“OFF-THE-CLOCK” TIME-
WHEN IS IT COMPENSABLE?

Ellen C. Kearns, Esq.
Epstein Becker & Green, P.C.
111 Huntington Avenue
Boston, Massachusetts  02199
Tel. 617-342-4000

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I. INTRODUCTION

Two fundamental concepts of the Fair Labor Standards Act (FLSA) are “minimum wage” and “overtime.” Section 6 of the FLSA requires that each covered employee must be paid at least a specified minimum wage for each hour worked and Section 7 provides that non-exempt employees who work more than 40 hours in a workweek must receive at least 1 ½ times their regular rate of pay for each hour worked over 40. The amount of money an employee is entitled to receive cannot be determined without knowing the number of hours worked in each workweek.

Questions frequently arise as to whether time spent on various job-related activities—ranging from travel time and on-call time to meal periods and sleep time—must be compensated. This paper discusses the principles involved in determining what constitutes working time, and applies those principles to situations that frequently arise.\(^1\)

The phrase “off-the-clock” has been used by a number of courts, legal commentators and attorneys. There is no universal definition for the phrase, but it is generally meant to describe work that is performed without compensation outside of an employee’s recorded work hours. The phrase can be found in numerous newspaper headlines and articles. For example, in Volume 1 of the Wage Hour & Leave Report, we find “Four Wal-Mart Workers Can Proceed to Trial With Off-the-Clock Work, Rest Break Claims;”\(^2\) “Fleetwood to Pay $7.35 Million to Employees In Final Settlement Over ‘Off-the-Clock’ Work;”\(^3\) “Maintenance Company Foremen…Not Compensated For ‘Off-The-Clock’ Work…May Proceed With Class Suit;”\(^4\) Through Manipulation of Time Records and Off-The-Clock Work,…Pep Boys Illegally Avoided Paying…Overtime;\(^5\) As will be more fully described below, in each of these cases, the alleged “off-the-clock” work involved different fact patterns describing different kinds of off-the-clock work. Some involve preliminary and postliminary work, others involve a disruption of the meal period. It is my contention that “off-the-clock” cases are, in fact, cases involving what is compensable work.

For example, in Brasco et al. v. Wal-Mart Stores Inc.,\(^6\) the U.S. District Court for the Eastern District of Louisiana held that four individual employees of a Wal-Mart store in Louisiana could proceed with their breach of contract claim charging that the company required then to work “off-the-clock” and failed to provide adequate rest breaks. In denying class action certification


\(^2\) 1 WHLR 262 (5-24-02).

\(^3\) 1 WHLR 288 (6-07-02).

\(^4\) 1 WHLR 462 (9-13-02).

\(^5\) 1 WHLR 289 (6-07-02).

\(^6\) 216 F. Supp. 2d 592 (E.D. La. 2002), 1 WHLR 262 (5-24-02).
with regard to the employees’ claims that they were required to work off-the-clock, the court wrote “individualized issues will arise from the myriad of possibilities that could be offered to explain why any of the employees worked off-the-clock.”

The court noted that as to any of the putative class members Wal-Mart can be expected to raise defenses that correspond to specific facts alleged. “Thus, the individual issues concerning the facts surrounding any plaintiffs’ work performed off-the-clock and defendant’s potential defenses predominate any common issues.”

In the case involving Fleetwood Enterprises Inc., the employees alleged that they were not paid for work performed before the regular starting time, during lunch breaks, and after the regular shift. Additionally, the employees alleged that Fleetwood changed time records, did not keep some required records, and improperly rounded down employees’ work time. In the Settlement Documents, Fleetwood did not admit to any liability or wrongdoing, but agreed to prohibit “off-the-clock” work and modify the Company’s work-time rounding practice. Clearly, what was at issue in the case was whether preliminary/postliminary time and meal periods were “compensable.”

On August 28, 2002, a complaint was filed by current and former Pep Boys employees alleging that the employer, by manipulating time records and requiring off-the-clock work, avoided overtime compensation. According to the allegations, the employer altered employee time cards to reflect fewer hours and required employees to assist customers during lunch breaks and after the end of shifts, and required employees to clock out before finishing their duties. Again, these allegations can properly be characterized as whether the meal periods should have been compensable, and whether the postliminary activities were an integral part of the employee’s principal activities, compensable work issues.

In a complaint filed in the Middle District of Alabama, a maintenance company foreman alleged that he and other foremen were not compensated for time spent performing off-the-clock work such as cleaning and restocking company vehicles, maintaining tools, traveling to distantly located job sites and transporting workers to and from their homes on weekends. The foremen also alleged that they were not paid for administrative work, such as submitting crew members’ payroll information, planning and tracking field work, attending supervisory meetings, and interviewing prospective crewmen. The federal district court ruled that the foremen could proceed with a class action on their “off-the-clock” allegations.

Again, as with the cases referenced above, the issues before the Alabama court are whether the preliminary and postliminary activities of the foreman should be compensable.

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7 216 F. Supp. 2d at 602.
8 Id at 603.
9 Id.
10 1 WHLR 288-89 (6-7-02).
11 Id.
12 Wilks v. Pep Boys, M.D. Tenn., No. 8-02-0837, 1 WHLR 462 (9-13-02).
13 Id.
This paper tracks the Department of Labor (DOL) regulations on what constitutes “compensable work” and reviews recent case law on the topics found in DOL regulations Part 785 entitled “Hours Worked.”

II. PRINCIPLES FOR DETERMINING HOURS WORKED

A. Definitions of “Employ”

The FLSA does not define the term “work.” Section 203(g) provides that the term “employ” includes “to suffer or permit to work.” (Emphasis supplied.)

Under DOL regulations, time that is spent for the benefit of the employer, with the employer’s knowledge, that is considered a “principle activity” of the employee is considered to be hours worked. Principal activities include all tasks that are an integral part of the employee’s job.

B. Judicial Construction of “Hours Worked”

In Tennessee Coal, Iron & Railroad Co. v. Mascada Local 123, the United States Supreme Court stated that employees subject to the FLSA must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”

Two years later, the Court modified this ruling in Anderson v. Mount Clemens Pottery Co. and stated that there need not be exertion at all, that when the employee is required to give up a substantial measure of his or her time and effort, the time is hours worked.

The court in Mt. Clemens held that time spent in walking to work on the employer’s premises after time cards had been punched constituted compensable work time.

C. The Portal-to-Portal Act

The Supreme Court’s decision in Mt. Clemens prompted Congress to enact the Portal-to-Portal Act. Congress estimated that the ruling in Mt. Clemens together with the ruling in Brooklyn Saving Bank v. O’Neil (workers inability to waive or compromise liquidated damages) and the fact that there was no federal statutes of limitations created potential liability in the billions of dollars and that, uncorrected, would result in an adverse impact on the economy.

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16 29 C.F.R. §§ 785.7, 785.9, 785.11.
17 Id. § 785.24.
18 321 U.S. 590 (1944).
19 Id. at 598.
21 328 U.S. at 680.
22 324 U.S. 697 (1945).
The Portal-to-Portal Act abolished all claims for minimum wage or overtime for any preliminary or postliminary activity engaged in by an employee before May 14, 1947, unless there was an “express provision of a written or non-written contract” or a custom or practice in effect at the place of employment that made such activity compensable.

Section 4 of the Portal-to-Portal Act applied to prospective claims and defined noncompensable activities to include “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities” and “activities which are preliminary to or postliminary to” the principal activities. Section 4 specified that these activities would be compensable only if there was an express provision in a written or non-written contract that included them as compensable activities or if it was the custom or practice at the place of employment to include them as compensable activities. However, if activities such as changing clothing and preparing machinery were an integral part of the principal activity, then such activities would be compensable under the FLSA.

III. APPLICATION OF PRINCIPLES

A. Employees “Suffered or Permitted to Work”

Work performed, that is not requested by the employer, but is permitted, is “work time.” The DOL cites, as an example, a situation where an employee voluntarily continues to work at the end of his or her shift. For example, the worker may stay to finish an assigned task, or correct errors, or prepare time reports or other records. The reasons why an employee stays to work are immaterial. If the employer knows or has reason to believe the employee is continuing to work, the time spent is work time.

This rule is also applicable to work performed away from the premises or the job site, even at home. If the employer knows or has reason to believe that work is being performed, he or she must count the time as hours worked.

It is the duty of management to exercise control and see that work is not performed if the employer does not want to pay for it being performed. Employers cannot accept the benefits without compensating employees for the work. Moreover, the mere promulgation of a rule against such work is not enough. Management must make every effort to enforce the rule.

