

**FLSA2018-18**

April 12, 2018

Dear **Name***:

This letter responds to your request for an opinion letter concerning the compensability of travel time for hourly technicians under the Fair Labor Standards Act (FLSA). As discussed below, the FLSA requires compensation for much, but not all, of the technicians' travel time. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

In your letter and follow-up communications with WHD staff, you have stated that your company generally repairs, inspects, and tests cranes. Your company's hourly technicians do not work at a fixed location, but rather work at varying customer locations each day. The technicians have no fixed daily schedule and often work between 8 and 12 hours per day servicing cranes. They may, at times, work up to 16 hours per day depending on the condition of the crane, the availability of parts, and other variables. A technician may need to stay in a hotel overnight and return in the morning to complete the job. You also indicated that the company generally assumes a start time of 7:00 a.m. for the technicians, although service calls occasionally require technicians to arrive at work earlier than 7:00 a.m. When there are no cranes to service, technicians will generally perform routine maintenance and repair work at refineries from 7:00 a.m. to 3:30 p.m. On occasion, your technicians travel out of town for training courses.

You also note that the company provides its technicians with vehicles, which technicians may use for both work and personal purposes. The company covers all fuel and maintenance costs for the vehicles.

In your letter you provide the following three scenarios and ask multiple questions concerning the compensability of travel time in each:

Scenario 1: An hourly technician travels by plane from home state to New Orleans on a Sunday for a training class beginning at 8:00 a.m. on Monday at the corporate office. The class generally lasts Monday through Friday, with travel home on Friday after class is over, or, occasionally, on Saturday when Friday flights are not available.

Scenario 2: An hourly technician travels from home to his or her home office to get a job itinerary and then travels to the customer location. The travel time from home to office varies depending on where the technician lives and can range from 15 minutes to 1 hour or more. All of this travel is in an assigned company vehicle.

Scenario 3: Hourly technicians drive from home to multiple different customer locations on any given day.

GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to pay employees for their work. The FLSA defines “employ” as including “to suffer or permit to work,” 29 U.S.C. 203(g), but does not explicitly define what constitutes “work.” The U.S. Supreme Court initially explained that compensable time under the FLSA includes employees’ activities “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business,” as well as “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-92 (1946). Such “expansive definitions” “provoked a flood of litigation,” and “Congress responded swiftly” by passing the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 516 (2014).

The Portal-to-Portal Act provides that employers do not need to compensate employees for:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C. § 254(a).

These standards make clear that compensable worktime generally does not include time spent commuting to or from work. *See id.*; *see also, e.g.*, WHD Opinion Letter, 1997 WL 998025, at *1 (July 28, 1997). FLSA regulations further clarify that “[n]ormal travel from home to work is not worktime” regardless of “whether [the employee] works at a fixed location or at different job sites.” 29 C.F.R. § 785.35. Unlike ordinary commute time, however, “travel from job site to job site during the workday, must be counted as hours worked.” 29 C.F.R. § 785.38.

At times employers require that employees travel away from their home communities overnight. In these circumstances the regulations provide that “[t]ravel away from home is clearly worktime when it cuts across the employee’s workday. The employee is simply substituting travel for other duties.” 29 C.F.R. § 785.39; *see also* WHD Opinion Letter FLSA-292 (Jan. 9, 1951) (concluding that compensable time includes “all time spent in such travel during the hours which correspond to [the employee’s] normal hours of work, including those hours on Saturday and Sunday which correspond to [the employee’s] normal working hours on other days of the week”). Thus, by way of example, “if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days.” *Id.* As an enforcement policy, WHD “will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.” 29 C.F.R. § 785.39.

OPINIONS

“The principles which apply in determining whether or not time spent in travel is working time depend on the kind of travel involved.” 29 C.F.R. § 785.33. As shown above, there are multiple types of travel, such as travel away from an employee’s home community (as you present in Scenario 1) or ordinary commuting to and from work (as you present in Scenarios 2 and 3). We discuss each scenario, in turn, below.¹

Scenario 1

Scenario 1 addresses the compensability of travel time for technicians who take a flight on Sunday for a training that begins on Monday at 8:00 a.m. These technicians return home on Friday after the training concludes, although they occasionally travel home on Saturday if earlier flights are not available.

Such travel away from the employee’s home community “is clearly worktime when it cuts across the employee’s [regular] workday,” as “[t]he employee is simply substituting travel for other duties.” 29 C.F.R. § 785.39. And, as referenced above, WHD does “not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.” *Id.* The central issue raised in Scenario 1, however, is how to determine what travel time is compensable when there is *no* regular workday.

As a general matter, in its investigations, WHD carefully scrutinizes claims that employees have no regular or normal working hours. In WHD’s experience, a review of employees’ time records usually reveals work patterns sufficient to establish regular work hours. Some courts have confirmed the need for such scrutiny. In *Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005), for example, a company contended that it did not owe employees pay for travel away from their home communities because the employees did not have “normal working hours.” *Id.* at 86. The court ultimately was “not persuaded by this argument,” as it analyzed the employees’ time records and, among other things, observed that the records “tend[ed] to be consistent” in terms of both the employees’ start times and end times. *Id.* at 86-87.

