



FLSA2020-19

December 31, 2020

Dear **Name\***:

This letter responds to your request for an opinion on the compensability of certain travel time. Specifically, you ask whether an employee who chooses to telework for part of the day and work at the office for part of the day, with sufficient time to perform certain personal tasks in between, must be compensated for travel time between her home and office under a number of different scenarios. We conclude that the time the employee spends on travel in these scenarios is not compensable.

**BACKGROUND**

You ask whether, under several different fact patterns, an employee who chooses to telework for part of the day and work at the office for part of the day, while completing personal tasks in between, must be compensated for certain intervening travel time. You give two examples to illustrate these fact patterns. Both examples involve an employee with a one-hour commute to and from her office who normally works Monday through Friday from 8:00 a.m. to 4:30 p.m. The employee does not perform any work during her commutes.

In your first example, the employee has a parent-teacher conference at her child's school from 1:30 p.m. to 2:15 p.m. She has received permission to attend the conference and then work from home rather than returning to the office. She leaves her office at 1:00 p.m., drives 30 minutes to the school, and meets with the teacher for 45 minutes; the travel time from the school to her home is 30 minutes. You ask whether the time spent driving from the office to the school and the school to home would be compensable depending on whether the employee:

- Immediately resumes working when she gets home;
- Devotes an hour to personal activities upon arriving home and then resumes working;
- Devotes two hours to personal activities upon arriving home and then resumes working;
- or
- Devotes at least an hour to personal activities before driving home, devotes at least another hour to personal activities upon arriving home, and then resumes working.

In your second example, the employee has a doctor's appointment from 8:30 to 9:15 a.m. The drive from her home to the doctor's office is 45 minutes; the drive from the doctor's office to the

employer's office is 15 minutes. The employee has received permission to work from home before driving to her appointment and will work the rest of the day after the appointment at her regular office location. You posit that the employee works at home from 5:00 to 6:00 a.m., is free to perform personal activities between 6:00 and 8:00 a.m., leaves for her appointment at 8:00 a.m., finishes her appointment at 9:15 a.m., and arrives (and begins working) at her office at 9:30 a.m. At the end of the day, the employee commutes home from her office as usual, and performs no work either during the commute or after she arrives home. You ask two related questions:

- Is the employee's one hour of travel time from home to the appointment and the appointment to the office compensable?
- Is the employee's commute time from her office to home, where she first began working that day, compensable?

## GENERAL LEGAL PRINCIPLES

The Fair Labor Standards Act generally requires that an employee be paid at least a federal minimum wage for every hour that he or she works and be paid at one and one half times her regular rate of pay for each hour worked in excess of 40 in a single workweek.<sup>1</sup> Whether an employee is "working" typically can be answered by determining whether her action is primarily for the benefit of the employer.<sup>2</sup> An employee does not need to be paid for hours that she is off duty—that is, periods when she is completely relieved from duties and that are long enough to enable her to effectively use the time for her own purposes.<sup>3</sup> Additionally, time an employee spends in normal commuting or ordinary travel from home to work and vice versa—that is, travel from home to work before the regular workday and travel from work to home at the end of the workday—is specifically excluded from compensable hours.<sup>4</sup>

"[I]n general, the period between the commencement and completion on the same workday of an employee's principal activity or activities" is considered compensable, a principle known as the continuous workday doctrine.<sup>5</sup> An employee is generally not considered to be on duty, and the continuous workday doctrine does not apply, until she has performed her first principal work activity of the day—that is, her first task that is integral and indispensable to the duties that she was hired to perform.<sup>6</sup> Unlike ordinary commuting time, travel that is part of an employee's

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<sup>1</sup> 29 U.S.C. §§ 206–207.

<sup>2</sup> *Tenn. Coal, Iron, & Rail Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

<sup>3</sup> 29 C.F.R. § 785.16(a).

<sup>4</sup> 29 C.F.R. § 785.35.

<sup>5</sup> 29 C.F.R. § 790.6(b); see *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

<sup>6</sup> *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 33 (2014).

principal activity, such as travel between different worksites between the start and the end of the workday, is considered part of the day's work and is compensable.<sup>7</sup>

## **OPINION**

Based on the facts you have provided, we conclude that the travel time you describe is not compensable.

