



## News & Trending

PUBLICATIONS & ALERTS

### NEW U.S. DOL OPINION LETTERS PROVIDE GUIDANCE ON COMPENSABILITY OF TRAVEL TIME AND BREAK TIME

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On April 12, 2018, the U.S. Department of Labor's Wage and Hour Division (WHD) issued two opinion letters that should help employers determine when they must pay for an employee's travel time and break time.

The opinion letters issued this month are the first opinion letters issued since 2010 when the Obama administration discontinued the practice of issuing opinion letters in favor of issuing Administrator's Interpretations to address more general issues. In its [press release](#) accompanying the issuance of the letters, the WHD said, "by addressing the application of statutes and regulations in the specific circumstances presented by an employer, employee, or other entity, opinion letters provide clarity that helps increase compliance to the benefit of all." Opinion letters are official statements of agency policy.

**Travel time for workers with no fixed daily schedule.** In opinion letter [FLSA2018-18](#), the WHD addressed several questions related to the compensability of time certain non-exempt crane technicians spend in travel. The technicians work for a company that repairs, inspects, and tests cranes. The workers have no fixed daily schedule. They may work up to 16 hours a day and may spend the night in a hotel away from their home community in order to complete a job or to attend training. The WHD's opinion letter confirmed the well-established rules that: travel from hotel to job site is normal non-compensable commute time; travel from home to job site is non-compensable work time, even if the commute is by means of a company-provided vehicle; and travel from job site to job site during the work day is work time that must be compensated.

Time spent in travel away from the employee's home community that involves an overnight stay is compensable work time if it "cuts across the employee's regular workday" as "the employee is simply substituting travel for other duties." Most helpful for employers is the WHD's guidance in the opinion letter on how to determine what travel time is compensable when there is no regular workday. The WHD described three methods: 1) review the employee's time records for the most recent month of employment and, if those records reveal typical work hours, use those hours as the "normal work hours;" 2) if the records do not reveal a pattern of normal hours, "choose the average start and end times for the employee's workdays;" and, (3) "in the rare case in which employees truly have no normal work hours," the employer and employee could agree to a reasonable amount of time or timeframe in which travel would be compensable. If an employer uses one of these three methods, the WHD will not find a violation if an employee is not paid for travel time that is outside of the employee's normal working hours.

**Break time for FMLA-covered rest break.** In opinion letter [FLSA2018-19](#), the WHD concluded that rest breaks protected by the Family Medical Leave Act (FMLA) and given to accommodate an employee's serious health condition are "primarily for the benefit of the employee" and, as such, do not need to be compensated. This is an exception to the general rule that short rest breaks of up to 20 minutes in length are ordinarily compensable

because such breaks benefit the employer by promoting the efficiency of the employee. The WHD emphasized that the employee who takes unpaid FMLA-protected breaks must still receive “as many compensable rest breaks as their co-workers receive.”

**Additional Guidance.** On the same day that the opinion letters described above were issued, the WHD also issued a third opinion letter that addressed whether certain lump sum payments were earnings for garnishment purposes under Title III of the Consumer Credit Protection Act **CCPA2018-NA** as well as a new **Fact Sheet 17 (s): Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FSLA)**.

In its press release announcing the release of the new opinion letters, the Department of Labor specifically encouraged the public to submit requests for opinion letters. Requesting an opinion letter is a process with which Smith Anderson has assisted clients.

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## PRACTICE AREAS

Employment, Labor and Human Resources