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25 Id. § 254 (b).
27 29 C.F.R. § 785.11.
28 Id.
29 29 C.F.R. § 785.12.
30 29 C.F.R. § 785.13.
In Darrikhuma v. Southland Corp., a federal district court in Maryland held that an employee did not prove that his employer had actual or constructive knowledge of his off-the-clock work hours. Although a field consultant for the employer saw the plaintiff working on weekends, the court found that this was insufficient to demonstrate that the field consultant knew that the plaintiff was performing off-the-clock work. Furthermore, the plaintiff did not offer more than his own unsupported allegations that he had advised his employer of his working unpaid hours on the job.

In Robertson v. Board of County Commissioners, the plaintiffs, deputy sheriffs and a dispatcher working in the sheriff’s office, sued for uncompensated overtime for hours spent on call. But, only one of the plaintiffs produced any evidence that the employer knew that they were on call. Therefore, the court granted partial summary judgment for the employer as to all other plaintiffs, noting that an employer is not required to pay for time worked when the employer truly did not know, and had no reason to know, the work was being performed.

B. Waiting Time

Whether “waiting time” is time worked under the FLSA depends upon the particular circumstances. In Skidmore v. Swift, the Supreme Court said that the determination of whether “waiting time” is compensable involves “scrutiny and construction of agreements between particular parties, appraisal of…conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.”

1. On Duty

Waiting time while an employee is on duty is almost always considered work time, especially when the periods during which waiting time occurs are unpredictable and of short duration. Generally speaking, during these periods of time the employee is unable to use the time effectively for his or her own purposes. The time belongs to and is controlled by the employer. According to the DOL regulations, waiting time while the employee is on duty is an integral part of the job. That is, the employee is engaged to wait.

On duty employees are to be compensated for waiting time whether their work is on or off the employer’s premises, even if the employee spends the time engaging in such amusements as playing cards, watching television, or reading.

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33 323 U.S. 134 (1944).
34 Id. at 137. (quoted in 29 C.F.R. § 785.14).
35 29 C.F.R. § 785.15.
36 Id.
2. Off Duty

Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not “hours worked.” To be completely relieved from duty an employee must be told that he can use the time effectively for his or her own purposes and that he or she will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable the employee to use the time effectively for his or her own purposes depends upon all the facts and circumstances of the case.

For example, if a truck driver reaches his destination and while awaiting the return trip is required to take care of the employer’s property, the truck driver is working while waiting. On the other hand, if a truck driver is sent from Boston to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6:00 p.m. when he or she begins the return trip to Boston, the idle time is not working time.

In United Transportation Union, Local 1745 v. Albuquerque, local bus drivers working for the city alleged that they should be paid for the non-working time between the morning and evening rush hour shifts they were required to work. The Tenth Circuit affirmed the district court’s holding that the time bus drivers spent outside the two shifts in a day was not compensable. The court reasoned that the drivers had a three to five-hour period between shifts in which they were free to do anything they wanted except to drink alcohol, knowing that they would not have to commence work “until a definitely specified hour has arrived.” The court said that this was “long enough to enable [them] to use that time effectively for [their] own purposes.”

In Banks v. City of Springfield, a district court found that police trainees confined to their barracks during their training were free to use their time as they wished and therefore were not entitled to compensation for periods during which they were confined to their barracks.

3. On-Call Time

An employee who is required to remain “on-call” on the employer’s premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is “working” while on call. An employee who is not required to remain on the employer’s premises during the “on-
call” period, but is merely required to leave word at home or with company officials as to where he or she may be reached, is not working while on call.\footnote{Id.}

\subsection*{a. Cases Finding On-Call Time Is Compensable}

In \textit{Pabst v. Oklahoma Gas & Electric Company},\footnote{228 F. 3d 1128 (10\textsuperscript{th} Cir. 2000).} the Tenth Circuit affirmed the district court’s ruling that the on-call time for electronic technicians of a gas company was compensable where the employees experienced three to five calls per on-call period, were required to respond to their pages within 10-15 minutes, and the average time responding to each call was 45 minutes.

According to the court, the short response time, coupled with unreliable pagers, required the on-call employees to remain at or near their homes while on call. In addition, the frequency of the calls and the time employees spent responding to calls severely disrupted the employees’ sleep habits, and, even during waking hours, the employees were unable to pursue many activities because of the need to come home and check their computers every 15 minutes.

In \textit{Rutlin v. Prime Succession, Inc.},\footnote{220 F. 3d 737, 6 WH Cases 2d 359 (6\textsuperscript{th} Cir. 2000) \textit{reh’g and suggestion for reg’g en banc} denied (Sept. 11, 2000).} the Sixth Circuit reversed the district court’s ruling that a funeral director was not eligible for compensation for some of his time spent on call on behalf of his employer- a funeral parlor. The employee argued his on-call time “severely restricted” him, preventing him from “drinking alcohol, visiting his children, or boating, and that his meals, evening activities, and sleep were disrupted by his on-call duties.” The employee also said he answered between fifteen and twenty calls per night, taking up about an hour of his time. On the other hand, the employer argued, the employee “was free to engage in personal activities while on call” because it gave the employee a pager so he could leave his home if he wanted and the employee could switch on-call shifts if he needed. The Sixth Circuit held that the employee was entitled to compensation for his on-call time spent answering the fifteen to twenty phone calls per night. “Answering these phone calls was not a typical on-call time; rather, [the employee] was actually working, albeit from home. There is no question that the time [the employee] spent on those phone calls was primarily for the benefit of [the employer].” The remainder of his on-call time was ruled to be non-compensable as the restrictions on his time were not “onerous.”

In \textit{Roberston v. Board of County Commissioners},\footnote{78 F. Supp. 2d 1142, 1160, 5 WH Cases 2d 1449, 1463 (D. Colo. 1999).} the court found that an issue of fact was raised as to whether on-call time was compensable. One deputy sheriff out of several plaintiffs, presented evidence to show that he was required to be on call for two hours prior to his regular shift, averaged two calls per week while on-call, was required to remain within the county and had to be available by phone or pager.

In an opinion letter from the Wage and Hour Division,\footnote{1999 WL 1788156 (DOL Sept. 2, 1999).} the Department of Labor addressed whether the on-call time of electricians and maintenance engineers was compensable under two different scenarios. Under the first scenario, service calls occurring outside of normal work
hours were handled by a voluntary on-call system where employees were given beepers and the ability to accept or refuse calls at their discretion. Calls averaged two per twenty-four hours on the weekends and one per sixteen-hour period during the workweek. The Division expressed the view that this time would not be compensable hours worked because the employees could accept or refuse calls and were free to engage in a full range of personal activities during the periods of idleness when they were on-call. Under the second scenario, an employee was designated for stand-by status and required to handle service calls during weekends and evening hours. Employees were to remain within reach by the phone and respond to calls within ten minutes or report to the job site within one hour. Only one employee was on-call at a time and employees were not permitted to trade on-call duties with other employees. The Division stated that time under this mandatory on-call system was compensable because it unduly restricted employees’ freedom to use the on-call system for their own benefit. On the other hand, the Division stated it would not consider the time to be compensable hours worked if employees were provided pagers or cell phones and free to engage in personal activities both at home and away from home during periods of idleness, unless the calls were so frequent or the on-call restrictions were so restrictive that employees could not effectively use the on-call time for their own purposes.

In *Spencer v. Hyde County*, the district court denied summary judgment for the employee finding that there were genuine issues of material fact raised by the evidence that emergency medical technicians had short response time, had to wear a uniform to calls, and could not leave the island on which the services were performed while on call.

Similarly, in *Brown v. Luk, Inc.*, the court found that genuine issues of material fact were raised when the employee had to make an “inordinate” number of daily commutes to projects, and was severely hampered in his personal activities.

b. Cases Finding On-Call Time Is Not Compensable

In *Reimer v. Champion Healthcare Corp.*, the Eighth Circuit affirmed the district court’s decision that on-call time for nurses was not compensable because it was not spent predominantly for the benefit of the employer. The nurses had sued their employer hospital claiming that they were not paid minimum wage for on-call time in violation of the FLSA. While on-call, the nurses were required to be reachable by cellular phone, beeper, or contact number, were required to be able to report to the hospital within 20 minutes, and were prohibited from drinking alcohol or using mind-altering drugs. In affirming the lower court’s decision, the appellate court reasoned that the nurses had a great deal of flexibility in their activities when they were on-call. Despite their restrictions, the nurses otherwise could do whatever they wished during on-call time; they were not required to be home or at the hospital, and they could play sports, work at home, go shopping, and visit friends and neighbors. Moreover, it was uncommon for the nurses to be called in more than once during an on-call shift.

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50 3 WH Cases 2d 560 (N.D.N.Y. 1996).  
51 258 F. 3d 720 (8th Cir. 2001).
Similarly, in Wisnewski v. Champion Healthcare Corp., a federal district court in North Dakota concluded that nurses were not entitled to be compensated for on-call time where employees were not required to remain on the premises while on-call; there were no excessive geographical limitations placed on the employees; the response time was 20 minutes; employees were allowed to trade calls; employees used pagers and cell phones or left numbers where they could be reached; employees were not frequently called in more than once per on-call shift and the longest on-call time period was a weekend. The employer’s main restriction was that the nurses could not use alcohol or take mind-altering drugs.

