Proskauer

Do We Have to Pay for That? Part 2—Travel and Commute Time (in a Post-Pandemic World)

Law and the Workplace Blog on **March 9, 2022**

In this blog series, we look at a variety of activities and discuss whether an employer has to pay its non-exempt (*i.e.*, overtime-eligible) employees for their time spent engaging in them. We'll focus on federal law, but as with all wage and hour issues, applicable state and local laws must be considered as well. Also, while we discuss the guiding principles, employers should always seek counsel on how to apply those principles to their specific facts.

In our first installment of this series, we looked at the compensability of time spent in COVID-19 vaccination, testing, and screening activities. Today, we're looking at work-related travel time, including time spent getting to and from the office or other worksite.

Two Fundamental Principles

Two fundamental principles run throughout the rules on travel time. The first is that in all circumstances, all time spent *actually performing work-related tasks* (regardless of the day of the week, time of day, or location) is paid time. *See* 29 C.F.R. § 785.41 ("Any work which an employee is required to perform while traveling must, of course, be counted as hours worked.").

The second fundamental principle—a cornerstone of the 1947 Portal-to-Portal Act amendments to the Fair Labor Standards Act (FLSA)—is that time employees spend commuting from home to their place of work before the beginning of the workday and from work back home at the end of the workday is not considered time worked and therefore is not time for which employees must be paid. *See* 29 U.S.C. § 254(a)(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" are not compensable activities); 29 C.F.R. § 785.35 ("Normal travel from home to work is not worktime.").

What is the "Normal" Commute?

The rule is clear that the "normal," "ordinary home to work" commute is unpaid. But what do "normal" and "ordinary" mean? The first guardrail is the language in the regulation itself, which defines "ordinary home to work travel" as travel "from home [to work] *before [the] regular workday* and [from work] to … home *at the end of the workday* ." This language places the "normal" commute outside the boundaries of the workday—*i.e.*, it occurs at the beginning of the day before work has started, and it occurs at the end of the day after work has ended. It does not include travel *in the middle* of the workday, which can be compensable under one of two different rules—the "all in the day's work" rule and the "continuous workday" rule.

Mid-Day Travel

Under the "all in the day's work" rule (29 C.F.R. § 785.38), "time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." So if an employee drives from home to the office, and then leaves an hour later to travel to a customer site, the drive from home to work is unpaid but the travel time to the customer site is considered compensable mid-day travel under the "all in the day's work" rule. The same rule would apply throughout the workday if the employee is traveling from site to site for work-related reasons, until the end of the workday. Once the employee completes the last task of the day, regardless of the location of that last task (*e.g.*, back at the office, at a customer site, etc.), the travel from that location to the employee's home is the "normal," "ordinary" commute and is unpaid. The U.S. Department of Labor (DOL) gives this example:

> If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

The bottom line is that once an employee has reported to the first worksite for the day, the employee's travel time to other work locations is compensable.

The same principles are reflected in the "continuous workday" rule in 29 U.S.C. § 790.6, which notes that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the [Portal-to-]Portal Act had not been enacted."

Multiple Worksites

What if an employee reports to different worksites each morning? Does that render the home-to-work commute not "normal" or "ordinary," such that the commute time is compensable? The answer is no, as the commute regulation makes clear: "An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. *This is true whether he works at a fixed location or at different job sites*."

So that's helpful. What if the commute is to a different location depending on the day and the *length* of the commute varies significantly from day to day? The Second Circuit tackled that question in *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 272 (2d Cir. 1999), noting:

> [The term "normal travel" in 29 C.F.R. §785.35] does not represent an objective standard of how far most workers commute or how far they may reasonably be expected to commute. Instead, it represents a subjective standard, defined by what is usual within the confines of a particular employment relationship.

In *Kavanagh*, the plaintiff drove to various cities in New York State, sometimes for hours at a time, to provide services at various Grand Union locations. The court held that "the regulations . . . do not permit a construction that would require Grand Union to compensate Kavanagh for his time spent traveling to the first job of the day and from the last job of the day, regardless of the length of that distance or the benefit to Grand Union of having only one employee cover such a large geographic area."

Other federal courts around the country have confirmed the plain language of § 785.35 and have consistently held that travel incurred prior to commencing or subsequent to ceasing principal activities is non-compensable even if commuting time varies day-to-day.

