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Volume 39 | Issue 126 | October 28, 2016

Paid Meal Break No Substitute for Overtime Pay

Federal law does not require employers to provide meal periods, or to compensate employees for meal breaks as long as they are completely relieved of work duties during the breaks. In a case of first impression, the Third Circuit Court of Appeals ruled that an employer cannot use voluntarily provided paid meal periods to offset compensable overtime worked. Employers will want to review their pay practices in light of this ruling.

Background

The federal Fair Labor Standards Act (FLSA) requires employers to pay employees for all hours worked, and generally entitles employees to receive overtime pay at one and one-half times their regular rate of pay for hours worked in excess of 40 in a workweek. Under the FLSA, a *bona fide* meal period (generally 30 minutes or more) is not considered work time or compensable as long as the employee is completely relieved from duty for the entire period. By contrast, coffee or other short rest breaks (usually 20 minutes or less) and interrupted meal periods are considered work time and would be included in determining whether any overtime was worked.

E.I. DuPont de Nemours & Company and Adecco USA, Inc. (collectively, DuPont or "company") employed workers at a Pennsylvania manufacturing plant. Hourly employees worked 12-hour shifts, four-shift schedules, and spent approximately 30-60 minutes per day donning and doffing uniforms and protective gear and providing work status information to employees on incoming shifts ("shift relief"). The company provided three 30-minute meal breaks per shift. Although the company could have treated the *bona fide* meal time as non-compensable, it voluntarily treated the time as hours worked, included it in calculating employees' regular rate of pay, and paid them for it. When employees sued to recover overtime pay for donning, doffing and shift relief, DuPont moved to dismiss, arguing it could offset unpaid time for those activities with paid meal break time. Finding no FLSA prohibition against the offset and no overtime pay owed since the amount of paid meal time exceeded the amount of unpaid work time, the trial court dismissed the case. The employees appealed.

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Third Circuit Weighs In

In *Smiley v. E.I. DuPont de Nemours & Co.*, the Third Circuit Court of Appeals acknowledged that the FLSA allows employers in certain circumstances to offset their overtime pay obligations with other employee compensation, but said that the FLSA should be construed "liberally in favor of employees." Against that backdrop, the court began its analysis with a look at what constitutes hours worked and how the regular rate of pay is determined under federal law.

Under the FLSA, the regular rate is determined by dividing the employee's total remuneration for the workweek (less statutory exclusions) by the total number of "hours worked" during that week. For FLSA purposes, "hours worked" generally includes the time an employee is required to be on duty, which may include time spent in "active productive labor" as well as non-productive work time (such as pre- and post-shift activities and time spent eating meals).

While employers have some flexibility in determining whether to treat non-productive work time as hours worked, all payments for time the parties regard as working time are generally included in the regular rate of pay unless they qualify for one of the following statutory exclusions: gifts or discretionary bonuses; payments for occasional periods when no work is performed due to vacation, holiday, illness or failure of the employer to provide sufficient work, and other similar payments; travel and other expense reimbursements; contributions to pension or health insurance plans; certain value or income derived from stock options, stock appreciation rights, or employee stock purchase programs; and premiums for working more than eight hours in a shift, on weekends or holidays, or outside regular hours set forth in a collective bargaining agreement.

Other Courts Disagree

At least two other circuit courts of appeals have reached other conclusions. Both the **Seventh** and **Eleventh** Circuits have held that employers may credit voluntarily compensated *bona fide* meal breaks against an employee's pre- and post-shift work time.

The Third Circuit took a narrow view of permissible offsetting under the FLSA, limiting when an employer may credit compensation already given to an employee against any overtime pay owed. Contrary to the lower court's analysis, the appeals court reasoned that offsetting is prohibited unless explicitly allowed by the FLSA, and the FLSA allows only three categories of compensation to be credited toward the employer's overtime pay obligations. Each of these categories involves "extra compensation" paid at a premium rate, which is excluded from the regular rate. As the court explained, once DuPont voluntarily included non-work pay in the regular rate calculation, it could not qualify as "extra compensation." While acknowledging that the FLSA does not expressly prohibit offsetting where the compensation used to offset is included in the regular rate, the court said that allowing employers to do so would "shortchange" employees. Reversing the lower court, the Third Circuit held that the company could not use the amounts voluntarily paid for meal breaks to avoid paying other compensation owed under the FLSA.

In Closing

In light of this ruling, employers in Pennsylvania, New Jersey and Delaware will want to review their pay practices and how they are calculating hours worked, in particular, to minimize the potential risk of noncompliance.

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