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When is employee travel time compensable?

If you're a "non-exempt" employee — typically someone who doesn't work in a professional, executive or managerial capacity and who earns an hourly wage — your compensation structure is pretty simple. Under the federal Fair Labor Standards Act (FLSA) you get paid for the hours you work and if you put in more than 40 hours in a week, you get overtime.

But what about time you spend traveling for work? That seems simple too. You don't get paid for commuting time to and from work. But you do get paid for time you spend traveling around during the workday.

This seems straightforward on the surface. But there are little wrinkles and nuances that workers and employers need to understand.

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What if an employee's activities at home signal the start of the workday? In that case, he or she has to be paid for that time. For example, a federal court in Massachusetts ruled that an insurance adjustor who made phone calls, checked email, reviewed the day's assignments and mapped out her route for the day while still at home in the morning had to be paid for her commuting time, since these activities signaled the start of the workday. Similarly, a federal judge in Indiana ruled that a bus driver who kept his bus at home and had to spend significant time inspecting it in the morning before leaving on his route had to be paid for travel time between his house and his first stop.

On the other hand, in a more recent case out of California the 9th U.S. Circuit Court of Appeals ruled that a man who installed car alarms did not need to be paid for his commuting time even though he received, mapped and prioritized jobs and routes before leaving his home in the morning and ended the day by sending an electronic communication to his boss about all the jobs he did during the day. According to the court, his route-mapping activity was related to his commute and

continued on page 3

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Disabled workers may need accommodations beyond FMLA leave

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Under the federal Family and Medical Leave Act (FMLA), companies with more than 50 employees must allow workers to take up to 12 weeks of unpaid leave to deal with medical issues. But if a worker isn't ready to return after 12 weeks, employers should talk to an employment attorney before taking any disciplinary action. That's because an employee who's used all of his or her FMLA leave may still be entitled to more leave time as an accommodation under the Americans with Disabilities Act (ADA).

In a recent Massachusetts case, bank employee Amanda LePete took 12 weeks of FMLA leave when she had a baby. While she was out she developed postpartum depression. As her return date approached she was still suffering symptoms so she sought medical help and tried to extend her leave. When her counselor couldn't pin down a specific date when she might be able to return the bank sent her a letter setting a hard deadline, telling her she'd be fired if she didn't return on that date. Panicked, she and her attorney appealed to human resources to extend her leave but the request was denied. She subsequently got a letter telling her she was fired.

LaPete filed a disability discrimination claim against the bank under the ADA and state anti-discrimination law.

The bank argued that it had gone above and beyond in extending her leave, since she was ultimately out 17 weeks before being terminated. It also claimed LaPete made no attempt to engage in an "interactive dialogue" regarding her return to work and that she was trying to turn her absence into an "indefinite leave."

But a hearing officer with the Massachusetts Commission Against Discrimination found that she'd done enough to inform the bank about her condition, and that even if her leave time was up the ADA and state law required the bank to make "reasonable accommodations" for her disability.

By setting a strict time constraint, the bank failed to do so. The officer also rejected the notion that LaPete was seeking indefinite leave, and said that if the bank had only sought to communicate with her it would have realized she was just trying to extend her leave long enough to see her doctor. As a result, the bank had to pay emotional distress damages and lost wages and was ordered to train its managers and supervisors on disability discrimination.

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Tips are considered wages, court decides

Employers in the service industry should consult with an employment lawyer before requiring workers to pool their tips. That's because the laws regarding tip pooling can be complex and employers who engage in certain tip-pooling practices run the risk of violating the federal Fair Labor Standards Act and state wage laws.

This happened recently in South Carolina. Zen 333, a restaurant in Charleston, didn't allow bartenders or wait staff to take tips directly from customers. Instead they had to put them into a tip pool that was divided among the staff. Servers also had to contribute 4.5 percent of their gross food and alcohol sales directly to "the house" and 3.5 percent of their alcohol sales to the bartenders, who in turn had to contribute a percentage of their alcohol sales to "the house." According to bartenders and waiters, the restaurant's owners would withdraw these mandatory contributions from the tip pool and if the cash tips didn't cover those contributions they'd take the difference from credit-card tips.

The bartenders, who were paid $40 plus tips for all shifts worked, and the servers, who were paid $2.25 an hour plus tips, took the restaurant to court, claiming that this practice violated FLSA and the state wage law because it resulted in them not being paid the wages they earned.

The restaurant tried to have the case dismissed, arguing that tips don't count as wages.