Pre-Commute Activities

What if the employee begins some work at home and then goes into the office? Does the performance of work *prior* to the commute render the commute compensable, under the "all in the day's work" or "continuous workday" rules? The Second Circuit has tackled that question as well, holding in *Kuebel v. Black & Decker Inc.*, 643 F.3d 252, 259 (2d Cir. 2011), that the performance of work-related activities at home prior to the commute to the office (or at home after the evening commute) does not render the commute compensable. (The time spent *performing* those at-home activities, however, is always compensable—*see* 29 C.F.R. § 785.12, applying the rules on hours worked to "work performed away from the premises or the job site, or even at home.").

An important consideration in *Kuebel* was that the employee *chose* to perform certain work-related activities at home prior to his morning commute or after his end-of-day commute. In declining to require the employer to pay for the commute time, the court noted that the employee could well have performed those activities at his employer's workplace. The same logic arguably would not apply if an employee who begins a remote workday at home is required by the employer to report to the office (or other work location) at some point during that same workday. Under that circumstance, the employer would have to consider the application of the "all in the day's work" and "continuous workday" rules discussed above.

Same-Day Travel to Another City (No Overnight Stay)

If an employee is required to travel for a one-day assignment in another city, all travel time to and from the destination—less the time the employee would have spent commuting to their regular work site—is counted as time worked and must be paid under the "special one-day assignment" rule in 29 C.F.R. § 785.37.

Travel Involving an Overnight Stay

A more nuanced analysis is required when employee travel involves an overnight stay away from home. When employee travel includes an overnight stay, the travel time that occurs during the employee's "normal working hours" is counted as time worked, regardless of whether the travel occurs on the employee's "regular working days" (*e.g.*, Monday through Friday) or "non-working days" (*e.g.*, on Saturday or Sunday). Conversely, travel time that occurs outside the employee's "normal working hours" need not be counted as time worked, regardless of whether the travel occurs on a weekday or a weekend. These principles are codified in the "travel away from home" rule in 29 C.F.R. § 785.39.

For example, if an employee is scheduled to work 9:00 a.m. to 5:00 p.m. Monday through Friday and the employee is required to travel between the hours of 6:00 p.m. and 11 p.m. (on any day of the week), the employer is not required to pay for the travel time. If, however, the employee is required to travel between the hours of 9:00 a.m. and 5:00 p.m. (on any day of the week), the employer is required to pay for the travel time.

What if the employee has no "normal working hours"? How do you apply the overnight travel rules? The DOL addressed this scenario in an April 2018 opinion letter, in which the it outlined three permissible methods that employers can use to reasonably ascertain an employee's "normal" or "regular" working hours for purposes of the "travel away from home" rule:

- If the employee's time records during the most recent month of "regular employment" 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 or typical working hours, the employer may instead choose the average start and end times for the employee's workdays.
- Alternatively, 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. On this third option, the DOL cited to a 1964 opinion letter in which the agency approved 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 employee agree on this method of determining the "normal" workday for travel time purposes.

The DOL notes that "[t]his is not an exhaustive list of the permissible methods for determining an employee's normal start times or end times [for purposes of the "travel away from home" rule] … [b]ut when an employer reasonably uses any of these methods …, [the DOL] will not find a violation[.]" You can read our blog on this opinion letter here.

Travel From Hotel to Worksite, and Vice Versa

The DOL has made clear that once an employee arrives in the community "away from home" on a business trip involving an overnight stay, time spent in travel from the hotel to the work site before the regular work day and from the work site back to the hotel at the end of the regular work day is considered ordinary home-to-work travel and does not count as time worked.

What about the time spent *at the hotel*? That wouldn't count as time worked, except to the extent the employee actually performs work at the hotel. It's not travel time, and therefore would be subject to the other rules regarding hours worked, and likely considered "off duty" time under 29 C.F.R. § 785.16 ("Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.").

Travel Across Time Zones

What if an employee travels across time zones? Which time zone should be used to determine whether the travel cuts across "normal working hours" for purposes of the "travel away from home" rule? There's no regulation on this, and a reasonable approach would be for the employer use the time zone associated with the point of departure (on each leg of the trip) to determine whether the travel falls within "normal working hours."