In Ragnone v. Belo Corp., a federal district court in Oregon granted the employer’s summary judgment motion where a helicopter pilot sued his employer news station alleging it violated the FLSA by not compensating him for his on-call time. The court found that the employee’s on-call time was not spent primarily for the benefit of the employer and its business. Although the pilot could not easily trade calls, the pilot did not have to comply with an on-premises living requirement, there was no geographical restriction on his movement, he did not have a fixed time limit in which to respond to calls, he carried a pager, he was not required to stay at home or near a telephone, and there was no agreement between him and his employer that the on-call time would be compensable.

The on-call time of emergency medical technicians (EMTs) was found not to be compensable in Sletten v. First Care Med Service. In that case, EMTs were required to carry hand-held radios, stay within five minutes traveling time to the ambulance garage, arrive for any call sober, remain call-ready in their work uniforms, and respond to an average of 1.2 ambulance calls per shift. The court found the minimal number of calls per shift, on average, did not discourage a wealth of activities that could be performed within five minutes of the ambulance garage. As such, the court found that the on-call time was not predominantly for the employer’s benefit but rather that the employees were waiting to be engaged.

In Ingram v. County of Bucks, the Third Circuit affirmed the summary judgment granted to the county and concluded that sheriff’s deputies were not entitled to compensation while on call. The employees’ ability to use the time for personal pursuits was not effectively restricted, the court reasoned, because they (1) could wear beepers, (2) were summoned infrequently and had no fixed time within which they were required to respond, (3) could easily trade on-call shifts with other deputies to freely enjoy personal time, and (4) could engage in personal activities while on call. The court noted that its determination was proper on summary judgment, since the issue of how an employee spent on-call time was not in dispute.

In both Shepard v. City of Burlington and Bartholomew v. City of Burlington, the U.S. District Court for the District of Kansas held that a city need not compensate patrol officers for

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52 2000 WL 1474414, 7 WH Cases 2d 150 (D.N.D. 2000).
55 144 F. 3d 265, 4 WH Cases 2d 1011 (3d Cir. 1998).
56 4 WH Cases 2d 1149 (D. Kan. 1998).
8-hour on-call periods spent after their regular shifts although (1) it was difficult to trade such on-call duties with other officers, and (2) the patrol officer claimed to have been precluded from travel away from home by the combination of the city’s prohibition against personal use of the patrol car with the requirement that the patrol officer respond immediately. A significant factor making the on-call time noncompensable was that the patrol officer was merely required to stay within the limits of the city and was thus free to travel or to remain at home. Therefore, the on-call time was spent primarily for the officer’s benefit. Other factors making the on-call time noncompensable were the following: (1) the officer was required to return to work only two to three times per week; (2) the requirement of returning “as soon as possible” allowed more flexibility than a fixed 5- to 10- minute response time; and (3) the officer carried out personal activities during the on-call period.

A federal district court sitting in Georgia concluded that city police officers were not entitled to be compensated for their time spent on-call.\textsuperscript{58} Although during their on-call time the officers were required to be readily accessible, to notify dispatchers of their whereabouts any time they left their homes, to remain in a geographical area that would allow for radio or pager or telephone contract, and to respond to a call within 30 minutes, the court held that these restrictions were not so onerous and did not restrict their free time so severely that their on-call time should be construed as work time under the FLSA. There was no indication that the employees were subject to frequent calls or were unable to use their on-call time predominantly for their own benefit.

A state highway employee’s on-call time was not compensable where the employee was not required to do any affirmative act while on call, was called upon only once per week during the winter season, could predict when he would be called on the basis of weather conditions, was not required to live on the employer’s premises, was not required to wear a pager, and was permitted nearly an hour to respond.\textsuperscript{59}

C. Rest and Meal Periods

1. Rest Periods

Rest periods of short duration, running from 5 minutes to 20 minutes, must be counted as hours worked.\textsuperscript{60} According to the DOL, rest periods promote the efficiency of the employee and must be counted as hours worked.\textsuperscript{61}

\textsuperscript{60} 29 C.F.R. § 785.18.
\textsuperscript{61} Id.
2. Meal Periods

The DOL regulations provide that bona fide meal periods of 30 minutes or more are not worktime, providing the employee is completely relieved from duty. 62 “The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating.” 63 According to the DOL, it is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period. 64

In 2000, the DOL recognized an exception to the general rule contained in FLSA regulations that a meal period should last at least 30 minutes in order to be bona fide. 65 In an opinion letter from the Wage and Hour Division, the Department of Labor opined that employees of a production operation did not have to be compensated for a 15-minute meal period where (1) the employees were completely relieved of duty; (2) the building had numerous readily accessible lunch rooms so that no employee was more than a minute’s walk from a place to eat; (3) there were no eating establishments within a 30-minute drive; and (4) the employees requested the shortened meal period because it served as an adequate meal period and allowed them to end the day earlier.

In lieu of the “completely relieved from duty” test set forth in the regulations, courts have adopted a “predominant benefit” test to determine the compensability of meal periods. These courts have applied principals from the Supreme Court’s decisions in Armour Co. v. Wantock 66 and Skidmore v. Swift & Co., 67 which predate adoption of the regulation. The “completely relieved from duty” standard appears to be yielding to the judicially devised “predominant benefit” test. For the most part, courts are applying the looser “predominant benefit” test in determining the compensability of a meal period. For example, in Summers v. Howard University, 68 a federal district court for the District of Columbia applied the “predominant benefit” test in determining whether meal breaks are compensable for university police officers. The court reasoned that, in the absence of controlling authority in the D.C. Circuit, it would follow the “predominant benefit” test utilized by the majority of circuits because it “provides a flexible standard that is consistent with the FLSA and governing case law.” 69 Moreover, the court found the “completely relieved from duty” standard to be inconsistent with controlling Supreme Court precedent. 70

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62 29 C.F.R. § 785.19(a).
63 Id.
64 29 C.F.R. § 785.19(b).
65 2000 WL 33126561 (Dep’t of Labor Sept. 25, 2000).
66 323 U.S. 126, 4 WH Cases 862 (1944).
67 323 U.S. 134, 4 WH Cases 861 (1944).
69 Id. at 33.
70 Id.
a. Cases Finding A Meal Period Compensable

In Hartsell v. Dr. Pepper Bottling Co.,\(^\text{71}\) the Fifth Circuit affirmed the trial court’s ruling that employees who worked as merchandisers building and stocking displays in stores were entitled to compensation for meal periods. The district court’s finding that the time was spent predominantly for the benefit of the employer was supported by employees’ testimony that they rarely took their meal period and that they were verbally disciplined when they took their meal period.

In Bernard v. IBP Inc.,\(^\text{72}\) the Fifth Circuit again affirmed the decision of the district court that was based on a jury finding that maintenance employees at a meat processing plant were entitled to compensation for meal breaks. The district court had denied the defendant’s proffered instruction, and refused to permit argument to the jury, that plaintiffs were entitled to pay only for those lunch periods which were actually interrupted by problems requiring their immediate attention.\(^\text{73}\) The jury determined that the meal breaks were predominantly for the employer’s benefit because employees were required to wear their radios and tools during lunch, could not leave the site, and had their lunch breaks interrupted frequently by work demands. The court also upheld a jury instruction which stated that the critical issue for determining whether meal breaks should be compensated “is whether the employee can use the time effectively for his or her own purposes.”\(^\text{74}\)

In AFSCME Local 889 v. Louisiana,\(^\text{75}\) the Fifth Circuit affirmed a ruling of the district court that the state of Louisiana was required, under the FLSA, to compensate correction officers for lunch periods, because the officers were required to eat lunch in the cafeteria with inmates and were required to be prepared to react to disturbances or other needs.

In Herman v. Hogar Paderas de Amor, Inc.,\(^\text{76}\) a federal district court in Puerto Rico held that nurses’ aides and maintenance employees were entitled to compensation for portions of meal breaks during which they worked. In that case, the employees would sign out for an hour at lunch time but would continue to work for approximately 30 minutes.