That said, WHD recognizes that certain employees do not have normal work hours. WHD has not examined your company’s time records and, for purposes of this letter, assumes the accuracy of your assertion that hourly technicians have no normal schedule. WHD notes, though, your acknowledgment that technicians typically begin work at 7:00 a.m. In this case, the only apparent irregularities in technicians’ work schedules are their end times.

There are different methods that an employer may use to reasonably ascertain an employee’s normal work hours for purposes of determining compensable travel time under 29 C.F.R. § 785.39. One permissible method is to review the employee’s time records during the most recent month of regular employment. If the records reveal typical work hours, the employer may consider those as the normal hours going forward unless some subsequent material change in circumstances indicates the normal hours have changed. If the records do not reveal any normal working hours, the employer may instead choose the average start and end times for the

¹ Many of the questions you pose raise similar issues for each of the scenarios; for purposes of this letter, WHD will try to address most or all of the issues only once without responding to them again in each other scenario.

employee's workdays. As another alternative, in the rare case in which employees truly have no normal work hours, the employer and employee (or the employee's representatives) may negotiate and agree to a reasonable amount of time or timeframe in which travel outside of employees' home communities is compensable. *See* WHD Opinion Letter (March 17, 1964) (approving an employer's use of an employee's average daily number of hours worked as the number of compensable hours on a travel day, "provided [the employer] and [the] employees agree on this method of determining the normal workday"). This is not an exhaustive list of the permissible methods for determining an employee's normal start times or end times under 29 C.F.R. § 785.39. But when an employer reasonably uses any of these methods to determine employees' normal working hours for purposes of determining compensable travel time under 29 C.F.R. § 785.39, WHD will not find a violation for compensating employees' travel only during those working hours.²

In addition to the issues concerning regular work hours, your questions for Scenario 1 raise the issue of whether compensable travel time will differ if an employee chooses to forego travel by plane and instead travels by automobile. To answer this question we note that "if any employee is offered public transportation but requests permission to drive his [or her] car instead, the employer may count as hours worked either the time spent driving the car or the time he [or she] would have had to count as hours worked during working hours if the employee had used the public conveyance." 29 C.F.R. § 785.40.

You have also inquired about compensability of travel time for an employee's commute between a training site and the hotel in which he or she spends the night. WHD has previously confirmed that when an employee is temporarily working at a fixed remote location, "generally, the travel time from the hotel to the work site and back would be considered ordinary home-to-work travel, and, as such, need not be compensated." WHD Opinion Letter, 1996 WL 1031779, at *2 (May 13, 1996); *see* WHD Opinion Letter, 1999 WL 1002360, at *1 (Jan. 29, 1999).

Scenarios 2 and 3

Scenarios 2 and 3 deal largely with ordinary commutes to and from work. In Scenario 2 you indicate that hourly technicians travel from their homes to the office to get job itineraries before traveling to the customer location. Technicians' commute time to and from home may vary, and they ordinarily use a company vehicle. In Scenario 3 you state that technicians may "drive from home to multiple different customer locations on any given day."

As confirmed above, compensable worktime generally does not include time spent commuting between home and work, even when the employee works at different job sites. *See* 29 U.S.C. § 254(a); 29 C.F.R. § 785.35; WHD Opinion Letter, 1997 WL 998025, at *1.³ Travel *between* job

² Of course, "any work which an employee is required to perform while traveling must ... be counted as hours worked" regardless of whether it falls within the regular workday. 29 C.F.R. § 785.41. For purposes of these responses, WHD assumes the employees are not performing any other work during travel time.

³ WHD has opined that it considers commuting time between home and a customer site not to be compensable "unless the time involved is extraordinary." WHD Opinion Letter, 1999 WL 1002360, at *2 (stating, in response to the specific facts on which that letter is based, that when an employee's "commute to the first job site in the morning takes four hours, [WHD] would consider the greater portion of travel time compensable"). *Id.* You have not

sites after arriving at work, however, is compensable. 29 C.F.R. § 785.38 (“[T]ravel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day’s work, and must be counted as hours worked regardless of contract, custom, or practice.”).

Your inquiry raises the issue of whether use of a company vehicle makes otherwise noncompensable travel time compensable. Of course, as discussed above, travel between job sites during the workday is already compensable. 29 C.F.R. § 785.38. With respect to commuting time, however, the law specifies that use of a company-provided vehicle does not, alone, make an ordinary commute compensable, provided that “the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.” 29 U.S.C. § 254(a); *see also* WHD Opinion Letter, 1997 WL 998025, at *1 (providing that agreements to use employer-provided vehicles need not be written, and may also be “based on established industry or employer practices”).

We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan L. Jarrett
Acting Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

provided examples of travel times for your technicians, so we will not opine on the amount of time that WHD may find compensable.