the employer can call it "off-duty" non-compensable time if the employees:
 - Are completely relieved of all their duties;
 - Permitted to leave the worksite;
 - Can use the time for their own purpose;
 - Have the understanding that they will not have to return to work until a specified time;

The employer can request that the employees leave word as to how or where they can be contacted.

Points of caution:

Employers should establish regular work schedules in advance of the traveling workweek. These times should not change from week to week.

Any type of agreements and practices that attempt to circumvent the FLSA definitions and act to turn compensable activities into non-compensable activities are unenforceable and invalid even if the covered (non-exempt) employee(s) agrees to such conditions.

When all hours worked, including the compensable travel hours, exceed 40 hours within the workweek they are to be counted toward eligibility for overtime payments.

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