In Summers v. Howard University,\(^\text{77}\) a district court for the District of Columbia denied a summary judgment motion filed by university police officers who brought suit for unpaid overtime compensation for time spent on uncompensated meal breaks. Applying the “predominant benefit” test, the court concluded that genuine issues of material fact existed as to whether the employees’ meal breaks were compensable.\(^\text{78}\) Although the record showed that,

\(^{71}\) 207 F. 3d 269, 5 WH Cases 2d 1700 (5th Cir. 2000).
\(^{72}\) 154 F. 3d 259, 4 WH Cases 2d 1604 (5th Cir. 1998).
\(^{73}\) Id. at 265-66.
\(^{74}\) Id.
\(^{75}\) 145 F. 3d 280, 4 WH Cases 2d 1355 (5th Cir. 1998).
\(^{76}\) 130 F. Supp. 2d 257 (D.P.R. 2001).
\(^{78}\) Id. at 34-35.
while on their meal breaks, the employees had to remain in uniform, respond to emergency situations and public inquiries, and had to spend ten to fifteen minutes checking out equipment to get off campus, the court found factual uncertainty surrounding the nature and significance of these restrictions and could not conclude, as a matter of law, that the employees spent their meal breaks predominantly for the benefit of the employer.\footnote{79}

b. Cases Finding A Meal Period Not Compensable

In \textit{McKnight v. Kimberly Clark Corp.}\footnote{80} the Tenth Circuit affirmed a district court ruling that the lunch break was primarily for the benefit of the employee and therefore not compensable, despite the employee’s contention that the employee was not allowed to leave work during lunch and was on call during his lunch break.

In \textit{Roy v. County of Lexington}\footnote{81} the Fourth Circuit, applying the predominant benefit test, affirmed the trial court’s ruling that emergency medical service paramedics and technicians were not entitled to compensation for meal periods. The trial court had found that the paramedics had no official responsibilities during the meal periods other than to respond to emergency calls and that they were permitted to go anywhere within their 82-square-mile response zone during meal time.

In \textit{Powell v. Simon Management Group}\footnote{82} the Kansas Supreme Court also applied the predominant benefit test in holding that shopping mall security guards and a maintenance worker who monitored their radios during their lunch breaks and were to respond to calls if no one else was available or if an emergency situation occurred were not entitled to compensation for their meal periods under the FLSA. The court determined that the services provided by the security guards and maintenance workers during their lunch breaks did not “eclipse [ ] the central purpose of the break as a time for the employees to relax and eat.”\footnote{83} On those occasions when the employees are deprived of time to eat and relax, they are eligible for compensation.

In \textit{Salon Enterprises, Inc. v. Langford}\footnote{84} a Kansas appellate court reversed the trial court and determined that a salon stylist’s meal breaks were not compensable. The salon stylist sued her former beauty salon employer in Kansas state court alleging a claim under the FLSA to recover unpaid wages as a result of her not being compensated for meal breaks. The employee successfully argued at a bench trial that she should have been compensated for her meal breaks because she had to be “available” to work over lunch.\footnote{85} On appeal, the court applied the “predominant benefit” test adopted by the Kansas Supreme Court in \textit{Powell v. Simon Management Group}\footnote{86} and held that an employer who merely requires an employee to be

\begin{footnotes}
\footnotetext[79]{Id.}
\footnotetext[80]{149 F. 3d 1125, 4 WH Cases 2d 1299 (10th Cir. 1998).}
\footnotetext[81]{141 F. 3d 533, 4 WH Cases 2d 869 (4th Cir. 1998).}
\footnotetext[82]{960 P. 2d 212, 4 WH Cases 2d 1200 (Kan. 1998).}
\footnotetext[83]{Id. at 221.}
\footnotetext[84]{31 P. 3d 290 (Kan. Ct. App. 2000).}
\footnotetext[85]{Id. at 293.}
\footnotetext[86]{960 P. 2d 212, 4 WH Cases 2d 1200 (Kan. 1998).}
\end{footnotes}
available for work during a meal break does not violate the FLSA.\footnote{31 P. 3d at 294.} Besides, the court noted, the evidence did not establish that the employee was required to be available during her meal break; rather, the employee had the choice as to whether to work during her break and was compensated for the occasions when she worked during her meal break.\footnote{Id.}

In \textit{Hahn v. Pima County},\footnote{24 P. 3d 614, 7 WH Cases 2d 434 (Ariz. Ct. App. 2001).} an Arizona appellate court affirmed the trial court’s decision granting summary judgment in favor of Pima County (the “County”) after it was sued by corrections officers seeking overtime compensation for unpaid meal breaks. Applying the “predominant benefit” test employed by federal courts, the court found that the employees did not establish that they spent their meal time for the predominant benefit of the County, even though the corrections officers were implicitly required to carry their portable radios and service revolvers, were expected to respond to emergency situations or citizen inquiries, and were subject to calls and interruptions from fellow employees, inmates and visitors.\footnote{Id. at 616-20.} The court explained that, at most, the record reflected employees “enjoyed something less than unfettered freedom during meal periods,” but the employees did not provide evidence as to how often and to what extent these theoretical restrictions interfered with an employee’s primary lunch-break activity of eating.\footnote{Id. at 619.}

In \textit{Brown v. Howard Industries},\footnote{116 F. Supp. 2d 764 (S.D. Miss. 2000).} a federal district court in Mississippi granted the employer’s motion to dismiss where production workers sued their employer under the FLSA seeking compensation for their 30-minute lunch breaks. The employees alleged that, by remaining on their employer’s premises, their lunch breaks were primarily for their employer’s benefit, and the failure to pay them for their time on their lunch breaks violated the FLSA.\footnote{Id. at 765.} In rejecting this argument, the court held that the mere fact that the employees were restricted to the employer’s premises during their lunch period did not make the lunch period compensable, and noted that, to sustain a cause of action, “Plaintiffs must allege that some duty imposed upon Plaintiffs during the lunch break benefited Defendant, not merely the fact that Plaintiffs were required to remain on the premises during the lunch break benefited Defendant.”\footnote{Id. at 767.}

In \textit{Arrington v. City of Macon},\footnote{986 F. Supp. 1474, 4 WH Cases 2d 348 (M.D. Ga. 1997).} a federal district court considered whether police officers were entitled, under the FLSA, to compensation for meal times and held that they were not, despite the fact that they were (1) subject to immediate call into service during meal breaks, (2) required to remain in uniform, (3) subject to interruptions by inquiries from citizens, and (4) required to maintain constant radio contact. The court found insufficient evidence that the predominant benefit of the meal period was for the city or that the officers were unable to utilize their meal periods for the intended purpose of eating a meal. The court, however, did find that the officers
were entitled to compensation on those occasions when they were actually called from their lunch breaks to work, or when they received no lunch break at all.

In Bayles v. American Medical Response of Colorado, Inc., ambulance drivers’ hour-long meal breaks were found not compensable. The court noted that ambulance drivers were permitted to leave the premises during meal times to eat at restaurants or run personal errands; the only restrictions placed on the employees were that they had to maintain radio contact with their dispatch center and remain with or near the ambulance and within the district. The court applied the predominant benefit test and concluded that because the employees could comfortably and adequately pass the meal time, the meal was not compensable.

In Leahy v. City of Chicago, police officers’ 30-minute meal periods were held not compensable. Restrictions on the officers during meal breaks included the following: (1) permission was necessary to take a meal break; (2) permission was necessary for an officer to leave an assigned district during a meal break; (3) officers were required to remain in uniform during a meal period; (4) no more than two officers were permitted to congregate during a meal break without permission; (5) two-person units were required to break at the same time; (6) officers were required to end their meals upon request; (7) officers were required to respond to emergencies and requests for assistance; and (8) officers were required to be available to the dispatcher by radio.

D. Sleeping Time and Residing on Employer’s Premises

Under certain conditions an employee is considered to be working even through some of his or her time is spent sleeping.

1. Duty Period of Less Than 24 Hours

An employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in personal activities when not busy. For example, a telephone operator who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy making calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to the employer.

2. Duty Period of 24 Hours or More

Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping

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98 29 C.F.R. § 785.21.
facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night’s sleep. 99 Where no express or implied agreement to the contrary is present, the eight hours of sleeping time and lunch periods constitute hours worked.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. The DOL takes the position that if the sleeping period is interrupted such that the employee cannot get at least five hours’ sleep during the scheduled period, the entire time is working time. 100

In Roy v. County of Lexington, 101 the Fourth Circuit affirmed a district court ruling that emergency medical service paramedics and technicians were not entitled to compensation for an eight-hour sleep period where only 35% of the sleep periods were interrupted such that the paramedics received less than 5 hours sleep. (Paramedics were paid for hours actually worked during the eight-hour sleep period.)

3. Employee Residing on Employer’s Premises

An employee who resides on his or her employer’s premises on a permanent basis, or for extended periods of time is not considered to be “working” all the time he or she is on the premises. Said employee may engage in normal private pursuits and have enough time for eating, sleeping, and entertaining. The employee may also have periods of complete freedom from all duties when he or she may leave the premises for his or her own purposes. 102

The DOL takes the position that any reasonable agreement between the employer and the employee that sets forth the hours of work for the employee will be accepted, provided the agreement takes into consideration all of the pertinent facts. 103

In Braziel v. Tobosa Development Services, 104 residential assistants for developmentally disabled persons sought compensation for sleep time. During the time they were on duty as residential assistants, the Plaintiffs each had their own bedroom, bathroom and use of the house’s kitchen. Plaintiffs’ work schedules were greater than 24 hours in length, but upon hire they were each told that they would not be paid for the eight-hour period from 10:00 p.m. to 6:00 a.m. Tobosa had a policy of paying residential assistants for any time they were disturbed during the night if the disturbance was reported. Although plaintiffs alleged that they regularly got less than eight hours of sleep, they often did not report disturbances.

