

# Labor: The top 5 compensable time issues that spell disaster for employers



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## Compensable time isn't limited to normal working hours

Employers must frequently defend against costly wage and hour lawsuits due to widespread confusion over whether certain time counts toward compensable hours worked by nonexempt employees. The **Fair Labor Standards Act (FLSA)** distinguishes between exempt and nonexempt employees, as well as employer obligations to properly compensate such employees for hours worked. Under the FLSA, nonexempt employees must be paid for all hours worked in a week and must receive overtime pay for all hours worked in excess of 40 hours in a one-week period. Employers have grappled with meeting these requirements and otherwise complying with the various wage payment laws. To avoid landing in hot water, employers should tread carefully when determining payment for nonexempt employees.

## Nonexempt employees must be compensated for “hours worked”

Nonexempt employees must receive payment for all hours worked. Such hours worked are limited to “compensable time.” Many employers find themselves facing

class actions and other significant lawsuits for failing to properly account for time that employees spend at work, though not necessarily performing “work.”

The following are five tricky compensable time issues for employers to consider:

1. “Waiting time,” during which the employee is not productive due to lack of work or assignments, but is still required to remain in the workplace while waiting for work or assignments, is considered compensable time. Of course, an employee that is given the option to go home and return after a certain number of hours, but chooses to wait at the workplace instead, is not entitled to compensation for such waiting time.

2. If time in the workplace is spent attending a mandatory lecture, training program or other meeting (including a social event), such time must be counted as “compensable time”. This is particularly true if the mandatory meeting involves material directly related to the employee’s job and is performed for the benefit of the employer. However, if the meeting is voluntary (e.g., a team building exercise occurring outside of work hours), rather than mandatory, hours spent attending such a meeting would not be compensable.

3. Employees must also be compensated for “off-the-clock” time, which includes time spent working before or after the employee’s scheduled shift or during a scheduled work break (e.g., lunch), even if the work is performed from home, and even if the work simply consists of responding to work-related emails from home.

4. Although employees are not entitled to compensation for ordinary travel between the home and the workplace, they are entitled to compensation for “work travel.” For example, employees must be compensated for travel time spent in excess of ordinary travel when they are required to attend an event during shift hours. However, an employee that is required to travel a longer distance to attend an event outside of shift hours is not entitled to compensation. Nevertheless, an employee must be compensated for all time spent working during ordinary travel and/or during travel for an event, regardless of whether the event takes place during or outside of shift hours.

5. Generally, unpaid internships and other trainee positions need not be compensated, particularly in the public and not-for-profit sectors where interns knowingly volunteer to work without compensation. Similarly, interns often knowingly volunteer to work without compensation, even in the private sector, in exchange for academic credit from their educational institutions. Employers must be careful, however, to compensate interns and trainees as regular workers whenever they are indeed filling the shoes of employees.

For example, interns and trainees should be compensated as employees if they:

- Are being used to substitute for regular workers or to otherwise increase the employer’s existing workforce
- Were hired in lieu of hiring additional employees or having existing employees work additional hours
- Have become intrinsic to the employer’s business operations

## Important guidance for employers

Every employer should pay special attention to the top five compensable time issues described above, but also should invest in effective training for its management-level and human resources personnel so that they are better able to recognize and resolve compensable time and other issues arising under the FLSA. Additionally, employers should continually ensure their exempt and nonexempt employee classifications are accurate and up-to-date. Employers also should develop and implement compensable time policies and work rules that require employees to report all hours worked (and allow supervisors to better track employees' hours worked, whether or not they are explicitly reported by employees).

Such policies and work rules also should include disciplinary provisions for employees who fail to report hours worked, or who fail to obtain appropriate permission from their supervisors prior to performing work outside of their scheduled shifts. Compensable time issues often spell disaster for even the most well-meaning employers. Accordingly, employers must stay informed and remain focused on ensuring compliance with the relevant wage payment laws.

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