### **A. The employee's travel time is not compensable because she is either off duty or engaged in normal commuting.**

In your first example, the employee's travel time once she leaves the office is non-compensable off-duty time. Between the employee's leaving work at 1:00 p.m. and her resuming work at 2:45 p.m. at the earliest, her time is hers to do with as she pleases—she is no longer performing compensable work for the employer. This remains the case whether she is traveling to a personal appointment, traveling from a personal appointment, having personal meetings, or performing other personal activities. Though the off-duty regulation speaks of an employee who has been “definitely told in advance that ... [she] will not have to commence work until a definitely specified hour,”<sup>8</sup> it applies with equal force here, where the employee may freely choose the hour at which she resumes working. There is no question that such an employee is free to use her time effectively and for her own purposes before resuming work.<sup>9</sup>

We reach a similar conclusion regarding your second example: None of the employee's travel time is compensable. The hour that the employee spends performing the principal duties of her job for the employer beginning at 5:00 a.m. is compensable work, just as it would be if the employee had performed that work at the office. But at 6:00 a.m., she is off duty—she has a block of time to use effectively and for her own purposes. Her time remains noncompensable until she reaches the office and resumes working at 9:30 a.m. Finally, her commute from her office to her home following the conclusion of her workday is an ordinary work-to-home commute and is not compensable.<sup>10</sup>

### **B. The travel time is not compensable as worksite-to-worksite travel or under the continuous workday doctrine.**

In neither example do we consider the travel between the employee's home, the personal appointment, and the employer's office to be compensable travel between worksites or to be compensable as a result of the continuous workday doctrine.

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<sup>7</sup> 29 C.F.R. § 785.38.

<sup>8</sup> 29 C.F.R. § 785.16(a).

<sup>9</sup> *Id.*

<sup>10</sup> *See* 29 C.F.R. § 785.35.

First, the travel time is not compensable worksite-to-worksite travel. Travel time must be counted as hours worked when it is part of an employee's principal activity, such as travel from worksite to worksite during the work day.<sup>11</sup> But that is not what this travel is. The employer is not requiring the employee to travel as part of her work; rather, she is traveling of her own volition for her own purposes during her off-duty time.

Similarly, the travel time here is not compensable under the continuous workday doctrine because, as explained above, it is off-duty time. Our regulations contemplate that the period between an employee's first and last principal activities will "in general" be compensable.<sup>12</sup> But they also explicitly state that when an employee is completely relieved from duty such that she can use time effectively for her own purposes, that time is non-compensable.<sup>13</sup> As we have observed, the FLSA "recognizes that employment is a relationship both parties enter into for their mutual benefit," and, as such, "employees' rights ... are not always separate from and at odds with their employers' interests."<sup>14</sup> When an employee arranges for her workday to be divided into a block worked at home and a block worked at the office, separated by a block reserved for the employee to use for her own purposes, the reserved time is not compensable, even if the employee uses some of that time to travel between home and the office.

Courts generally have reached the same conclusion when analyzing similar questions. For example:

- An employee's morning and evening commutes were not compensable, even though he performed various administrative tasks at home, when he was not required to perform such tasks immediately before leaving home or immediately after returning home. He instead was free to "wake up early, check his email, synch his PDA, print a sales report, and then go to the gym, or take his kids to school, before driving to his first" worksite of the day. And he similarly was not precluded from "leaving his last [site] of the day and going straight to a restaurant for dinner, or waiting until late at night to synch his PDA (as electronic records show[ed] he sometimes did)."<sup>15</sup>
- A traveling alarm installer's evening commute time was not compensable, even though he was required to upload data to a central work computer after finishing his last assignment of the day, where the only requirement was that he upload the data "any time between 7:00 p.m. and 7:00 a.m." and he was otherwise "completely relieved from duty"

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<sup>11</sup> 29 C.F.R. § 785.38.

<sup>12</sup> 29 C.F.R. § 790.6(b); *see also id.* §§ 785.18–.19 (discussing rest periods and meal times).