The district court granted summary judgment to the employer, and, on appeal, the Tenth Circuit affirmed. The Tenth Circuit found that whether the facts were analyzed under 29 C.F.R. § 785.22 or 29 C.F.R. § 785.23, the issue in the case was whether an agreement existed between

99 29 C.F.R. § 785.22 (a).
100 29 C.F.R. § 785.22 (b).
101 141 F. 3d 533, 546, 4 WH Cases 2d 869, 878 (4th Cir. 1998).
102 29 C.F.R. § 785.23.
103 Id.
104 166 F. 3d 1061, 5 WH Cases 2d 97 (10th Cir. 1999).
the employer and the plaintiffs to exempt scheduled sleep periods from hours worked. The Tenth Circuit agreed with the district court that an agreement to exempt sleep time from paid work under the FLSA can be implied, and that the undisputed facts in the case compelled the conclusion that there was an implied agreement to do so. The Tenth Circuit also addressed plaintiffs’ argument that the deduction of sleep time from hours worked where employees reside on an employer’s premises, should not apply because they did not reside primarily in the houses where they worked as residential assistants. The Tenth Circuit agreed with the district court that 29 C.F.R. § 785.23 does not require permanent residence, only that an employee reside on the premises “for extended periods of time.”

In Gaby v. Omaha Home For Boys, 105 twelve individuals who were employed as “house parents” sought to be compensated for additional time worked on the premises. Each individual had signed an employment agreement that provided that the usual six-day workweek would be 60 hours with overtime payment for hours over 40. The house parents contended that their work required considerably more than 10-hour days. The district court cited testimony that showed that with two house parents present, one person was often sufficient to respond to occasional demands while the other person could engage in normal private pursuits. Thus, it was possible to cover well over 10 hours of activity per day, and 60 hours per week was a reasonable estimate to complete the house parents’ work. On this basis the district court found the employment agreement to be reasonable, and the Eighth Circuit affirmed.

In Shannon v. Pleasant Valley Community Living Arrangements, 106 a federal district court held that employees whose shifts require them to reside at group homes for mentally retarded persons from 3:00 p.m. on Wednesday until 10:00 a.m. the following Wednesday resided at homes for “extended periods of time” for purposes of 29 C.F.R. § 785.23 allowing employers to enter into a reasonable agreement regarding sleep time with employees who reside on premises. However, the court found that summary judgment was precluded because there were genuine issues of material fact as to whether the employer paid overtime only if an employee received less than 5 hours of sleep and whether the employer told employees not to turn in any other overtime for sleep interruptions.

E. Preparatory and Concluding Activities

An employer is not required to compensate employees for preparatory and concluding activities unless such activities are an integral part of the principal activity. In November, 1947, the Wage and Hour Administrator at the DOL issued a Portal-to-Portal Bulletin in which he described, by example, what is meant by the words “integral part of a principal activity”:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

105 140 F. 3d 1184, 1189-40, 4 WH Cases 2d 865, 867 (8th Cir. 1998).
(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employees. Such preparatory activities, which the administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.  

According to DOL regulations, the activities which are included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. The DOL cites, as an example, an employee in a chemical plant who cannot perform his or her principal activities without putting on certain clothes. Under that circumstance, changing clothes at the beginning and end of the workday at the employer’s premises would be an integral part of the employee’s principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his or her principal activities, it would be considered as a “preliminary” or “postliminary” activity rather than a principal part of the activity.

Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of an employee’s job. In Steiner v. Mitchell, the time employees spent changing their clothes and taking showers was compensable because the employees worked in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials, and the shower and clothes changing were considered an integral and indispensable part of the employee’s principal activities. Similarly, in Mitchell v. King Packing Co., the time that knifemen in a meatpacking plant spent sharpening their knives at the end of the workday was considered an integral and indispensable part of their principal activities.

1. Clothes Changing

   a. Meat Packing Plant

   Metzler v. IBP, Inc., involved a meat slaughter and packing employer that did not record and compensate its meat-processing employees for time spent performing various pre- and post-shift activities. The district court made the following findings as to the average reasonable time to perform activities which it ultimately found to be compensable: (1) three minutes to wait for and

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107 29 C.F.R. § 785.24(b).
108 29 C.F.R. § 785.24(c).
112 127 F. 3d 959, 4 WH Cases 2d 229 (10th Cir. 1997) earlier litigation involving these matters decided sum nom. Reich v. IBP, Inc., 38 F. 3d 1123, 2 WH Cases 2d 641 (10th Cir. 1994).
exchange knives; (2) three minutes to put on and take off personal protective equipment; (3) three minutes of wait time at wash stations to clean protective equipment; (4) two minutes for post-shift cleaning of protective equipment; and (5) three minutes of pre-shift and post-shift compensable walk time.

On appeal, the employer challenged the district court’s factual finding that three minutes was a reasonable amount of time for employees to don and doff the required safety equipment, asserting that 1.5 minutes was a reasonable amount of time, and that the district court failed to consider that employees removed the safety equipment while waiting to wash. The U.S. Court of Appeals for the Tenth Circuit held that the district court’s estimate was not clearly erroneous, and that the employer’s own time study estimates account for a separate amount of time to perform both functions.

In another meatpacking case, Reich v. Monfort, the parties agreed that the periods of time spent on pre- and post-shift activities would be compensable unless they met the “de minimis” exception. The district court had concluded that 10 minutes per day should be compensated. Although both the trial and the appellate courts found that the time would be administratively difficult to record, the court of appeals affirmed the district court’s decision to find the time compensable. The Appeals Court found that the total amount of time involved, both on a per-employee basis (10 minutes per day over 3 years) and on an aggregate basis for all of the employees as a group would properly be considered substantial, and that the regularity of the activities involved also weighed against a de minimis finding.

b. Chicken Processing Plant

In Anderson v. Pilgram’s Pride Corp., the court held, after trial, that employees were not entitled to compensation for donning and doffing sanitary clothing and required equipment and cleaning various items of clothing worn in a chicken processing plant. The court found that the employees wore clean outer garments to protect their street clothes from becoming soiled, and the donning and doffing of work clothes did not involve any physical or mental exertion and took only seconds. For these reasons the court found the time not compensable. In addition, the issue had been rejected in collective bargaining negotiations, and the non-compensability of these activities was both practice and custom in the industry.

In January, 2002, a federal magistrate judge in Maine distinguished Anderson and allowed a group of chicken processing plant workers to proceed with their claim that they should be compensated for time spent donning and doffing sanitary and safety clothing. “I conclude that the donning and doffing of clothing and equipment required by the [Company] or by government regulations, as opposed to clothing and equipment which employees choose to wear or use at their option is an integral part of the Plaintiffs’ work for the [Company].” The magistrate

113 144 F. 3d 1329, 4 WH Cases 2d 1106 (10th Cir. 1998).
116 Id at 8.
judge acknowledged “this is admittedly a close question”\textsuperscript{117} and other courts have “held otherwise in cases that appear close on their facts to the claims presented here.”\textsuperscript{118}

In May 2002, Perdue Farms agreed to settle a DOL lawsuit involving the donning and doffing of safety clothing and equipment.\textsuperscript{119} Although the DOL estimated that approximately 25,000 current and former Perdue workers will be paid about $10 million as a result of the consent decree, Perdue said that it will take about six months for an amount to be determined.\textsuperscript{120}

The DOL then filed a new lawsuit against poultry producer, Tyson Foods, Inc.\textsuperscript{121} seeking to recover back wages for employees not currently being compensated for time spent donning, doffing and sanitizing the plant.

In August, 2002, Perdue Farms agreed to settle a private lawsuit concerning donning and doffing for $10 million. This suit was filed by chicken processing workers seeking compensation for time spent putting on and taking off protective gear and cleaning sanitary equipment.\textsuperscript{122} The settlement in the private lawsuit will cover some of the same workers who were covered by the DOL settlement in May. Up to 60,000 current and former employees who worked on assembly lines in Perdue’s 18 chicken processing plants are eligible to opt-in to the settlement.\textsuperscript{123} The settlement agreement was approved by the federal court in Delaware on October 17, 2002.\textsuperscript{124} The settlement order included payment of some $2.5 million in attorney’s fees and approximately $500,000 in costs to be taken from the $10 million total settlement.\textsuperscript{125}

2. “Shift Change” Activities

In \textit{AFSCME Local 889 v. Louisiana},\textsuperscript{126} the Fifth Circuit held that a 15 minute roll-call period for field officers at state correctional facilities was compensable. The state had argued that the roll-call period was offset by a compensated lunch period. However, the court concluded that under the circumstances of the case, the state was required to compensate the officers for the lunch period, and therefore the field officers were entitled to additional compensation for the roll-call period.