But a federal judge disagreed, deciding that because tips are payment for work they clearly count as wages. Now the employees will be able to bring their case before a jury.

It's important to note that a decision like this does not mean employers can never use a tip-pooling arrangement, but they do need to talk to an attorney to make sure that the particular arrangement they choose doesn't run afoul of the law.

Is employee travel time compensable for non-exempt workers?

continued from page 1

took very little time, and thus was too insignificant to be compensable.

Another interesting situation is out-of-town travel for non-exempt employees. Any travel you make that's outside your regular work hours will not be considered work time. But if you're traveling during your regular work hours, it does count as "time worked" even if it's not a day you would have normally gone to work. So if you work a normal 9-to-5 schedule during the week and you travel on a work trip from 3 p.m. to 11 p.m. on Saturday, your employer has to pay you for the two hours you spent traveling between 3:00 and 5:00. The rest of the time is unpaid.

The mode of transportation you use when traveling matters too. Let's say an employee can either drive or take a train. If the worker opts to drive, the employer can decide whether to pay him for the time he actually spent driving or the hours that overlap with his normal work hours. But if the employer doesn't give the employee the option to use public transportation and he's forced to drive, then he has to be paid for all of his travel time.

Of course once a non-exempt worker reaches his final destination, he doesn't need to be compensated for every minute spent there. The employer only needs to pay the employee for the time spent doing the work he or she was sent to do.

To make things even more confusing, the rules are different for one-day trips that don't require an overnight stay. In those instances, the employee's commute to the airport or train station is still considered unpaid commuting time. But the rest of his travel time is paid, including time spent waiting around an airport terminal if there's a flight delay.

All of the above scenarios deal with the requirements under FLSA. Employers also need to be aware of state laws that may be stricter. States can give workers more rights than they're entitled to under FLSA, but they can't take away rights that FLSA guarantees. So if you're trying to figure out if you need to pay a particular worker for travel time or if you're a non-exempt worker and you think you may be getting stiffed for time that should be paid, be sure to talk to an attorney where you live.

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Signature not enough to bind worker to arbitration clause

Mandatory arbitration agreements, which require employers and employees to forego court if they get into a legal dispute with one another and take the case to a private third-party arbitrator to resolve, are a popular way for employers to avoid the unpredictability and expense of the court system.

But if you plan on subjecting workers to such agreements, it's critical to give *actual notice* of the terms, as a restaurant in North Carolina recently learned.

In that case, two white employees who worked under a Latino supervisor alleged that he often made racist remarks to them, saying among other things that because they weren't Hispanic, they couldn't relate to customers or co-workers or handle day-to-day situations.

Within a two month period the two men were fired for, respectively, inventory abuse and insubordination. They were each replaced by Latino workers and ultimately brought race discrimination claims against the employer.

The restaurant moved to have the case dismissed, arguing that the men's claims were covered by a mandatory arbitration provision that they agreed to when they were hired.

But a federal judge refused to dismiss the case, concluding that even if the plaintiffs signed an "acknowledgements page" stating that they received a copy of the agreement they never actually had an opportunity to review its terms. The fact that the terms were available on the company's internal website wasn't enough to show that the workers had read them or that the provision had been provided to them before they had to sign.

As a result, the judge said, their signatures were meaningless and the case could proceed in court.

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Employers take note: 'Hostile environment' claims can be costly

A "hostile" work environment is one where an employee is constantly confronted with offensive behavior by co-workers or supervisors. This can include sexually charged or bigoted comments and jokes, repeated requests to engage in sexual activity, taunting, or insulting personal comments. An employer that doesn't properly investigate workers' complaints of a hostile environment, or that investigates but fails to take proper action in response, can face discrimination and sexual harassment claims, as Kansas City, Missouri recently found out.

In that case, LaDonna Nunley, an African-American woman who had worked as a chemist for Kansas City's water department for 24 years, claimed that a co-worker had engaged in a pervasive pattern of offensive speech directed toward her, including comments referencing genitalia and comments comparing President Barack Obama to a bowel movement. She said she reported the comments to supervisors but they failed to discipline the co-worker.

Ultimately Nunley, who also claimed that she was passed over for promotions in favor of less qualified,

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younger white workers, brought age, sex and race discrimination claims against the city along with a claim of hostile work environment.

The case went to trial. The jury ruled against her on the discrimination claims but did find that she was subjected to a hostile work environment. As a result, it awarded her a significant amount to compensate her for the harm she suffered and even more in what are called "punitive" damages — extra money designed to punish a person or an organization for especially bad behavior.