

# PUBLICATION

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## You Need to Understand the Fair Labor Standards Act Part 2 - What Is "Work" Under The FLSA?

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What you may assume is a relatively simple issue - how to calculate the total number of hours an employee works during a week - can be complicated. The construction industry particularly faces these complications because under the FLSA, your employees may perform activities that qualify as compensable time but do not meet what you would consider "work."

### **Do you have employees you keep "on call"?**

Should employees be paid while "on call"? Maybe. An employee who is required to remain on call on the employer's premises is working while "on call."<sup>1</sup> In contrast, an employee who may remain on call at home or who can easily be reached is, in most cases, not performing compensable work.

The key analysis is the extent to which there are constraints on the employee's freedom. As a contractor, you should consider whether an employee "on call" may leave the jobsite to handle personal affairs. The FLSA considers factors such as whether the employee is "completely relieved" of duties and whether the time at issue is "effectively for his own purposes." Whether employees required to live on an employer's premises, part or full-time, should be paid for that time merits particular consideration.<sup>2</sup>

### **Do you have employees gang up at the office and car pool to the project site?**

How your employees travel to a job site can be compensable. Normal time spent commuting from home to work generally is not compensable.<sup>3</sup> The issue is whether the mode of travel is voluntary. If the employee is required to travel by the employer's chosen method, the time spent traveling likely is compensable. If the means used to get to the jobsite is voluntary, the time spent traveling likely is not compensable.

### **Do you have employees who are required to wear certain types of gear?**

Another issue spawning litigation costs is whether the time spent "donning" or "doffing" certain gear, clothing or equipment is compensable. "Work" or "employment" is generally considered as "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."<sup>4</sup> Whether time is spent for the employer's benefit or for the employee's depends on all of the circumstances of the situation at issue.<sup>5</sup>

Under the FLSA, "activities performed either before or after the regular work shift, on or off the production line, are compensable ... if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed."<sup>6</sup> Activities, such as putting on hard hats, certain types of boots, protective arm sleeves, certain overcoats, etc., may be compensable when they are "necessary to the business" and performed "primarily for the benefit of the employer."<sup>7</sup>

While the FLSA does not define "work" or "employment," it has carved out certain exclusions from these terms. It is important, though, for you to know that there is no one-size-fits-all list of excluded activities. Some may be

compensable in one set of circumstances when they would not be under another set of circumstances.<sup>8</sup> The answer lies in a factual analysis that looks at what an activity is, how long the activity takes, and whether it is for the benefit of the employer or the employee.

### **Do you pay employees by the "piece" of work they finish?**

If you do, complying with the FLSA is important. There are two ways to calculate the regular rate for individuals paid on a piecemeal basis. Under either method, verify that the employee's regular rate does not fall below the minimum wage. You also must make sure that any hours worked over 40 are compensated at time and a half.

First, the total weekly earnings of the employee may be divided by the total weekly hours worked to arrive at the regular rate. The individual is then entitled to an additional one-half time premium pay for any hours worked over 40. Or, provided the employee consents and the piece rate is reasonable, the regular rate may be the same as the straight-time piece rate so long as the employee receives one and one-half times this piece rate for hours worked over 40.

Second, employers also may pay day rates - a flat sum for a day's work or particular job no matter the number of hours worked. Under this plan, the regular rate is calculated by adding together all day rates in the workweek and dividing by the total number hours worked. Employees who work over 40 hours are still entitled to one-half times the regular rate for each hour worked over 40.

1. 29 C.F.R. § 785.17

2. 29 C.F.R. § 785.23

3. 29 U.S.C. § 254; 29 C.F.R. § 785.35

4. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005); see also *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944)

5. See *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)

6. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)

7. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398-99, 401 (5th Cir. 1976)

8. 29 C.F.R. § 790.7(b)