\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Chao v. Perdue Farms Inc., M.D. Tenn., No. 2:02-CV-0033, consent decree filed 5/09/02, 1 WHLR 268 (5-24-02).
\textsuperscript{120} 1 WHLR 268 (5-24-02).
\textsuperscript{121} Chao v. Tyson Foods, Inc., N.D. Ala. No. CV-02-TMP-1174-5, filed 5/9/02.
\textsuperscript{122} Trotter v. Perdue Farms Inc., D. Del. No. 99-893-RRM, settlement agreement filed 8/06/02, 1 WHLR 405 (8-16-02).
\textsuperscript{123} Id.
\textsuperscript{124} Trotter v. Perdue Farms, Inc. D. Del., No. 99-893-RRM, settlement approved, 10/17/02, 1 WHLR 547, 10/25/02.
\textsuperscript{125} 1 WHLR 547 10/25/02.
\textsuperscript{126} 145 F. 3d 280, 4 WH Cases 2d 1355 (5\textsuperscript{th} Cir. 1998).
Similarly, in Schwertferger v. Village of Sauk,\(^\text{127}\) the court held that the mandatory fifteen minute roll-call period was clearly compensable time, but it was unclear whether the department compensated the officers for that time. The court held that roll call time could be set off against meal periods, if meal periods were found to be non-compensable time. However, the court found that a genuine issue of material fact existed with regard to the compensability of the officers’ lunch period.

In Robertson v. Board of County Commissioners\(^\text{128}\) a federal district court held that genuine issues of material fact existed as to whether sheriff’s deputies were denied compensatory time for pre-shift briefings where evidence existed to show that the sheriff’s deputies were told to record pre-shift briefings on their time records, but no individual time records were submitted.

3. Training and Care of Police Dogs

Courts continue to hold that training and care of police dogs after hours is compensable. In Holzapfel v. Town of Newburgh\(^\text{129}\), the Second Circuit stated that such activities could be considered work time because “walking, feeding, training, grooming and cleaning up are integral and indispensable parts of the handler’s principal activities.” The court further noted that the determination of the amount of time actually spent in such activities was a question for the jury, but that time spent by the employee for personal pleasure was not compensable.

In DeBraska v. Milwaukee,\(^\text{130}\) a federal district court in Wisconsin also addressed the question of whether the time canine officers spent caring for their dogs outside work was compensable. The city compensated the officers for 30 minutes of canine care per day. Referring to Holzapfel v. Town of Newburgh, supra, the court asked 3 questions: (1) did the city require the officers to spend more than 30 minutes per day performing canine care; (2) was the time spent beyond 30 minutes per day for the officer’s benefit or for the city’s benefit; and (3) did the city know that the officers spent more than 30 minutes per day performing canine care? Based on the police officers’ evidence that the city required them to care for their dogs in a certain way, combined with evidence that the officers spent more than 30 minutes per day caring for their dogs, the court granted partial summary judgment to the officers on this issue.

Other cases involving the care of canines include: Mayhew v. Wells,\(^\text{131}\) (holding that dog-care time was compensable); Rudolph v. Metropolitan Airport Commission,\(^\text{132}\) (agreement as to the amount of time to be spent caring for the dogs was reasonable, officers not entitled to additional compensation); Karr v. City of Beaumont,\(^\text{133}\) (holding that officers’ care and transportation of dogs and related maintenance of the police vehicles was an integral and indispensable part of the

\(^{127}\) 2001 WL 293 115 (N.D. Ill. 2001).
\(^{130}\) 11 F. Supp. 2d 1020, 4 WH Cases 2d 1377 (E.D. Wisc. 1998), affirmed on other grounds, 189 F. 3d 650, 5 WH Cases 2d 982 (7th Cir. 1999).
\(^{131}\) 125 F. 3d 216, 217 (4th Cir. 1997).
\(^{132}\) 103 F. 3d 677, 3 WH Cases 2d 1089 (8th Cir. 1996)
officers’ duties, but denying summary judgment because a material issue of fact remained in a dispute over the amount of damages): Helmers v. Vestal, New York, 134 (off duty care of dogs is compensable; there were genuine issues about time spent on “making and receiving dog-related phone calls”); and, Jerzak v. City of South Bend, 135 (travel to and from the veterinarian might be compensable, but whether it was compensable or whether the time was de minimis were issues for the jury).

F. Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities is not considered working time provided the following four criteria are met:

1. attendance is outside the employee’s regular working hours;
2. attendance is, in fact, voluntary;
3. the course, lecture, or meeting is not directly related to the employee’s job; and,
4. the employee does not perform any productive work during such attendance. 136

According to the DOL regulations, attendance is not voluntary, in fact, if the employee is given to understand or led to believe that his or her present working conditions or the continuance of employment would be adversely affected by nonattendance. 137

The DOL further opines that training that makes an employee perform his or her job more effectively as distinguished from training for another job or for a new skill is training directly relevant to an employee’s job. However, where a training course is instituted for the bona fide purpose of preparing an employee for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his or her present job, the training is not considered directly related to the employee’s job even though the course incidentally improves the employee’s skill in doing his or her regular work. 138

The DOL regulations provide that if an employee on his or her own initiative attends an independent school, college, or trade school after hours, the time is not hours worked even if the courses are related to the job. 139

The DOL regulations also provide that employers may establish, for the benefit of their employees, a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses, outside of his or her working hours would not be hours worked even if the courses were directly related to the employee’s job, or paid for by the employer. 140

134 3 WH Cases 2d 1837 (N.D.N.Y. 1997).
136 29 C.F.R. § 785.27.
137 29 C.F.R. § 785.28.
138 29 C.F.R. § 785.29.
139 29 C.F.R. § 785.30.
140 29 C.F.R. § 785.31.
According to the DOL, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the conditions set forth in 29 C.F.R. § 785.32 are met.

In Dade County v. Alvarez police officers assigned to a “special response team” (SRT) sought compensation for the physical training they conducted off duty in order to maintain required physical fitness standards. SRT officers’ physical conditioning was evaluated monthly, and SRT officers were instructed to do whatever was necessary to maintain adequate cardiovascular and strength levels. However, SRT supervisors never directed SRT officers to engage in any specific off-duty routine or training.

The Eleventh Circuit reversed a jury verdict in favor of the SRT officers, and found that the time spent in off duty physical training was not compensable work within the FLSA. The Eleventh Circuit held that the time spent in training was not compensable for four reasons: (1) the training was conducted outside of officers’ regular working hours; (2) officers did not perform any productive work while training; (3) the off-duty training satisfied the voluntariness requirement of 29 C.F.R. § 785.27 in as much as officers could exercise where, when and for any duration they selected and they were not required to perform certain exercise routines; and (4) the training was not directly related to the officers’ special response team employment.

In 1999, the DOL issued an Opinion letter in which it opined that although training for licensed vocational nurses was clearly related to their job, it would not be considered as compensable time since it occurred outside of working hours and because it corresponded to courses offered by independent bona fide institutions of learning.

G. Travel Time

1. Section 4 of the Portal-to-Portal Act

Under Section 4 of the Portal-to-Portal Act, travel time at the commencement or cessation of the workday need not be counted as working time unless it is compensable by contract, custom or practice. If an express contract requires payment, or if a custom or practice exists that is not inconsistent with an express contract, such travel time must be counted in computing hours worked.

141 124 F. 3d 1380, 4 WH Cases 2d 225 (11th Cir. 1997), cert denied, 118 S. Ct. 1904 (1998).
142 1999 WL 1788164 (Dep’t of Labor Sept. 30, 1999).
143 29 C.F.R. § 785.34.
144 Id.
2. Home to Work-Ordinary Situations

Ordinary travel from home to work or work to home need not be counted as hours worked, even if the employer agrees to pay for it. This is true whether an employee works at a fixed location or at different job sites. In Kavanagh v. Grand Union Co., the Second Circuit affirmed the district court’s summary judgment for the employer in the case of a supermarket refrigerator repairer who worked at various sites across a three-state region, and who claimed that he had been denied overtime compensation for the 7 to 8 hours a day he spent traveling to the first work site and home from the last site of the day. Acknowledging the employee’s situation was “inequitable,” the court nevertheless concluded that the FLSA did not permit a construction that would require the employer to compensate the employee, regardless of the length of that distance or the benefit to the employer of having only one employee cover such a large geographic area. The court stated that the DOL regulation providing “normal travel” from home to work is not compensable is not an objective standard, but a subjective standard defined by what is usual within the confines of a particular employment relationship.

