

# What is “Work Time” Under the Fair Labor Standards Act?

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Webinar, June 13, 2013



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Ms. Shad’s practice focuses on representing employers in connection with all aspects of employment-related litigation and counseling. She has represented clients in state and federal courts throughout the country, including North Carolina, Arizona, California, Florida, Georgia, Illinois, New York, Pennsylvania, South Carolina, and Tennessee. Her experience includes defending individual, class and collective action claims of discrimination, harassment, wrongful discharge, retaliation, and wage and hour violations; representing clients in investigations by state and federal Department of Labor and The Equal Employment Opportunity Commission and similar agencies; serving as “in-house” employment litigation counsel to large company managing employment litigation across the country; and representing clients in disputes involving alleged violations of non-competition agreements.



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Ms. Parrott regularly assists clients in complying with state and federal employment-related laws and preventing employee lawsuits. Her experience includes identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and plant closings and developing and interpreting employment, non-competition, confidentiality, and severance agreements. Her appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Prior to attending law school, Ms. Parrott worked for the United States Environmental Protection Agency and obtained a Masters Degree from the University of North Carolina, School of Public Health.

# Introduction

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## I. Introduction

### A. What is “work time” under the FLSA?

- A work week is all time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed work place (29 C.F.R. § 785.7)
- An employee must be paid for “all time spent in physical or mental exertion . . . pursued necessarily and primarily for the benefit of the employer or his business.” *Tenn. Coal, Iron & R.R.Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)

# Introduction

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## I. Introduction (cont.)

### B. Why is it important to correctly determine “work time”?

- Employees must be paid for all time worked and overtime is calculated in part on hours worked
- Class actions are expensive (Wal-Mart : \$8.5 Million; Charter Communications: \$18 Million)

# Continuous Workday Rule

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Workday is the “period between the commencement and completion on the same workday of an employee’s principal activity or activities.” (29 C.F.R § 790.6(b))

- including activities that are “integral and indispensable” to the “principal activities”

# Principal Activities

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Portal-to-Portal Act excludes from compensable time:

- Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities, and
- Activities which are preliminary or postliminary to principal activities
  - Unless it is an “integral and indispensable” part of the principal activity

# Integral and Indispensable

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- Performed as part of the regular work of the employee in the ordinary course of business
- Three factors
  - Whether employer requires the activity
  - Whether it is necessary to the employee's principal activity
  - Whether it primarily benefits the employer

# De Minimis Doctrine

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- Allows work which is theoretically compensable to be treated as noncompensable when the amount of such work is “negligible”
- No “bright-line” test



# De Minimis Doctrine

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- Three factors:
  - Administrative difficulty of recording the additional time
  - Amount of time in the aggregate
  - Whether the work is performed on a regular basis

# Pre and Post Shift Donning and Doffing

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Is it “integral and indispensable”?

- Required to be worn?
- Primarily benefits employer?
- Necessary for the work?

# Pre and Post Shift Donning and Doffing

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US DOL View:

If employee is required to put it on at the facility, it is “integral and indispensable.”

# Pre and Post Shift Donning and Doffing

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Examples of gear:

- Ear plugs
- Safety glasses
- Hard hats
- Hairnets
- Gloves
- Aprons
- Coveralls
- Pants
- Shorts
- Boots
- Special Shoes

# Pre and Post Shift Donning and Doffing

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- Martinez-Hernandez v. Butterball, LLC (EDNC 2011)
  - Failure to pay for donning and doffing
  - Defendant argued requirements varied based on area and personal preference
  - Court refused to decertify the collective and class actions

# Pre and Post Shift Donning and Doffing

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- Martinez-Hernandez v. Butterball, LLC
  - Primary issue is whether donning and doffing of protective gear and related activities constitutes “work”
  - Settled:
    - \$4 million (max.) - \$1.6 million (min.)
    - \$2.2 million attorneys’ fees
    - Average employee gets \$629

# Pre and Post Shift Donning and Doffing

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Best Practice to Avoid Liability:

- Allow employee to change into work clothes/put on gear at home (if possible)
- Include donning and doffing and other related pre- and post-shift activities in the compensable work day

# Pre and Post Shift Administrative Tasks

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- Checking work-related emails
- Conducting research
- Checking out tools/putting tools away
- Cleaning work stations



# Pre and Post Shift Administrative Tasks

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- Turning on machines/equipment
- Booting up computers, logging into network, opening computer programs

If not “de minimis,” likely compensable.