<sup>13</sup> *See* 29 C.F.R. § 785.16.

<sup>14</sup> WHD Opinion Ltr. FLSA2020-16 (Nov. 3, 2020), quoting *Sec'y of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019).

<sup>15</sup> *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 361 (2d Cir. 2011).

and could use the time after his last installation of the day “effectively for his own purposes.”<sup>16</sup>

- Investigators’ commute time was not compensable, even though they were required to complete some preliminary work before leaving home for a surveillance site and to upload reports after completing the day’s surveillance, where they could do the preliminary work the night before (and sometimes even earlier) and upload the reports at any time until the following morning. That they were “not required to perform these activities ‘at any specific time’” meant that they could “‘use the intervening time for [their] own purposes’” and their commuting time was thus not compensable.<sup>17</sup>
- A retail representative’s commute time was not compensable, even though she “undoubtedly perform[ed] some preparatory and administrative work at home, because she [was] able to perform these tasks from any number of locations and [was] free to schedule her time so as to ‘use the time effectively for [her] own purposes[.]’”<sup>18</sup>

Several decisions that may appear to be to the contrary analyze situations in which employees were potentially required to perform work immediately before commuting to or immediately after commuting from a work site.<sup>19</sup> Because you inform us that the employee is not required to perform her work at any particular time, we are not opining as to such a situation. One court concluded that travel time may be compensable even if the employees were not required to perform work immediately before or immediately after their commute, but that opinion, unlike the four we cite above, did not consider the off-duty regulation—and its reasoning on this point does not appear to have been followed by any other courts.<sup>20</sup>

As the *Garcia v. Crossmark* court summarized, our conclusion that the employee’s travel time is not compensable “follows inexorably” from the regulations. If “taken to its logical conclusion,” the proposition that the travel time is compensable:

would demand that had [an employee] elected to prepare her materials every morning at four, rather than six, and then return to sleep before leaving for the

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<sup>16</sup> *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1060 (9th Cir. 2010), quoting 29 C.F.R. § 785.16.

<sup>17</sup> *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 917 (D. Minn. 2010), quoting, with alterations, *Rutti*, 596 F.3d at 1061, and citing 29 C.F.R. § 785.16(a).

<sup>18</sup> *Garcia v. Crossmark, Inc.*, 157 F. Supp. 3d 1046, 1049 (D.N.M. 2015), quoting 29 C.F.R. § 785.16 (alteration in quotation in original).

<sup>19</sup> See *Gomley v. Crossmark, Inc.*, No. 1:13-cv-420, 2015 WL 1825481, at \*4 (D. Idaho Apr. 22, 2015); *Harris v. Reliable Reports Inc.*, No. 1:13-cv-210, 2014 WL 931070, at \*5 (N.D. Ind. Mar. 10, 2014); *Bowman v. Crossmark, Inc.*, No. 3:09-cv-16, 2012 WL 2597875, at \*8 (E.D. Tenn. July 5, 2012).

<sup>20</sup> *Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 244–45 (D. Mass. 2004) (considering 29 C.F.R. §§ 785.35 and 790.6 but not 29 C.F.R. § 785.16).

day, she would be entitled to compensation for the time she spent unconscious.... It simply cannot be the case that an employee is empowered unilaterally to convert her commute into compensable time merely by deciding to perform her daily routine in a particular manner.<sup>21</sup>

## CONCLUSION

For these reasons, we conclude that when an employee (a) chooses to perform some work before traveling to the office or (b) chooses to perform work at home after leaving the office, and in either case has sufficient time in between her telework and office work periods to use effectively for her own purposes, the time she spends traveling between home and office is not compensable.

This opinion is based exclusively on the facts you have presented and on your representation that you do not seek this opinion for a party that WHD is currently investigating or for use in litigation that began before your request. This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”<sup>22</sup>

We trust that this letter responds to your inquiry.

Sincerely,



Cheryl M. Stanton  
Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**

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<sup>21</sup> 157 F. Supp. 3d at 1049–50.

<sup>22</sup> 29 U.S.C. § 259(a).