In Aiken v. City of Memphis, the Sixth Circuit affirmed a district court ruling that police officers’ commute time to work was not compensable. The police officers contended that they should be compensated because they had to respond to emergencies that they observed or that were communicated to them by radio dispatch as they were driving to work. They also contended that they should be compensated for travel time because the presence of marked police vehicles on the street deterred crime. The court held that the commuting time was not compensable because the officers were compensated for emergencies if the response time was 30 minutes or longer, the amount of work involved monitoring the police radio was de minimis and the deterrent effect of marked cars on the streets was irrelevant for FLSA purposes.

In United Transportation Union Local 1745 v. Albuquerque, the Tenth Circuit held that time bus drivers spent on a shuttle bus traveling from the terminal point of the first shift, to the commencement point of the later shift during the course of a split-shift work day, was compensable. The court reasoned that “there is a meaningful distinction between time spent shuttling to or from a relief point, where a working shift just ended or is about to begin, and the remainder of the drivers’ split shift periods, during which they have an extended block of time in which to pursue, as most testified they do, purely personal pursuits.” During this period, “the drivers are not free to do whatever they wish- they must spend that time traveling to or from a

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145 29 C.F.R. §§ 785.34 and 785.35.
146 29 C.F.R. § 785.35.
147 192 F. 3d 269, 5 WH Cases 2d 1089 (2d Cir. 1999).
148 190 F. 3d 753, 5 WH Cases 2d 961 (6th Cir. 1999), cert denied, 528 U.S. 1157, 5 WH Cases 2d 1632 (2000).
149 178 F. 3d 1109, 5 WH Cases 2d 555 (10th Cir. 1999).
150 Id., 5 WH Cases 2d at 562.
location dictated by the City, and situated to serve the City’s need to provide an efficient and useful bus transportation system.” Thus, this time was part of the drivers’ “principal activity.”

In *Steelman v. Telco Telephone Co., Inc.*, a telephone network systems installer brought suit for compensation for the time he traveled directly to the first customer site from his home and directly home from the last customer work site. The employee contended that while he was traveling he carried indispensable equipment and tools for his job. To determine whether the travel was integral and indispensable to the employee’s principal activity, the court considered whether the employer required the employee to do the work, to what degree did the employer benefit from the work, and to what extent was the activity indispensable to the primary goal of the employee’s work. The court concluded that issues of disputed fact remained as to whether the particular travel time at issue was integral and indispensable to the employee’s principal activity.

In *DeBraska v. Milwaukee*, police officers in a canine unit argued that the time they spent transporting their dogs from home to work and from work to home should be compensable. The federal district court declined to grant either party’s motion for summary judgment on this issue. It stated that at least part of the time spent transporting the dogs might be considered compensable if the city required the officers to respond to emergency calls or to maintain contact with the police dispatchers, and if the city prohibited the officers from making personal stops during their commute.

In *Baker v. Barnard Construction Co.*, employee welders sought to be compensated for their return home travel time during which they refueled and restored their welding rigs. The Tenth Circuit noted the difficulty in applying a definite standard for determining the compensability of activities performed outside employees’ normal working hours. The welders contended that because their travel was indispensable to the performance of their job, it was a “principal” activity and therefore compensable. At trial, the jury returned a verdict for the defendants. The Appeals Court reversed and remanded the case to the district court, finding that the jury instructions were erroneous. The instructions required the jury to find (1) that the travel from the job was integral and indispensable to the welders’ principal activities and (2) that the parties made no mutual agreement that the rig rental fee would compensate welders for travel time associated with refueling and reloading rigs. The Appeals Court held that if the travel time met the first requirement it must be compensated under the FLSA regardless of any agreement between the parties.

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151 Id.
153 Id. at *3.
154 Id.
155 11 F. Supp. 2d 1020, 4 WH Cases 2d 1377 (E.D. Wis. 1998) *affirmed on other grounds* 189 F. 3d 650, 5 WH Cases 2d 982 (7th Cir. 1999).
156 146 F. 3d 1214, 4 WH Cases 2d 1249 (10th Cir. 1998).
In Abeyta v. Phelps Dodge Corp,\(^{157}\) mine employees sought compensation for traveling on a 15-minute bus ride from the mine entrance gate to the place of the morning lineup. The mine employees contended that there was a custom or practice that provided for such compensation. The district court held that the copper mine employees were not entitled to compensation, finding no merit in their contention that the employer had, through custom and practice, agreed to pay its employees for travel time.

3. Home To Work-Emergency Situations

The DOL regulations provide that, in emergency situations, travel time from home to work may be compensable. According to the regulations, if an employee has gone home after completing his or her work day and is subsequently called out at night to travel a substantial distance to perform an emergency job for one of the employer’s customers, all time spent on such travel is working time.\(^{158}\) The DOL takes no position on whether travel to and from an employer’s regular place of business is compensable when the employee receives an emergency call outside of his or her regular hours to report back to his or her regular place of business to do a job.\(^{159}\)

4. Home To Work- Special One-Day Assignments In Another City

Problems may arise when an employee who regularly works at a fixed location is given a one-day work assignment in another city. Suppose an employee, who regularly works in Boston, Massachusetts with regular work hours from 9:00 a.m. to 5:00 p.m. is given a special assignment in New York City. Assume the employee takes the 8:00 a.m. shuttle from Boston’s Logan Airport and arrives in New York City, ready for work at 10:00 a.m. Assume the special assignment is completed at 5:00 p.m. and the employee arrives back at Logan Airport in Boston at 7:00 p.m. According to the DOL regulations, all of this travel is not ordinary home-to-work travel. Rather it was performed for the employer’s benefit and at his or her request. It would thus qualify as an integral part of the “principal” activity which the employee was hired to perform on the workday in question and it must be compensated. However, all the time involved need not be counted as compensable work time. The travel between the employee’s home and the airport may be deducted as well as the usual meal time.\(^{160}\)

In Imada v. City of Hercules,\(^{161}\) the court considered whether the FLSA requires a city to compensate police officers for the time they spend commuting from their homes to mandatory off-site training locations when that time exceeded their regular commuting time. The court found that the conditions of 29 C.F.R § 785.37 did not apply to the time spent traveling to the training. First the court found the travel was not unusual, but rather was normal, contemplated and in fact required by the collective bargaining agreement. Second, the travel was not undertaken to meet special needs of the employer. Although the travel to the off-site training facility conferred benefits on the city, the court concluded that the officers realized an equivalent,

\(^{157}\) 3 WH Cases 2d 1422 (D. Ariz. 1997).
\(^{158}\) 29 C.F.R. § 785.36.
\(^{159}\) Id.
\(^{160}\) 29 C.F.R. § 785.37.
\(^{161}\) 138 F. 3d 1294, 4 WH Cases 2d 705 (9th Cir. 1998).
if not greater, benefit from the training because they were required to attend the training sessions in order to maintain their state law enforcement certification. Because it was neither unusual nor specialized, the travel time fell outside the regulatory requirements and was considered ordinary home to work travel time.

5. Travel That Is All In A Day’s Work

Time spent by an employee in travel as part of his principal activity, must be counted as hours worked. For example, travel from job site to job site is compensable work. If an employee is required to report at a meeting place to receive instructions or to pick up or carry tools, travel from the meeting place to the work place is part of the day’s work and must be counted as hours worked regardless of contract, custom or practice.\(^{162}\) According to the DOL regulations, if an employee normally finishes his work on the premises, at 5:00 p.m., and is sent to another job which he finishes at 8:00 p.m., and is then required to return to his employer’s premises arriving at 9:00 p.m., all the time from 5:00 p.m. to 9:00 p.m. is working time. However, if the employee goes home instead of returning to his or her employer’s premises, the travel after 8:00 p.m. is not hours worked.\(^{163}\)

6. Travel away from home

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when the travel time cuts into the employee’s workday. Moreover, the travel time is not only hours worked on regular work days during normal working hours but also during the corresponding hours on non-working days. For example, if an employee regularly works from 9:00 a.m. to 5:00 p.m., Monday through Friday, travel time during these hours on Saturday and Sunday is work time.\(^{164}\) Regular meal periods are not counted as hours worked. The DOL will not consider as work time, time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.\(^{165}\)

In \textit{Imada v. City of Hercules},\(^{166}\) the court considered whether the FLSA required the city to compensate police officers for the time they spent traveling to training locations in another city. Where the travel was to a destination that required an overnight trip, the court held, “The regulations plainly exempt from compensation an employee’s travel to a location where he or she must stay overnight unless, [the travel] cuts across the normal workday or the corresponding hours on non-working days.”\(^{167}\)

\(^{162}\) 29 C.F.R. § 785.38.
\(^{163}\) Id.
\(^{164}\) 29 C.F.R. § 789.39.
\(^{165}\) Id.
\(^{166}\) 138 F. 3d 1294, 4 WH Cases 2d 705 (9th Cir. 1998).
\(^{167}\) 4 WH Cases 2d at 707.
7. Use of Private Automobiles To Travel/ Employer Vehicle Use

If an employee is offered public transportation, but requests permission to drive his or her car instead, the employer may count as hours worked either the time spent driving the car or the time the employee would have had to count as hours worked if the employee had used public transportation.\(^{168}\)

In 1996, the Portal-to-Portal Act was amended to address the issue of the compensability of time spent traveling in a company car. Under the amendment, the use of an employer’s vehicle for travel by an employee for commuting shall not be considered part of the employee’s principal activities if the use of the vehicle for travel is within the normal commuting area for the employer’s business and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee.\(^{169}\)

A year later, a federal district court applied the 1996 amendment to police officers traveling to and from work in city-owned vehicles, and found that the city did not violate the FLSA by failing to compensate police officers for this time or for the time spent on vehicle maintenance.\(^{170}\) The Sixth Circuit affirmed the lower court’s ruling\(^{171}\) that a municipal employer did not violate the FLSA by failing to compensate police officers for time spent on cleaning and scheduling the maintenance of city-owned vehicles used by officers for commuting to and from work.