# Pre and Post Shift Administrative Tasks

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- Kellar v. Summit Seating, Inc. – 7th Circuit (December 2011)
  - Preliminary vs. integral/indispensable
    - Arrived 15-45 minutes early
    - Unlocked doors, turned on lights, made coffee for everyone, reviewed schedules, gathered and distributed fabric and materials to subordinates' workstations, checked patterns, cleaned work area, etc.
    - Everything after making coffee = “work”

# Pre and Post Shift Administrative Tasks

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- Kellar v. Summit Seating, Inc.
  - “De Minimis”
  - But, Employer did not know – no liability
    - Employer knew she clocked in early
    - Other employees did the same, but socialized
    - Employee never told employer she was doing pre-shift work

# Pre and Post Shift Activities at Home

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- Are compensable if “integral and indispensable” and not de minimis
- Kuebel v. Black & Decker (2d. Cir. 2011)
  - Plaintiff alleged that he regularly did work at home, including:
    - Reading/responding to emails
    - Checking voicemail
    - Printing and reviewing sales reports
    - Making display signs

# Pre and Post Shift Activities at Home

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- These activities were “integral and indispensable”
- Fact that employee performed some administrative tasks at home, on his own schedule, did not make his commute time compensable

# Pre and Post Shift Activities

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## Best Practices:

- Have a policy regarding when OT is permitted
- Enforce the policy (pay for the OT, but discipline for violation)
- Do not put non-exempt employee in position of performing work outside of work hours
- Do not require employees to perform work activities immediately before beginning the commute to work or immediately upon arriving home

# Smartphones, the “Pervasive Workplace” and the FLSA

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- Surveys say:
  - 66% of people read email every day and expect a same-day response
  - Up to 60% check email while on vacation
  - 25% check email when out sick
  - 18% work from home every day
  - 41% check email in the morning at home

# “Crackberry Claims”

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- Use for work by non-exempt employees could create “off-the-clock” problems



# “Crackberry Claims”

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- Example:
  - IT professional earns \$30.00 per hour (non-exempt)
  - Assume 5 hours per week of undocumented, after-hours Blackberry use (helping to locate “lost documents” or coaching someone through a systems problem)
    - 5 hours x \$45 = \$225 per week
    - Liquidated Damages = \$450 per week
    - 2 – 3 years of recovery, plus attorneys’ fees

# Guidelines for Avoiding “Crackberry Claims”

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- Ensure proper classification (exempt/non-exempt)
- Limit company-issued devices to exempt employees absent strong business reason
- Develop a written policy – clear expectations regarding how employees use devices after work for work purposes

# Guidelines for Avoiding “Crackberry Claims”

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- Consider not providing email enabled devices to non-exempt employees
- Require non-exempt employees to track and report all time worked OR prohibit after-hours use
- Prior approval for “after hours” work
- Limit use of personal devices for work

# Guidelines for Avoiding “Crackberry Claims”

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- Do not allow managers to email non-exempt employees after hours
- Consider requiring employees to copy supervisor on all after-hours emails
- Timecard approval by employees
- Pay for all overtime (handle as a disciplinary matter)

# Guidelines for Avoiding “Crackberry Claims”

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- Training of supervisors so they understand that all work time has to be captured
- Train employees on the policies

# Wait Time

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Was the employee “engaged to wait or . . .  
[did he] wait to be engaged?”

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)

# Wait Time

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- If the wait time is controlled by and for the benefit of the employer, then it is part of the job and compensable (29 C.F.R. § 785.15 “On Duty”)
- If the employee is completely relieved from duty and allowed to leave the job site and he can use the time for his own benefit, then the time is not “hours worked” and it is non-compensable (29 C.F.R. § 785.16 “Off Duty”)

# On Call Time

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“An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while ‘on call.’” (29 C.F.R. § 785.17)

If the time is “predominately for the employer’s benefit” it is compensable.

*Armour & Co. v. Wantock*, 323 U.S. 126 (1944)



# On Call Time

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Compensability of on-call time requires fact-specific, case-by-case review of factors, such as:

- The terms of the employment contract, if any
- Physical/geographical restraints
- Response time required (*see Spencer v. Hyde Co.*, 959 F. Supp. 721 (E.D.N.C. 1997))

# On Call Time

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- Frequency of calls and percentage expected to be returned
- Use of the on-call time
- Disciplinary action, if any, for failure to respond

# On Call Time

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Consider totality of circumstances/factors

*Example:* A non-exempt employee who is not restricted to employer's place of business but can wear a pager, needs to respond to calls within fifteen minutes and is only rarely called, is probably not entitled to be paid for the on-call time.

## On Call Time

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*Caution:* Voluntary on-call payments (such as \$100 for the inconvenience of being on call) can alter the employee's "regular rate" for purposes of overtime compensation and the gracious employer may incur unexpected overtime expenses. (29 C.F.R. § 778.223)

# Best Practices

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- Pay employees for waiting time that is part of the “continuous workday”
- Pay for all time the employee is required to remain on company premises while on-call

# Travel Time

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Under “continuous workday rule,” time spent “traveling” after the workday has started is compensable.

# Travel Time

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- Walk time – time spent walking after the workday has started is compensable

*Example:* Employee dons protective gear and walks from locker room to work site.

*Example:* Employee starts work and then walks 15 minutes from one building to another for a meeting.