What If Driving Is Part of the Job?

The FLSA regulations make clear that "[a]n employee who drives a truck, bus, automobile, boat or airplane [as part of their job duties], or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when [the employee] is permitted to sleep in adequate facilities furnished by the employer." Such time is properly viewed as actual working time, and not merely "travel" time.

Remote/Flexible/Agile Work Considerations

What if employees work under a remote, flexible, or agile working arrangement under which they are required to report to the employer's offices with some regularity (*e.g.*, 2-3 times per week) or from time to time (*e.g.*, for monthly in-person meetings or otherwise when asked)? To minimize the risk of having to pay for home-to-office travel time in such circumstances, the key to is to make clear to the employees, in writing and as a condition of the work arrangement, that (1) their regular worksites include both their homes (or other remote worksite) and the office; (2) that on certain days, they will be permitted to work remotely; (3) that on certain days, they will be required to work from the office; (4) that the commute to the office is not considered a part of their duties; and (5) that on those days in which they are required to work from the office, they will not be paid for their time spent commuting to the office. This policy can be baked into a broader remote/flexible/agile work agreement that covers any number of other policies and considerations.

There are two things that might make the employee's argument for travel-related pay stronger in these circumstances: (1) if the employee lives far away from the office, such that the travel to the office would involve an overnight stay, and/or (2) if the employee is not regularly required/expected to come to the office, but only sporadically/upon request. The former scenario would require consideration of the rules around business-related travel involving an overnight stay, and the latter could implicate the rules on special one-day assignments. Employers considering such arrangements should consult with wage and hour counsel before implementing a strategy.

Consequences of Compensable Travel Time

If travel time is compensable under the rules discussed above, employers should bear three things in mind. First, they must pay employees for the travel time. Second, they must have a process in place to track the time (so they know how much they have to pay, and whether the hours are non-overtime or overtime hours). Third, the hours count toward the threshold for overtime pay (40 hours a workweek under federal law and the laws of most states).

Paying for Travel Time

Employers have flexibility as to how much they pay for compensable travel time. An employer could, of course, pay the same rate for travel time as it pays for all other working hours. Alternatively, an employer could set a different rate of pay for travel time (*e.g.*, an hourly rate for time actually spent in travel that is lower than the rate the employer pays the employee for productive working hours, or a flat fee for a travel day), so long as (1) the employer notifies the employee of the separate rate in advance of the travel, (2) the rate is sufficient to cover the minimum wage for all compensable hours, and (3) the arrangement does not violate any existing contract with the employee. *See* DOL Wage & Hour Div. Op. Ltr., Jan. 22, 1999 ("There is nothing in FLSA which prohibits an employer from paying an employee at different rates of pay for work at different times or various types of work as long as no rate is less than the statutory minimum wage."). Paying a different rate for travel time impacts the regular rate of pay for overtime purposes, so employers that do so should consult the rules on how to calculate overtime pay for employees working at two or more rates in 29 C.F.R. § 778.115.

Does Paying for Travel Time Make it "Hours Worked"?

Employers often wonder whether paying for travel time that is not required to be paid makes the time "hours worked," such that it counts toward the 40-hour threshold for overtime pay under federal law. The answer is no, *unless* the employer and employee have agreed (expressly or through an established practice) to treat the time as hours worked.

The FLSA regulations note that, "[i]n some cases an agreement or established practice provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the [FLSA] if no compensation were provided." In those cases, "[c]ompensation for such hours does not convert them into hours worked unless it appears from all the pertinent facts that the parties have treated such time as hours worked."

Absent an agreement or established practice to count such time as "hours worked," an employer can pay whatever it wants (or nothing) for the time, should not include such payments in the regular rate of pay for overtime purposes, and cannot use any part of such payments as a credit toward overtime pay otherwise owed for the workweek.

State Laws

As with all wage and hour issues, state law may require payment for certain travel time where federal law does not. Employers must always consider the state law implications of their travel time policies and arrangements.

Proskauer's Wage and Hour Group is comprised of seasoned litigators who regularly advise the world's leading companies to help them avoid, minimize, and manage exposure to wage and hour-related risk. Subscribe to our wage and hour blog to stay current on the latest developments.

View Original

Related Professionals

- **Allan S. Bloom**
  Partner