Similarly, in *Shepard v. Burlington*\(^{172}\) and *Bartholomew v. Burlington*\(^{173}\) the federal district court in Kansas held that patrol officers were not entitled to compensation for time spent driving to and from work in a city patrol car- even though the officers conducted briefings on the way to work with an officer going off duty. In that case, the court held that the city had an agreement with the employees regarding the use of city vehicles and the time spent traveling was within the “normal commuting area,” as defined in the 1996 amendment.

In *Manners v. State of New York*,\(^{174}\) a New York state court addressed the issue of whether time spent by a state employee traveling to and from his home to the actual place of performance of his principal activities in his employer’s vehicle was compensable when the employee’s use of the employer’s vehicle was nonconsensual. The court held that if there is not an employer-employee agreement, then the 1996 amendment to the FLSA\(^{175}\) requiring an employer-employee agreement for the time to be noncompensable is inapplicable and the issue of the compensability

\(^{168}\) 29 C.F.R. § 785.40.


\(^{172}\) 4 WH Cases 2d 1149 (D. Kan. 1998).


\(^{174}\) 703 N.Y.S. 2d 375 (Ct. Cl. 2000).

of the commuting time is decided by analyzing the activities involved. Imposing that analysis on the facts presented, the court found that the employee was merely traveling to and from his home to the actual place of the performance of his principal activities and was not involved in any conduct that was integral and indispensable to his principal employment activities. Simply commuting to and from work in an employer’s vehicle, without more, is not compensable and is not made compensable by an employer restricting or prohibiting the personal uses to which the vehicle may be put during the course of the commute.

On appeal, the New York appellate court agreed that the time spent by the employee commuting to and from work, in an employer-provided vehicle, was not compensable, since the employee was not engaged in any work-related activity while commuting to and from his assigned work station.

8. Work Performed While Traveling

If an employee is required to perform work while traveling, such time must be counted as hours worked. An employee who is required to ride in a truck, bus, automobile, boat or airplane as an assistant or helper, is working while riding, except during bona fide meal periods, or when the employee is permitted to sleep in adequate facilities furnished by the employer.

H. Adjusting Grievances, Medical Attention, Civic and Charitable Work, Suggestion Systems

1. Adjusting Grievances

According to DOL regulations, when an employee spends time attempting to adjust grievances between the employer and employees during the time when the employee was required to be on the premises, the time is considered “hours worked.” However, if a bona fide union represents the employees in question, whether such time will be considered as “hours worked” will be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

In DeBraska v. Milwaukee, police officers made voluntary appearances at preliminary disciplinary hearings, or drafted, voluntarily, written submissions for consideration during such hearings. The trial court held that such time was not compensable and the Seventh Circuit affirmed. The district court held that the time spent in the preliminary hearing was not compensable because the city did not require attendance and could not control what officers did during their own time. In affirming the district court ruling, the court of appeals noted that the

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177 29 C.F.R. § 785.41.
178 29 C.F.R § 785.42.
179 Id.
180 189 F. 3d 650, 5 WH Cases 2d 982 (7th Cir. 1999).
outcome of a preliminary hearing “does not adversely affect either working conditions or the continuation of employment.”\footnote{Id.}

2. Medical Attention

During an employee’s normal working hours on days the employee is working for the employer, if he or she spends time waiting for and receiving medical attention on the employer’s premises or under the employer’s directions and control, such time constitutes hours worked.\footnote{29 C.F.R. § 785.43.}

3. Civic and Charitable Work

If an employer requests that an employee spend time working for public or charitable purposes, or if the employee does so under the employer’s direction or control or while the employee is required to be on the employer’s premises, such time constitutes working time.\footnote{29 C.F.R. § 785.44.} However, the time spent volunteering in such activities outside of the employee’s normal working hours, is not considered hours worked.\footnote{Id.}

In a recent opinion letter,\footnote{1 Wage Hour & Leave Report, p. 278-279 (May 24, 2002).} the Department of Labor expressed its opinion regarding whether the time spent by nurses in community service activities such as taking blood pressure at a health fair, teaching child care classes to expectant parents, participating in “career days” at a local school, helping the Red Cross or helping with the hospital picnic was compensable. The activities described above were performed under the direction and control of the hospital-employer, or, in some instances, under the direction and control of a civic or charitable organization such as the Red Cross. The Wage and Hour Division opined that where the activities were performed under the direction and control of their employer, the hospital, the time spent in such activities was compensable time. However, the time spent by the nurses in activities under the control of other entities could be considered “ordinary volunteerism” if the criteria for that type of activity are satisfied.

4. Suggestion Systems

In general, the time spent by an employee, outside of his or her regular working hours, developing suggestions under a general suggestions system is not working time.\footnote{29 C.F.R. § 785.45.} However, if the employer permits employees to work on suggestions during regular working hours, the time spent must be counted as hours worked. Moreover, where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.\footnote{Id.}
IV. RECORDING WORK TIME

A. De Minimis Time

According to the DOL, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The DOL adds that this rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. The DOL cautions that an employer may not arbitrarily fail to count as hours worked any part, however small of the employee’s fixed or regular work time or practically ascertainable period of time that the employee is regularly required to spend on duties assigned to him or her.

1. Preliminary/Postliminary Activities

In Reich v. Monfort Inc. the Tenth Circuit held that preliminary and postliminary activities amounting to 10 minutes per day for each meat processing company employee, including putting on and taking off safety gear, were not de minimis. Although both the trial and appellate courts found that the time would be administratively difficult to record, the court of appeals determined that the total amount of time involved, both on a per-employee basis (10 minutes per day over 3 years) and on an aggregate basis for all the employees as a group would properly be considered substantial. The court also decided that the regularity of the activities involved weighed against a de minimis finding. In applying the de minimis rule to the aggregate amount of time worked by all employees involved in the litigation, the Tenth Circuit noted that it was a “close case.” The back pay awarded exceeded $1.5 million plus interest.

In Shepard v. Burlington and Bartholomew v. Burlington the U.S. District Court for the District of Kansas held that under the de minimis doctrine, patrol officers were not entitled to overtime compensation for time spent on briefings conducted on the way to work between an officer going off duty and a replacement officer. The court found that (1) the amount of time spent on the briefings in addition to the necessary travel time was small; (2) the officer benefited from using the city’s vehicle for commuting; (3) it was administratively difficult to record travel time, and (4) the officer was only occasionally required to spend up to an additional 15 minutes in preparing for work by participating in the briefings.

188 29 C.F.R. § 785.47.
189 Id.
190 Id.
191 144 F. 3d 1329, 4 WH Cases 2d 1106 (10th Cir. 1998).
192 Id., 4 WH Cases 2d at 1109.
In Aiken v. City of Memphis, the court found that the time spent by police officers monitoring a police radio in order to respond to possible emergencies arising during their commutes to work was found to be de minimis and not compensable.

Similarly in Aguilar v. United States, the court found that the time spent by border patrol canine handlers caring for their dogs during the commute to and from work was found to be de minimis because of the administrative difficulties in tracking such time and because the time spent on such activities, although generally not long, was widely varied.

B. Rounding Practices

The DOL does not require that employers use time clocks to record work time. Where time clocks are used, employers are not required to compensate employees who punch in before starting work, provided the employees do not engage in any work until their actual start time.

Many employers have the practice or recording the employees’ start time and stop time to the nearest five minutes, or nearest one-tenth or quarter of an hour. The DOL presumes that when an employer engages in this practice, the arrangement averages out so that employees are fully compensated for all the time they actually work.

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196 38 Fed Cl. 431, 4 WH Cases 2d 83 (1997), appeal dismissed, 155 F. 3d 565 (Fed. Cir. 1998).
197 29 C.F.R. § 785.48 (a).
198 Id.
199 29 C.F.R. § 785.48 (b).