# Travel Time

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- Ordinary home to work travel is not normally work time (29 C.F.R. § 785.35)
  - If an employee is required to report to a location to receive instructions or pick up equipment, travel from that place to the job is work time and must be paid
- Travel between job sites during normal work day is work time (29 C.F.R. § 785.38)



# Travel Time

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*Example:* computer technician works on employer premises from 9 am – 5 pm, then drives to a client site to work until 8 pm, and finally returns to the employer premises at 9 pm. All time is compensable. (If he went home at 8 pm rather than back to employer premises, time spent commuting home after 8 pm not compensable.)

# Travel Time

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Travel for special one-day (no overnight stay) assignment in another city is work time. (29 C.F.R. § 785.37)

*Example:* Employee lives in Raleigh and must fly to Philadelphia on a special one-day assignment. Work time begins when she arrives at the RDU airport and ends when she leaves the RDU airport to return home.

# Travel Time

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Overnight travel away from home -

- Travel time is work time only when it cuts across the employee's workday (regular workday hours and same hours on non-work days) (29 C.F.R. § 785.39)

# Travel Time

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*Example:* Employee regularly works from 9 – 5, Monday – Friday, the travel time during those hours is work time even if on a Saturday or Sunday. Travel time before 9 am or after 5 pm is not work time on any day.

# Travel Time

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- Work performed while traveling is work time (29 C.F.R. § 785.41)

*Example:* Employee prepares for a meeting while flying to another city.

# Travel Time

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## Transportation Choice Matters

- Travel time outside regular working hours as a passenger on a plane, bus, boat or train is not work time (29 C.F.R. § 785.40)
  - Employer can require such travel and avoid paying for travel time

# Travel Time

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- If employee chooses to drive instead of using public transportation, employer has option to consider as work time
  - Actual time spent driving, or
  - The time that would have been counted as hours worked had the employee used public transportation (if during business hours, count it; if not, don't)

# Travel Time

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- If employee must drive, all driving time is work time



# Travel Time

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## Best Practices:

- Pay for all travel time during normal work hours
- Pay for travel time outside of normal work hours if employee has to drive
- Do not have to pay for travel time outside of normal work hours if public transportation is used and no work is done while traveling

# Training Time

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Time spent in meetings, lectures or training is considered “work” and must be paid, unless:

- Attendance is outside regular work hours;
- Attendance is voluntary;

# Training Time

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- The meeting, lecture or training is not job-related; and
- Employee does not perform any productive work during attendance.

# Training Time

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Not “voluntary” if employment may be adversely affected by non-attendance or if employee is led to believe that it will be

*Example:* Time spent in wellness “lunch and learns” that affect discounts on insurance premiums is not voluntary so must be paid.

# Training Time

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Job-related: If designed to make employee more effective in his job

*Example:* Time spent by computer programmer in a programming course offered by the employer is job-related.

*Example:* Time spent by computer programmer in an accounting course offered by the employer is not job-related.

# Break Time

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## Rest Break

- Rest periods of short duration (5 to 20 minutes) must be counted as hours worked (29 C.F.R. § 785.18)
- Coffee breaks, smoke breaks, restroom breaks are “rest periods”

*Note:* Rest breaks are not required by the FLSA, but applicable state laws may require them and dictate the length of breaks.

# Break Time

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## Meal Break

- If the employee is “completely relieved from duty” during a meal break, the break is not work time and is not compensable (29 C.F.R. § 785.19)
- Generally, a meal break is 30 minutes or longer
- It is not necessary that an employee be permitted to leave the premises if he is otherwise relieved from duty during the meal break

# Break Time

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## Meal Break (cont.)

- Is the time for the “predominant benefit” of the employer or the employee?

*Ray v. County of Lexington*, 141 F.3d. 533  
(4th Cir. 1998)



# Break Time

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## Meal Break (cont.)

- *Caution:* FLSA does not require meal breaks, but applicable state law may dictate timing and length of meals and may require that such breaks be paid
- An office employee is not “relieved from duty” if he is required to remain at his desk to answer the telephone during a meal break, even if no telephone calls are received during the break

# Break Time

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## Meal Break (cont.)

- Automatic deductions for meal breaks are permissible, but if the employer knows or should have known that the employee is continuing to work, then the time is “work time” for which the employee must be compensated

*See Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *White v. Baptist Memorial Health Care Corporation*, No. 11-5717 (6<sup>th</sup> Cir. Nov. 6, 2012).

# Break Time

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## Best Practice Tips

- Require employees to take meal break away from work area to avoid working through break claims
- Train supervisors to monitor compliance
- If use automatic deductions, consider having a policy that requires employees to report when they work through the break

# Break Time

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## Breastfeeding Break

- Employers must provide “reasonable” unpaid breaks to a nursing mother to express breast milk for up to one year after her child’s birth (29 U.S.C. § 207(r)(1))
- Employers of less than 50 employees are exempt from this requirement
- State law may mandate breastfeeding breaks

# Thank you

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**Are Your Employees  
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*Presented by*

***Susan Parrott and Kerry Shad***

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Please check your email box for the invitation from [smithanderson@smithlaw.com](mailto:smithanderson@smithlaw.com)



# Webinar Materials

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*Please note that the webcast will be posted Monday (June 17, 2013)*

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